

Employer failed to meet its burden to show a stoppage of work within the meaning of G.L. c. 151A, § 25(b), at its metal coil manufacturing plant, where it relied primarily on one business metric to show lost production, and the Board could not tell whether the presented drop in production was due to a strike, its planned business transformation, or regular market forces. Held claimants were eligible for benefits.

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Introduction and Procedural History of this Appeal

The claimants appeal a decision by the Department of Unemployment Assistance (DUA) to deny unemployment benefits beginning March 28, 2021. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

This matter came before the Board following an appeal of a DUA determination issued on July 3, 2021, which denied the claimants benefits after concluding that their participation in a strike resulted in a stoppage of work pursuant to G.L. c. 151A, § 25(b). The claimants' appeal was referred by the DUA directly to the Board, as permitted by G.L. c. 151A, § 39(d). During a full evidentiary hearing, 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' 16-week strike at the employer's specialty rolled metal products manufacturing facility in Massachusetts caused a stoppage of work within the meaning of G.L. c. 151A, § 25(b).

Findings of Fact

Background

1. The employer is a manufacturing company that produces metal coils, and its business operations include a specialty rolled products line.
2. As of 2021, the employer had seven (7) manufacturing locations that produced specialty rolled products: [Location A], MA; [Location B], PA; [Location C], PA; [Location D], PA; [Location E], PA; [Location F], PA; and [Location G], OH.
3. The employer's [Location A] plant ([Location A]) is an intermediate processing and coil finishing facility. Employees at this location primarily work with materials that have thinner gauges and narrower width, which are referred to as precision rolled strip products.

4. [Location A] also specializes in slitting, racking, rolling and annealing steel, titanium, and nickel metals.
5. 75–80% of product manufactured in [Location A] is forwarded to a service center for distribution and final slitting. The remaining 20–25% of [Location A]’s manufactured product is shipped directly to the employer’s customers.
6. The union represents employees who work at several of the company’s facilities, including [Location A].
7. In [Location A], bargaining unit work consists of production and maintenance. As of April, 2021, the employer had a total of seventy-one (71) employees, and fifty-seven (57) of those employees were represented by the union. Of those, forty-seven (47) employees worked in production, which includes six (6) workers dedicated to shipping and receiving tasks. The other ten (10) union employees worked in maintenance.
8. Bargaining unit employees regularly worked 5–6 days a week, between 40–50 hours per week.
9. In 2021, the employer’s [Location G], OH and [Location E], PA plants also functioned as coil finishing facilities.
10. Apart from [Location A], at least one other plant, [Location E], PA, was capable of producing coils down to .008 inches. However, only [Location A] could produce coils smaller than that size.
11. In September, 2020, the employer idled one of its facilities located in [Location H], CT. Prior to this event, employees at the [Location H], CT plant were represented by the union.
12. In December, 2020, the employer announced a business transformation plan for its overall operations.
13. As part of its business transformation, the employer planned to shift away from standard stainless-steel product to more specialized products, such as titanium alloy, as it is known to have higher value than other metal products.
14. The employer also announced that it planned to idle the [Location G], OH facility, and anticipated that this would occur by March, 2023.
15. In early 2021, after the announcement of the business transformation plan, the employer began to implement upgrades to some of its facilities. For instance, the employer began making significant upgrades to its [Location E], PA facility, which is similar to [Location A]. The employer planned for the [Location E], PA plant to become more capable of performing specialty work.

16. In early 2021, the [Location A] plant was producing products using the titanium alloy. [Location A]'s metals came primarily from the [Location G], OH plant.

The Strike

17. When the collective bargaining agreement between the employer and the union expired on February 28, 2021, the parties mutually agreed to extend it in order to continue negotiating for a new contract.

18. By letter dated March 26, 2021, the union notified the employer that it terminated the collective bargaining agreement extension and intended to go on strike, effective March 30, 2021.

19. On March 30, 2021, the union's bargaining unit membership at the above seven specialty rolled product locations, including all union members who work in [Location A], went on strike.

20. The employer did not prevent any bargaining unit employees from crossing the picket line. None of the [Location A] union members crossed the picket line to work during the strike.

21. The employer and the union continued to negotiate for a successor collective bargaining agreement.

22. The employer continued to operate its business during the strike.

23. During the strike, the employer utilized a combination of approximately twenty (20) non-union employees and forty (40) replacement workers to sustain its business operations at the [Location A] facility. However, the employer decided to deploy higher skilled replacement workers to the [Location G], OH and [Location E], PA facilities, who had also gone on strike at the same time as [Location A].

24. Non-union employees and replacement workers at the [Location A] facility worked 6 days a week, 12 hours per day, for a total of 72 hours per week.

25. By July 4, 2021, the employer and the union had entered into a return-to-work agreement and reached a tentative agreement for a successor collective bargaining agreement.

26. On July 13, 2021, the employer and the union ratified a successor collective bargaining agreement.

27. Beginning July 19, 2021, the union's bargaining unit members at the [Location A] facility returned to work.

28. After the strike concluded, the employer did not increase the bargaining unit workers' hours or ask them to work overtime.

Measurable Data: 2019, 2020, and 2021

29. The employer does not measure itself by revenue per pound or what it earns from any product that it manufactures. Instead, the employer's fundamental metric for measuring [Location A]'s production, as well as the production of other specialty rolled products locations, is the number of shipped tons.¹
30. The employer calculates its cost per ton by dividing its expenses by shipped ton. The employer considers cost and expense to be one and the same.
31. The employer's accounting department produces its cost per ton report. The accounting department will not count all tons shipped out from [Location A] in a given month, because they are not considered to directly relate to an invoiceable ton. However, different reports compiled by the employer include all shipped tons that leave the [Location A] facility.
32. The employer defines "expense" as the total cost to operate the [Location A] facility each month, and everything it costs to produce a ton or pound of steel, including labor, fringe benefits, utilities, supplies, and any other costs associated with materials, including repair and maintenance.
33. It is the employer's accounting practice to count repairs as an expense whenever a machine or machine part that has been sent out for maintenance physically returns to the [Location A] facility, even though the employer was not yet billed for the repair.
34. The employer offers bargaining unit employees an incentive based on its monthly conversion costs, which the employer defines as a figure that is calculated to show how much it costs to produce product, as opposed to what it costs to ship product
35. Recently, the employer's conversion cost formula has changed completely and is no longer based on weight. Previously, if [Location A] produced more weight, the process moved faster. Currently, the conversion cost is based on smaller, lighter materials, such as smaller sized coils, and takes longer to process.
36. In January, February, and March, 2019, the employer shipped 3,438, 2,657, and 2241 tons, respectively.
37. In January, February, and March, 2020, the employer shipped 3,169, 1,637, and 2,005 tons, respectively.

¹ The employer presented a summary chart, Exhibit 20, to show the number of monthly shipped tons from the [Location A] plant for 12 months in 2019, 12 months in 2020, and 9 months in 2021; and a separate summary chart, Exhibit 22, "2021 Cost Per Ton by Location," which presents unredacted data of monthly expense, shipped tons, and cost per ton for the [Location A] plant for Jan. through Sept., 2021. The employer's witness specifically prepared Exhibit 20 in anticipation of the instant hearing before the Board. The union also presented a summary chart, Exhibit 21, a "General Incentive Update," dated Oct., 2021, which the employer had provided to bargaining unit members. It includes a monthly breakdown of tons shipped from the [Location A] plant from Oct., 2020 through Oct., 2021.

38. In January, February, and March, 2021, the employer shipped 2,517, 2,001, and 3,231 tons, respectively.
39. For the three (3) month period of January through March (pre-strike period) in years 2019, 2020, and 2021, the employer shipped an average of 2,779, 2,270, and 2,583 tons per month, respectively.
40. In April, May, and June, 2019, the employer shipped 2,890, 2,149, and 1,849 tons, respectively.
41. In April, May, and June, 2020, the employer shipped 1,697, 665, and 672 tons, respectively.
42. In April, May, and June, 2021, the employer shipped 834, 912, and 867 tons, respectively.²
43. For the three (3) month period of April through June, the three full months of the strike (strike period), in years 2019, 2020, and 2021, the employer shipped an average of 2,296, 1,011, and 871 tons per month, respectively.
44. In August, September, and October, 2019, the employer shipped 1,535, 1,805, and 2,138 tons, respectively.
45. In August, September, and October, 2020, the employer shipped 1,184, 1,484, and 2,484 tons, respectively.
46. In August, September, and October, 2021, the employer shipped 1,064, 1,947, and 960 tons, respectively.³
47. For the three (3) month period of August through October, the three full months after the strike (post-strike period), in years 2019, 2020, and 2021, the employer shipped an average of 1,826, 1,717, and 1,313 tons per month, respectively.⁴
48. In 2021, there was a 66.4% decline in average shipped tons per month during the strike period, when compared to the pre-strike period.
49. In 2021, there were 33.7% fewer average shipped tons per month during the strike period compared to the post-strike period.

² The Union's Exhibit 21, a General Incentive Update from October, 2021, corroborates the 867 figure, and generally, but not exactly, corresponds to the other figures in Exhibits 20 and 22. Therefore, we have used 867 in our calculations.

³ We have relied upon Exhibit 21 for the number of shipped tons in October, 2021, the third full month after the strike, because neither Exhibits 20 or 22 presented data beyond September, 2021.

⁴ Over all three periods, the Board also examined the month-by-month changes in the number of tons shipped from these exhibits. Because the monthly fluctuations went up and down over both the strike and non-strike periods without a discernable pattern or explanation, we have included findings only pertaining to the monthly average shipped tons.

50. The employer also tracks its production costs on a monthly cost per ton basis.
51. In the pre-strike period of January, February, and March, 2021, its monthly cost per ton was \$731.66, \$940.88, and \$676.66, respectively.
52. For the three (3) month pre-strike period of January through March, 2021, the employer's average monthly cost per ton was \$783.07.
53. In the three-month strike period of April, May, and June, 2021, its monthly cost per ton was \$1,945.91, \$1,928.30, and \$2,474.67 respectively.
54. For the three (3) month strike period of April through June, 2021, the employer's average monthly cost per ton was \$2,116.29.
55. In August and September, 2021, the employer's monthly cost per ton was \$1,484.06 and \$1,038.03, respectively.⁵
56. During the two-month post-strike period of August through September, 2021, the employer's average monthly cost per ton was \$1,261.05.
57. In the 2021 strike period, there was an increase of 170.3% in average monthly cost per ton, when compared to the 2021 pre-strike period.
58. The employer's average monthly cost per ton during the 2021 strike period was 40.4% higher than its average monthly cost per ton in the post-strike months of August and September, 2021.

2020 and 2021 Shipped Tons Comparison

59. During the pre-strike period in 2021, there was a 13.8% increase in average shipped tons per month, when compared to the same period in 2020.
60. During the strike period in 2021, there was a 13.9% decline in average shipped tons per month, when compared to the same period in 2020.
61. During the post-strike period in 2021, there was a 23.5% decline in average shipped tons per month, when compared to the same period in 2020.

2019 and 2021 Shipped Tons Comparison

62. During the pre-strike period in 2021, there was an 7.1% decline in average shipped tons per month, when compared to the same period in 2019.

⁵ The cost-per-ton figures are from Exhibit 22. There is no data furnished for October, 2021, nor any data from 2019 or 2020.

63. During the strike period in 2021, there was a 62.1% decline in average shipped tons per month, when compared to the same period in 2019.

64. During the post-strike period in 2021, there was a 28.1% decline in average shipped tons per month, when compared to the same period in 2019.

2019 and 2020 Shipped Tons Comparison

65. During the period January through March, 2020, there was an 18.3% decline in average shipped tons per month, when compared to the same period in 2019.

66. During the period April through June, 2020, there was a 56.0% decline in average shipped tons per month, when compared to the same period in 2019.

67. During the period August through October, 2020, there was a 6.0% decline in average shipped tons per month, when compared to the same period in 2019.

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--

(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).

The express language of G.L. c. 151A § 25(b), fails to assign the burden of proof with respect to showing stoppage of work.⁶ However, 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 (5th 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

⁶ 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 the evidence meets one of the statutory exceptions to the award of unemployment benefits.

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.” Hertz, 437 Mass. at 297. It is a matter of degree. Westinghouse, 378 Mass. at 55–56.

Although 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 constituted a work stoppage. Adomaitis v. Dir. 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).

G.L. c. 151A, § 25(b), 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 if it can be shown that the work from the striking facility where the claimants worked was transferred to other, non-striking facilities. *See* Reed I, 388 Mass. at 340 n.8 and 341. Absent such evidence, we must determine what impact, if any, the strike had on the facility where the claimants worked.

In this case, the findings show that the employer’s business operation included many manufacturing facilities outside of Massachusetts. However, our focus is on the employer’s

[Location A] facility, where all 57 members of the bargaining unit had performed their work before going on strike.⁷

As to the relevant period for comparing work performance data, the SJC in Reed I instructed the Board to determine whether there was a 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. It has been the Board's practice to follow the SJC's guidance in these decisions by comparing all of these periods. Thus, before the hearing in the present appeal, the Board asked the parties to present measurable evidence for the strike period, the three months before and after the strike, as well as the same periods in the prior year. Additionally, because of the extraordinary circumstances of the COVID-19 pandemic and its economic impact across many industries beginning in March, 2020,⁸ we asked the employer to produce data from 2019 as well.

The Employer's Evidence

The [Location A] facility is the company's intermediate processing and coil finishing facility. Its employees primarily work with materials that have thinner gauges and narrower widths which are referred to as precision rolled strip products. This facility also specializes in products comprised of steel, titanium, and nickel metals. The claimants performed the production, maintenance, and shipping and receiving work for this manufacturing process. During the strike period, March 30, 2021, through the week ending July 17, 2021, the employer continued manufacturing and shipping its specialty rolled product from the facility. In order to demonstrate that the strike caused a substantial curtailment of bargaining unit work, the employer offered data showing shipped tons and cost per ton at the [Location A] facility.

Specifically, the employer produced summary charts showing shipped tons of [Location A] product during the 2021 strike, the three non-strike months before and the two months after the strike, and the corresponding months in 2019 and 2020.⁹ The following chart, derived from Exhibits 20 and 21, captures the average number of shipped tons per month in each of these three-month periods.

Average Shipped Tons Per Month	2019	2020	2021
Pre-Strike Averages (January-March)	2779	2270	2583

⁷ During the hearing, a question was raised about whether the employer may have transferred its [Location A] production to its other plants during the strike. There was considerable discussion about the employer's redaction of information about its other plants in Exhibit 22. We decline to draw any negative inference from the redaction of this information, because the recorded transcript failed to capture what the Board said to the employer about producing the non-redacted portion of this evidence.

⁸ The Governor declared a state of emergency due to the outbreak of COVID-19, effective March 10, 2020. On March 23, the Governor issued COVID-19 Order No. 13, closing all non-essential businesses effective immediately. The Department of Health also issued Safer at Home advisories, recommending all individuals limit travel outside the home, and schools and daycare facilities were closed as a direct result of the COVID-19 emergency.

⁹ As stated earlier, October, 2021 is derived from Exhibit 21, which was provided by the union.

Strike Period Averages (April-June)	2296	1011	871
Post-Strike Period Averages (August-October)	1826	1717	1313

Another summary exhibit, Exhibit 22, presents the cost per ton during nine months in 2021. The next chart shows the average monthly cost per ton for the [Location A] facility derived from this exhibit.

Average Monthly Cost Per Ton	2021
Pre-Strike Period Average (January-March)	\$783.07
Strike Period Average (April-June)	\$2,116.29
Post-Strike Period Average (August-September)	\$1,261.05

If the Board considered this evidence in a vacuum, particularly just the 2021 figures, the data might suggest that the strike caused a substantial curtailment of bargaining unit work. The figures show a 66.4% decline in average monthly shipped tons during the strike period from the pre-strike period. They also show 33.7% fewer average monthly shipped tons during the strike period compared to the post-strike period. The cost per ton numbers also show large increases during the strike period compared to the 2021 pre-strike period. Specifically, the figures demonstrate a 170.3% increase in the average monthly cost per ton during the strike period from the average monthly cost per ton in the pre-strike, January through March, 2021, period, and a 40.4% increase from the average monthly cost per ton in August and September, 2021.

Looking at the record as a whole, however, these summary exhibits render the picture less conclusive.

The employer emphasized that tracking shipped tons was its fundamental metric for measuring production at its [Location A] facility. In fact, shipped tons was the only evidence presented that was responsive to the Board's request to show measurable evidence of bargaining unit work from prior years. Exhibit 20 shows the monthly shipped tons from the [Location A] facility for 2019, 2020 and part of 2021. This is the only exhibit that enables the Board to compare the strike's impact on bargaining unit work in the strike period with non-strike periods in prior years. The reliability of this evidence is questionable.

To show the levels of shipped tons, the employer offered only summary charts which presented a starkly different number for one month of data. Exhibit 20 shows the number of shipped tons in June, 2021 to be 305. Exhibit 22, a summary chart of 2021 costs per ton, reported the number of [Location A] shipped tons in June, 2021 to be 867, as does Exhibit 21, the General Incentive Update. During the hearing, the employer's plant manager was questioned about this discrepancy. He explained that the number of shipped tons will be slightly different among various reports because, for example, Exhibit 22 is prepared by its central finance department, which does not count a shipped ton until it is invoiced. This may be so, but, for our purposes, it creates a confusing

record, particularly because the employer asks the Board to rely heavily on this single metric to measure the strike's impact on the bargaining unit work.

With respect to Exhibit 22, the employer offered its cost per ton report for the three-month period before the strike, the three-month period during the strike, and two months after the strike. Because the employer did not present any data from October, 2021, or from the years 2019 or 2020, we are unable to fully compare the full three months when the claimants were on strike (the strike period) to the full three months after they returned to work (the post-strike period),¹⁰ and we have no way to compare the cost levels with the non-strike levels in prior years.

In presenting Exhibit 22, the employer explained that the cost figure reflects everything it costs to produce a ton or a pound of steel, including labor, fringe benefits, utilities, supplies, and other costs associated with materials, including repair and maintenance. However, the employer did not present testimony or evidence showing how, or to what degree, each of these factors contributed to the figures in the cost per ton report. As such, there is no way to assess how the strike impacted the employer's costs for materials, utilities, repairs, or replacement.

Without this information in the record, there is no way to determine if any increase in costs were a result of increased metal prices, shipping costs, residual commerce delays caused by COVID-19, market fluctuation, delays from products coming from other facilities, or any other cause. The Board is left to speculate. Thus, the data is of limited value to us, and we decline to attribute much weight to this evidence.

According to the employer's exhibits, from 2019 to 2020, there was a 56.0% decline in average monthly shipped tons during what would later constitute the strike period. As compared to 2019, the 2021 figures reflect a 62.1% decline in average monthly shipped tons during the same period. The employer would have us conclude that the latter demonstrates a substantial decline in average monthly shipped tons because of the strike. Viewed another way, however, the three-year downward trend raises a question as to whether the strike took place during months when the employer's production normally slowed down. If so, then the labor dispute was not responsible for all of the 62.1% decline.

Further, we observe that in the post-strike months of August, September, and October, 2021, when the claimants were fully back at work, the plant's average monthly shipped tons failed to return to the pre-strike 2021 levels. The levels were also lower than the same months in 2020 and 2019. There was a 23.5% *decline* in average monthly shipped tons in the 2021 post-strike period, August through October, compared to the same period in 2020, and a 28.1% decline compared to 2019. In order for the post-strike period data to be useful to analyzing the impact of the strike, we need to know what was going on.

Effect of Business Operations on Strike and Non-Strike Production

Evaluating the employer's normal, non-strike operational levels is clouded by the fact that, at some point not long before the strike, the [Location A] plant had started producing a different product.

¹⁰ Because the claimants were on strike for half of July, the numbers from this month are of little use for comparison purposes.

In December, 2020, the employer had announced a business transformation plan, which involved shifting production from using stainless-steel to higher value materials, including a titanium alloy. The employer's plant manager testified that [Location A] was producing this higher value material in the 2021 pre-strike period. However, we do not know how much.

The record suggests that the employer was making strategic decisions in anticipation of moving forward with its business transformation plan. By September, 2020, the employer had already idled its [Location H], CT facility. Just a few months later, in December, 2020, the employer announced that it planned to idle the [Location G], OH facility, and anticipated that this would occur by March, 2023. It is undisputed that the employer's plan to idle the [Location G], OH plant stems directly from its decision to make significant upgrades to its [Location E], PA facility, which had already begun in early 2021. We cannot discern from the record whether production slowed during the strike and post-strike periods as a result of the idling of other facilities and plans to idle others.

The employer's plant manager testified that, in 2021 and prior to the strike, most of [Location A]'s materials had come from its [Location G], OH facility, which also went on strike at the same time as [Location A]. The strike at the [Location G], OH facility, in particular, could have impacted the ability of [Location A] to receive materials, which could in turn have impacted its ability to produce. However, nothing in the record enables us to measure this.

The employer's plant manager also testified that titanium product takes more labor hours to produce and weighs less, so there are not as many tons in the end. He testified that the employer chose not to produce titanium product during the strike, because they did not have the skilled labor to produce it. Whether or not the [Location A] facility was shipping tons of titanium product during August through October 2021, when the skilled workforce had returned, is entirely unclear. If it was, that could have been driving the reduced level of shipped tons during that period. The new numbers, particularly with respect to August and September, may have been its new normal. We do not know.

The union representative testified that the employer provides a General Incentive Update, Exhibit 21, for purposes of issuing bonuses to employees. The bonus is based on a conversion cost formula designed to show how much it costs to produce product, as opposed to what it costs to ship product. The union representative testified that the employer's conversion cost incentive formula has changed completely, because it is no longer based on weight and is currently based on smaller, lighter materials, such as smaller sized coils.¹¹ While Exhibit 21 offers shipped tons numbers that are consistent with the shipped tons data reflected in Exhibit 22, we note that it does not reflect the same cost/expense figures reported in Exhibit 22. This discrepancy is confusing, raising further uncertainties about the employer's evidence.

As for October, 2021, the employer's plant manager testified that its shipped tons were lower because the company elected not to produce three weeks' worth of metal for reasons that were market-based or due to the business transformation. He testified that, in October and November, 2021, a major piece of equipment was down in its [Location E], PA plant, affecting the whole

¹¹ During the hearing, when asked if he had ever questioned the accuracy of the conversion cost figures, the union representative indicated that he had, because "there's a lot of stuff thrown in that I don't necessarily agree with."

supply chain. He also alluded to the fact that the employer chose to do less melting in order to get the backlog (from the strike) down, asserting that there was so much work backed up because of the strike that they were months behind in production.

However, he did not specifically explain how these factors detrimentally impacted the number of shipped tons in [Location A]. If there was a large backlog, we would expect to see steps taken to work through that backlog, such as increased work hours or overtime for bargaining unit workers. However, the employer did not assign any overtime or increase hours during this post-strike period, even though the employer had its skilled bargaining unit workers ready, willing, and able to work.

As a result, it is very difficult to draw any inference from the 33.7% difference in average monthly tons shipped between the strike and post-strike period, and we certainly cannot discern whether, or to what degree, it was attributable to the labor dispute.

In looking at the prior year comparison, we considered whether the 2020 production levels may have been skewed by the COVID-19 public health emergency. However, the employer's witnesses did not present any testimony asserting that the pandemic had an impact on its operations. In fact, the employer was already shipping 18.3% fewer tons of its product in the three months *prior* to the onset of the declared public health emergency, January through March, 2020, than the same period in 2019. Additionally, Exhibit 20 shows that, in the last quarter of 2020, October, November, and December, the employer's production was robust, with levels of shipped tons higher than the same period in 2019. Given the absence of any evidence that this industry was detrimentally impacted by the COVID-19 public health emergency, we decline to draw such an inference.

When we compare the 2021 strike period to the same months in 2020, the employer's data shows a 13.9% decline in average monthly shipped tons in 2021. A drop of 13.9% does not reflect a substantial curtailment of production.

Although we do see the substantial decline of 62.1% in average monthly shipped tons during the 2021 strike period from the same months in 2019, the data indicates that 2021 began as a less productive year than 2019. There was a 7.1% decline in the 2021 pre-strike period compared to the same months in 2019. And, as stated above, production remained depressed from 2019 levels in the three months following the 2021 strike, with the evidence showing a 28.1% decline in average monthly shipped tons during the post-strike period in 2021 compared to the same months in 2019. Again, this trend indicates that something other than the labor dispute may have caused production to be lower in 2021 than 2019.

From the plant manager's description of the employer's business operation, additional, perhaps corroborating, measurable evidence demonstrating the strike's impact could have been presented beyond the limited data revealed in the exhibits. For example, the plant manager testified that a portion of [Location A]'s manufactured product is shipped directly to the employer's customers and invoices are sent once product ships to them. Yet, the employer failed to present any invoices for the [Location A] product that had been shipped before, during, or after the strike, or in the corresponding periods in 2019 and 2020.

The plant manager also testified that orders for [Location A] were backed up two to three months, and that he heard some customers went to competitors due to the strike, inferring that the labor dispute interfered with the employer's ability to meet demand. Nothing in the record enables us to measure whether this is true. The employer did not present any evidence to compare customer orders for the facility's product before, during, or after the strike, or in the corresponding periods in 2019 and 2020. We have no way of knowing the actual number of orders for [Location A] product or when they were filled during the relevant period. Moreover, the fact that none of the striking workers performed overtime after returning to work suggests the facility was not backed up.

During the hearing, the plant manager further alleged that incoming material was shut off after the second month of the strike, implying that the employer had to do so because of the labor dispute. Again, the employer offered no measurable evidence to corroborate this, such as evidence showing the level of material scheduled for, and actually delivered to, the plant before, during, and after the strike, as well as the corresponding periods in 2019 and 2020.

In short, the employer's exhibits which purport to demonstrate a 13.9%–66.4% decline in shipped tons, and a 40.4%–170.3% increase in cost per ton at the [Location A] facility during the strike period, do not constitute substantial and credible evidence that the claimants' strike caused a substantial curtailment of bargaining unit work. This is because the employer failed to offer other measurable evidence to corroborate its data showing the difference in production levels between the strike period as compared to non-strike periods. Further, we cannot tell from the evidence presented the extent to which changes in production levels and costs can be attributable to the employer's business transformation plan, changes in the product line to lighter metals, market forces, changes in shipping costs, the availability of supplies, or any other reason. Because these variables remain as a possible source for the difference in production levels between the strike period and non-strike period, the employer has failed to carry its evidentiary burden to prove that, as a result of the strike, the work normally performed by the bargaining unit workers was disrupted to such a degree as to constitute a work stoppage within the meaning of the statute.

Non-Bargaining Unit Work

We are unable to analyze the strike's impact on non-bargaining unit work. The employer presented no evidence from which to measure any change to its non-bargaining unit operations. The record is devoid of any timesheets, work logs, activity sheets, notes, memorandum, or any other type of communication between the employer and its non-bargaining unit staff relative to the strike. The employer offered no evidence to demonstrate that non-bargaining unit employees performed bargaining unit work to the detriment of their own positions, or to what degree, if any, their performance of bargaining unit work during the strike impacted other aspects of the employer's business operations.

We, therefore, conclude as a matter of law that the employer did not meet its burden to show that the labor dispute caused a stoppage of work within the meaning of G.L. c. 151A, § 25(b).

The DUA's determination is reversed. The claimants are entitled to receive benefits for the week beginning March 28, 2021, through July 17, 2021, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - November 9, 2022



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member



Michael J. Albano
Member

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS
STATE DISTRICT 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

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/JMO/rh