

M-0336 et al. (Aug. 18, 2017) – Telecommunications company established that seven-week strike caused a substantial curtailment of bargaining unit work in its wireline business. *[Note: the District Court affirmed the Board of Review's Decision.]*

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Multi-Claimant Issue ID: M-0336, M-0338, M-0346, M-0352, M-0373, M-0395, M-0396, and M-0397

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. We review, pursuant to our authority under G.L. c. 151A, § 41, and we affirm in part and reverse in part.

In determinations issued on various dates between June 29, 2016 and July 9, 2016, the DUA concluded that the claimants were not eligible for benefits because their participation in a strike from April 13, 2016 through May 31, 2016 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 15-day 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 issues on appeal are: (1) whether the Board properly conducted a hearing *de novo*; (2) whether the Board properly assigned to the employer the burden to prove a stoppage of work under G.L. c. 151A, § 25(b); (3) whether the statutory provision at issue is pre-empted by federal labor law; and (4) whether the claimants' participation in a strike caused a stoppage of work within the meaning of G.L. c. 151A, § 25(b).

Findings of Fact

1. The employer is in the business of selling communication, information, and entertainment products and services to residential consumers, businesses, and government agencies. Its business is organized into two strategic business segments, wireline and wireless. Each segment serves customers in Massachusetts.
2. The employer's wireline business ("the Company") is the incumbent local telephone exchange carrier for all but a handful of Massachusetts communities. The Company currently provides

products and services to customers over a copper or fiber-optic (“fiber”) network. Since 2004, the expanding portion of the Company’s business has been the provision of products and services over its fiber network.

3. In April of 2016, the Company employed [total #] people in Massachusetts, of which [] were bargaining unit employees and [] were managers.
4. The 4,063 claimants are members of the collective bargaining units represented by [Union A] or the [Union B].¹
5. These claimants worked for four of the employer’s corporate entities. A majority of claimants (3,461) worked for [Corporation A], which installs and maintains traditional copper telephone and high speed internet (“HSI”) services, as well as fiber-based voice, data, and video services. Another 428 claimants worked for [Corporation B], which performs the employer’s engineering services and is responsible for building and maintaining its inter-office network. A third group of 168 claimants worked for [Corporation C], which performs payroll services as well as other centralized business functions, including finance, legal, human resources, information technology (“IT”), marketing, and product and new business development (“PNB”). Six claimants worked in a single retail store and were employed by [Company B].
6. The Company serves three types of customers. Residential consumers and small businesses are served by the Company’s Consumer and Mass Business group (“CMB”). Medium-sized and large businesses and government agencies are served through its [Employer Name] Enterprise Solutions (“Enterprise” or “[JES”]) group. Other telecommunications providers, which purchase products and services at the wholesale level, are served by its [Employer Name] Partner Solutions (“Wholesale” or “[JPS”]) group.
7. Bargaining unit members perform a number of different functions. The majority are technicians who build, install, and maintain the employer’s copper and fiber networks both in the field and within its central offices. Another large group of members work in one of the Company’s call centers, answering in-bound calls and selling products or services, handling billing inquiries, fielding calls for repairs, scheduling service, and providing directory assistance and call completion services. Smaller groups of bargaining unit members provide maintenance for the employer’s fleet of vehicles, accounting services, and administrative support.²
8. In November, 2015, the Company’s [Town A] warehouse closed. Since then, the 28 bargaining unit members who had been assigned to the warehouse have not been performing the same duties they previously performed at the warehouse.
9. A portion of the Company’s products and services are regulated by the government. Locally, the provision of plain old copper wireline telephone service (“POTS”) and television services subjects the employer to regulation by the Massachusetts Department of Telecommunications

¹Only 4,063 of the [] bargaining unit members filed claims for unemployment benefits.

² [Union A] bargaining unit members include approximately 400 customer service representatives in the Customer Sales and Service Center and 28 warehouse employees. The [Union A] also represents the six claimants who work in the [Company B] retail store. The remaining claimants are members of the [Union B] bargaining units.

and Cable (“DTC”). DTC ensures network reliability, enforces quality standards for the Company’s retail and wholesale customers, including parity of service to wholesale customers, and it oversees the migration of customers from the copper to fiber network and service disconnection.³

10. The parties began negotiations to renew their collective bargaining agreements during the spring of 2015. When the contract expired on August 1, 2015, they had not reached an agreement. They continued negotiating sporadically over the next eight months without reaching agreement on a successor contract. On April 11, 2016, the unions announced that they would commence a strike in two days. On April 13, 2016, members of the [Union B] and [Union A] bargaining units went on strike.
11. 22 bargaining unit members crossed the picket line to report to work. Another 199 bargaining unit members remained out on short-term disability for the duration of the strike.
12. The claimants were on strike for seven weeks. Pursuant to a negotiated return-to-work agreement, they returned to work starting on the evening of May 31, 2016, with the bulk of employees returning on June 1, 2016.
13. During the spring of 2016, there were no storms or unusual weather events that affected the employer’s ability to provide any of its services to customers.
14. In April, 2016, the Company had 980,136 copper voice lines and 205,070 high speed internet lines, which travel over the copper network, in service in Massachusetts. It also had 447,754 fiber voice, 463,807 fiber data, and 404,685 fiber video lines in service in Massachusetts. The number of lines in service for most of these product categories steadily declined from month to month in 2015 and in the months before and after the strike.
15. The exception was fiber data, which showed a steady increase in lines in service from January through March and June through August, 2016. As compared to the combined average number of fiber data lines in service during the three months before and after the strike, the average number of such lines in service in April and May declined 0.1%. In a year over year comparison, the number of fiber data lines in service were up in April and May, 2016 as compared to the same months in 2015.

Revenue and Profits

16. The Company generates the largest share of its revenue from residential and small business customers who pay each month to use its POTS and HSI services or its fiber voice, data, and video services. It generates additional revenue from its larger business and government customers, who pay for custom high capacity network access, security, and data storage, from its Wholesale customers, who primarily purchase access to its network, and from a separate corporate entity, [Corporation D], which also buys access to its network.

³ Additionally, the Federal Communications Commission (“FCC”) regulates interstate and international telecommunication services, including certain wireline voice and internet access services.

17. Combined revenue figures from these sources during the three full months prior to the strike, January, February, and March, 2016 (the “pre-strike period”), show average monthly revenue for the wireline business unit in Massachusetts of \$[] million.⁴ In the three full months following the strike, June, July, and August, 2016 (the “post-strike period”), the combined revenue figures show average monthly revenue of \$[] million. The average monthly revenue for April and May, 2016, which included the seven-week strike, was \$[] million. This was a decline of 1.0%.⁵ *See* Exhibit 66.
18. In the first quarter of 2016 (the “pre-strike period”), the combined wireline expenses in Massachusetts for CMB, []ES, []PS, and its separate corporate entity were \$[] million. During the second quarter, its combined expenses were \$[] million. In the third quarter, the combined expenses were \$[] million. *See* Exhibit 60. Even though the Company saved money on bargaining unit wages and overtime, employee health insurance, advertising, and sales commissions during the strike, it had a net increase in second quarter expenses of \$[] million due to travel and overtime costs for management personnel on emergency work assignments (“EWAs”), amounts paid to contractors, and other operating costs for plant and facilities maintenance, security, and network and software licenses.⁶ *See* Exhibit 65. Its expenses increased 31.9% from the combined average first and third quarter expenses.⁷
19. The Company’s wireline earnings before interest, taxes, and depreciation (“EBITDA”) in Massachusetts were \$[] million in the first quarter of 2016, \$[] million in the second quarter, and \$[] million in the third quarter. A company’s EBITDA is a standard financial measure of the profitability of the business. As compared to a combined average EBITDA of \$[] during the first and third quarters, the Company’s EBITDA declined 58.4% during the quarter encompassing the strike.
20. Looking at the second quarter of 2015, the Company’s EBITDA was \$[] million. The 2016 second quarter EBITDA declined 53.8% from the prior year.

⁴ We rely upon the figures in the balance sheets, Exhibits 60 and 66, rather than the monthly revenue data in Exhibit 67. The latter exhibit was prepared for DUA in the middle of the strike, by an unidentified source, and at a time when the finance group had decided to forego performing internal financial reports. In contrast, Exhibits 60 and 66 were authenticated by a witness who attested to their preparation and methodology for allocating the figures to Massachusetts, both of which were consistent with standard accounting procedures.

⁵ On April 1, 2016, the employer sold its wireline business in Texas, California, and Florida to [Name of Entity]. Its profit and loss statements, Exhibits 60 and 66, were adjusted, extracting the financial impact of the business in those three states from the results.

⁶ In an effort to minimize these expenses, the [Union A] asks the Board to compare the Company’s \$[] million second quarter 2016 increase in expenses to the Company’s \$[] million *annual* revenues. Our focus is on the strike period, as compared to the periods immediately before and after the strike. Since the strike fell within the second quarter, the relevant periods are the first and third quarters, with consideration of the second quarter in 2015. *See Reed Nat’l. Corp. v. Dir. of Division of Employment Security*, 388 Mass. 336, 340 (1983) (“*Reed I*”); *Hertz Corp. v. Acting Dir. of Division of Employment and Training*, 437 Mass. 295, 299 (2002). There is no authority for comparing the Company’s strike period expenses, revenues, or any other metric for that matter, to a longer view. We think rightfully so, because it would distort the labor dispute’s impact. Further, the significance of this \$[] million expense is only understood by comparing it to business as usual expenses, not to revenues. The relationship between expenses and revenues is captured in EBITDA, revenue less cash expenses.

⁷ We rely upon the quarterly balance sheet, Exhibit 60, for the most accurate account of Company expenses, because many of the strike-related labor costs were not reported to the Company until after the strike.

21. The Company's Massachusetts profit margin before interest, taxes, and depreciation was []% in the first quarter of 2016, []% during the second quarter, and []% during the third quarter. As compared to a combined average profit margin of []% during the first and third quarters, the profit margin dropped 58.9% during this second quarter.
22. In a year over year comparison to the Company's Massachusetts []% profit margin for the second quarter of 2015, the second quarter of 2016 showed a decrease of 52.3%.
23. One measure of the profitability of its CMB products is whether the number of billable services sold to customers exceeds the number of disconnected or cancelled billable services during the same period of time ("net adds to billing"). During the pre-strike period of January through March, 2016, the Company had a weekly average of (16.2) net adds to billing for its fiber TV product, 191.5 net adds to billing for its fiber data product, (700.6) net adds to billing for its HSI product, and an average weekly net adds to billing of (1,770.5) in the combined copper and fiber voice products in Massachusetts.⁸ During the post-strike period of June through August, 2016, the average weekly net adds to billing figures were (70.5) for fiber TV, 106.2 for fiber data, (652.6) for HSI, and (1,942.8) for the voice products.⁹
24. During the six full weeks of the strike, the average weekly net adds to billing for fiber TV was (520), for fiber data it was (411), for HSI it was (801), and for voice it was (2,402). Thus, during the strike, the Company experienced a decrease in net adds to billing of 1,100% for fiber TV, 376% for fiber data, 18% for HSI, and 29% for voice.
25. As a result of the drop in net adds to billing for these CMB products in Massachusetts during the strike, the Company lost an estimated \$[] million in revenue between April and September, 2016.¹⁰

Bargaining unit work

26. The employer sells access to communication. It designs and builds a physical plant or network to provide that access, installs the equipment necessary for its transmission, and ensures that the network remains in good working order through preventative maintenance and repair. Because it operates in a competitive market, it must also continuously make sales and preserve its customer base.

Construction

27. The Company owns half of the 1.2 million telephone poles in Massachusetts. However, it has physical facilities on almost all of them. If a pole breaks, is overloaded, or must be moved due

⁸ Numbers in parentheses reflect negative numbers.

⁹ The monthly data here is based upon a pre-strike period of January 3 to April 2, 2016, and a post-strike period of June 5 to September 3, 2016.

¹⁰ This calculation, as shown in Exhibit 98d, was derived by the employer's expert witness, an economist. It is based upon the Company's performance during January through April in 2015 and 2016. We reject the [Union A]'s assertion that the expert's methodology is suspect because he did not look at the Company's performance over different or lengthier periods of time. In fact, his comparison of the April strike period to the pre-strike months in 2016 and the matching period in 2015 is consistent with the benchmarks that we have chosen to rely upon for business as usual in the rest of this case.

to road construction, the Company must transfer its facilities to a new pole, in addition to replacing the poles that it owns.

28. Poles carry both the Company's facilities and electric power lines. Broken poles pose a public safety hazard. During the strike, the Company used contractors to perform these emergency repairs to broken poles and exposed cables and power lines.
29. In the pre-strike period, the Company placed an average of 656 new poles per month and in the post-strike period, it placed an average of 501, for a total average of 578 new poles per month before and after the strike. In April and May, 2016, it placed 254 and 150 new poles, respectively, or an average of 202 per month. This constitutes a 65.1% decline in the monthly average number of poles placed during the strike months.
30. During the same pre-strike period, it transferred plant facilities to a new pole on an average of 1,682 times per month and in the post-strike period, it transferred an average of 680, for a combined pre- and post-strike average of 1,181 transfers per month. In April and May, it transferred facilities 566 and 400 times, respectively, or an average of 483 per month. The average monthly number of transferred facilities during the strike period decreased 59.1%.
31. The Company removed an average of 811 broken or old poles per month in the pre-strike period. In the three post-strike months, it removed an average 403 poles per month. The combined pre- and post-strike average was 607 poles per month. During April and May, it removed 310 and 244 poles, respectively, or an average of 277 per month. This was a decline of 54.4%.
32. In 2015, the Company's construction team placed new poles, transferred facilities, or removed poles a total of 3,345 times in April and 3,377 times in May, or an average of 3,361 per month. In 2016, the total number of new poles placed, facilities transferred, or poles removed was 1,130 in April and 794 in May, or an average of 962. This was a decrease of 71.4% from the prior year.
33. During the strike, the Company did not place any new fiber on its fiber-to-the-premises ("FTTP") or fiber-to-the-cell ("FTTC") physical plant to build its network. Any fiber placed and spliced during this period was done by contractors and primarily limited to emergencies, such as when a pole was knocked down.¹¹
34. The average monthly volume of copper and fiber cable placed during the three months before and after the strike was 332,514 feet. In April, bargaining unit technicians placed 81,275 feet of cable from April 1 to April 12 and contractors placed 2,895 feet during the remainder of the month, for a total of 84,170 feet placed in April. In May, contractors placed 73,361 feet of cable. The average for both April and May was 78,766 feet of cable per month. As compared the average volume of cable placed in the months before and after the strike, the volume during the strike months declined 76.3%.

¹¹ Employer witnesses testified to a very small amount of obligatory road work and upgrades for a few customers toward the end of May.

35. Similarly, the total volume of spliced copper and fiber cables decreased from 29,167 fibers joined in the period April 1 through April 12 to 2,108 during the remainder of the month. In May, the total volume was 16,600. The average for both months was 23,938. Compared to the average monthly volume of 93,017 cable fibers spliced during the three months before and after the strike, the average dropped 74.3% during the strike period.
36. In 2015, the Company placed an average of 252,484 feet of cable per month in April and May. In the same period, it spliced an average of 90,955 fibers per month. A year over year comparison shows a 68.8% decline in fibers placed and a 73.7% decline in fibers spliced during the two strike months.
37. It is more expensive for the Company to maintain its copper network than its fiber network because copper corrodes over time, it requires electricity and special equipment to keep the lines air compressed, and it takes up a lot of space. Copper is also more difficult to repair, requiring the climbing of poles and troubleshooting expertise. Consequently, the Company has made a strategic decision to invest in the expansion of its fiber products and services and shrink its copper network, where feasible.
38. In 2015, the Company began an initiative to move copper customers over to its fiber network in those communities where it has a fiber network presence. Construction on this Network Transformation Project was to begin in April, 2016. The project could not begin in April or May due to the strike.
39. The Company had planned to begin construction to expand its fiber network into [City A] in April, 2016, with the goal of making its fiber products available to 25,000 new residential and small business customers by the end of 2016. Due to the strike, the construction work was delayed until June. Work by the technicians to test the underground conduits for clearance did not start until July.

Installation and Maintenance

40. The Company utilizes bargaining unit technicians to connect many customers to its network. Technicians are dispatched in trucks to install new POTS, HSI, or fiber voice, data, or video services, and special circuits. They are also dispatched to repair problems that cannot be fixed remotely.
41. During the pre-strike period of January through March of 2016, dispatched technicians installed an average of 4,952 new POTS, HSI, fiber voice, data, video, and special circuits per week. In the post-strike period of June through August, they installed an average of 5,671 such services each week. The combined pre- and post-strike average installation volume was 5,312 per week. The total average number of weekly installations during the six full weeks of the strike, from weeks ending April 23 through May 28, 2016, was 1,863. This was a decline of 64.9%.

42. In May of 2015, the Company had completed a total of 21,847 of these installations. In May of 2016, it completed a total of 9,727. It performed 55.5% fewer installations in May of 2016 than it did a year earlier.¹²
43. Dispatched repairs for POTS, HSI, fiber voice, data, video, and special circuits were completed during the pre-strike period of January through March, 2016 at the average rate of 5,623 per week. In the post-strike period of June through August, the technicians completed an average of 5,479 repairs per week. The combined pre- and post-strike average was 5,551 dispatched repairs per week. During the six full weeks of the strike, the average weekly repair completion volume was 4,023. This constituted a decreased weekly average of 27.5%.
44. In May, 2015, the total number of completed dispatched repairs for the same services was 22,081. In May, 2016, it was 18,458. This was a decrease of 16.4% year over year.
45. The mean time to repair on a dispatch for core voice averaged 87.23 hours during the six full weeks of the strike. During the same period, the mean time to repair averaged 105.11 hours for HSI, 51.43 hours for fiber products, and 70.20 hours for specials. The combined average mean time to repair during the pre-strike period of January through March, 2016 and the post-strike period of June through August was 37.74 hours for core voice, 59.41 hours for HSI, 38.32 hours for fiber products, and 28.41 hours for specials. This constituted increases in the mean time to repair of 131.1% for core voice, 76.9% for HSI, 34.2% for fiber products, and 147.1% for specials during the strike.
46. In May, 2015, the average weekly mean time to repair on a dispatch for core voice was 27.45 hours, for HSI it was 41.08 hours, for fiber products it was 29.54 hours, and for specials it took 27.07 hours. In comparison, the May 2016 strike weeks show an increase of 228.1% for core voice, 150.2% for HSI, 61.9% for fiber products, and 109.6% for special circuits.

Central Offices

47. Nearly all of the Company's services traverse through a central office. Each central office includes a plant to power equipment in the event of a power failure, a frame where cables are placed and connected to a large computer switch that connects telephone calls, and equipment that transports voice, data, and video. There are 278 central offices in Massachusetts.
48. During the strike, managers continued to perform the proactive maintenance of keeping the copper network inside its central offices dry, but they did not perform the outside preventative work of maintaining air pressure to keep its underground copper network dry.
49. The volume of completed central office equipment installations done by bargaining unit network installation technicians averaged 65 installations per month in the pre-strike period. Following the strike in June, July, and August, the average monthly volume was 92. The combined volume during the pre- and post-strike period was 78 per month. During April and

¹² Full monthly installation and repair numbers for April, 2015 were unavailable for comparison.

May, there were 37 and 7 installations, respectively, or an average of 22 per month. The rate of equipment installations decreased 71.8% during the strike.¹³

50. The work of central office technicians (“COTs”) to install new products or connect services is referred to as “provisioning.”
51. During 2016, the COTs completed provisioning orders for Fiber, HSI, POTS, the installation and testing of circuits for Wholesale and Enterprise customers (“WOTS”)¹⁴, and the transfers needed to move a customer to or from a competitive local exchange carrier (“CLEC”) at the average rate of 8,112 per month in January, February, and March. In June, July, and August, it completed an average of 8,393 orders per month. The combined pre- and post-strike monthly provisioning average was 8,253. In April and May, the Company completed an average of 4,755 orders per month. This was a decrease of 42.4% during the strike period.¹⁵
52. In the three pre-strike months, the central offices completed repair orders for Fiber, HSI, POTS, WOTS, and transfers to or from CLECs at the average rate of 6,291 per month. They completed an average of 6,680 total repairs per month in June, July, and August. The combined monthly average for the pre- and post-strike period was 6,485. During April and May, the central offices completed an average 5,043 repair orders per month. These central office repairs decreased 22.2% during the strike.

Wholesale and Enterprise

53. The Company sells complex, individually designed, high capacity circuits (“specials”) to its Enterprise and Wholesale customers. These specials carry services from its network to the customer.
54. During the strike, the company was only able to perform provisioning work for Wholesale or Enterprise customers via computer. Within its special service provisioning center, the Operational Control Office (“OCO”), the Company could not do any provisioning that required the dispatch of technicians into the field.¹⁶
55. The OCO provisioned an average of 991 specials per month during the period April - May, 2015. During the months of April and May, 2016, the total number of provisioned specials averaged 680 per month. Thus, as compared to the same period in 2015, there was a decline of 31.4%.
56. In the three months before and after the strike, the OCO provisioned an average of 1,259 specials a month. In comparison, there was a decline of 46.0% during the strike.

¹³ The employer did not provide central office equipment installation data from 2015.

¹⁴ Wired and Office Tested.

¹⁵ Because data for central office provisioning and repairs show a year over year decline in nearly every month from 2015 to 2016, we have not made a year over year comparison to the strike period.

¹⁶ Exhibits 47 and 48 show a small number of dispatched installations of specials during the strike. It is not known whether these were jobs that the OCO had generated prior to the strike.

57. Specials with the highest volume and highest revenue per unit were the Company's Ethernet, DS1, and DS3 circuits. In April and May, 2015, the OCO provisioned an average of 251 Ethernet, 555 DS1, and 16 DS3 circuits per month. During April and May, 2016, it provisioned an average of 148 Ethernet, 126 DS1, and 4 DS3 circuits per month. In a year over year comparison, the average provisioning volumes declined by 41.0% for Ethernet, 77.3% for DS1, and 75.0% for DS3.
58. During the three months before and after the strike, the OCO provisioned a monthly average of 291 Ethernet, 413 DS1, and 20 DS3 circuits. As compared to the pre- and post-strike period average, the volumes during the strike declined by 49.1% for Ethernet, 69.5% for DS1, and 80.0% for DS3.
59. Repairs to special circuits are performed within the Maintenance Control Office ("MCO"). In April and May of 2015, the MCO completed an average of 2,455 repairs per month. In 2016, there were 1,857 completed repairs in April and 2,240 in May, for an average of 2,049 per month. This data shows that there was an average monthly decline in special circuit repairs of 16.5% during the strike as compared to the same period in 2015.
60. The average number of specials repaired by the MCO in January, February, and March, 2016 was 2,162 and in June, July, and August, it was 2,329, for a combined monthly average of 2,245 completed repairs before and after the strike. The average declined 8.7% during the strike period.¹⁷
61. During April and May of 2015, the MCO's mean time to repair a special circuit averaged 3.99 hours. The average was 8.94 hours in April, 2016, and 17.76 hours in May, 2016, for a combined monthly average of 13.35 hours. This shows an increase in the average mean time to repair of 234.6% during the strike as compared to the same period in 2015.
62. The MCO's mean time to repair a special circuit averaged 3.87 hours during the months of January, February, and March, 2016. The average mean time to repair was 5.40 hours during June, July, and August. The combined pre- and post-strike monthly average was 4.64 hours. The average mean time to repair specials increased 187.7% during the strike, as compared to the pre- and post-strike period.

Call Centers

63. Prior to the strike, bargaining unit customer service representatives ("CSRs") fielded calls from consumers in the Company's various call centers. In the largest call center, the Consumer Sales and Service Centers ("CSSCs"), claimants fielded calls from residential and small business customers to order or upgrade service, or to question their bills. In the Business Sales and Billing Center ("BSBC"), CSRs took sales, service, and billing question calls from small businesses. CSRs in the LiveSource calling center handled directory assistance calls (411) and requests for assistance to complete a call (caller dials 0). In the [] ES Inbound Demand Call Center, CSRs received calls from the Company's mid-size businesses. In the smallest call

¹⁷ See Exhibit 73, which includes combined Massachusetts and Rhode Island metrics. Based upon the employer's undisputed testimony that 90% of these metrics were for work performed in Massachusetts, we are satisfied that the data is representative of work impacted by the strike in Massachusetts.

center, the [Employer Name] Center for Customers with Disabilities (“[]CCD”), CSRs helped callers with disabilities who needed assistance.

64. Additionally, 47 to 48 [Union B] claimants worked remotely for the Company’s Fiber Solution Center (“FSC”), taking repair calls from customers on the fiber network, or for the Enhanced [Employer Name] Resolution Center (“E[]RC”), taking customer repair calls involving the copper network.¹⁸
65. During the strike, the Company closed its []ES Inbound Demand Call Center, the FSC, and the E[]RC. One of the three LiveSource locations and three of the CSSC’s four locations were also closed. The Company suspended home-based routing, which first routes calls originating from New England to a call center in New England. The Company tracked most call center metrics only at the national level during the strike.¹⁹
66. Managers on EWA staffed the call centers during the strike. The Company also increased its use of outside vendors. The combined monthly average percentage of calls sent to vendors in the CSSC during the three full months before and after the strike was 46.7%. During the strike period, April 13 to May 31, vendor usage in the CSSC averaged 57%. This was an increase of 22.1% during the strike. In the BSBC, the Company stopped using vendors in August. The combined monthly average percentage of BSBC calls sent to vendors in the three months before and two months after the strike was 6.8%. From April 13 to May 31, the average was 31.5%, an increase of 363%. The []CCD had sent a combined average of 38.2% of its calls to vendors during the pre- and post-strike months. From April 13 to May 31, it sent 38%, showing a .5% decrease during the strike.
67. Because the EWAs and vendors were unable to answer all incoming calls, the Company added a message to notify callers that they could expect long wait times due to the strike, and many simply hung up. Frequently, due to the high call volume, the Company also issued a message informing waiting callers that their calls could not be answered, and then the Company disconnected the call. The Company did not “dead-end” calls during business as usual. From April 13 to April 30, it dead-ended 9.7% and 5.6% of its incoming calls in its two busiest call centers, the CSSC and the BSBC, respectively. During May, it dead-ended 5.2% of its incoming calls to the CSSC and 2.2% of its calls in the BSBC.
68. The employer tracks the number of calls abandoned, where a customer cannot reach a CSR. The daily average percentage of CSSC calls abandoned in the three full months before and after the strike was 4%. Stated differently, the CSSC answered 96% of its incoming calls in the pre- and post-strike period. From April 13 to April 30, the percentage of calls answered was 86.6% and in May it was 88.3%, a decrease from its normal call answering rate during the strike period of 9.8% and 8.0%, respectively.

¹⁸ The FSC and E[]RC are located in Rhode Island, but the claimants worked from their homes in Massachusetts. The parties agreed that the unemployment claims from these claimants are properly before the Board and that the Board’s decision as to the other [Union B] claimants shall govern these 47 to 48 claimants without the need to present evidence specific to the FSC and E[]RC. See Exhibit 135.

¹⁹ Although the employer only measured most call center performance at the national level during the strike, it supplied testimony that the national metrics reflected the performance of work that would have been done in the Massachusetts call centers, and we have no reason to discount that testimony.

69. In the BSBC, CSRs answered 96.3% of the incoming calls during the three full months before and after the strike. From April 13 to April 30, the BSBC answered 72%, and it answered 81% of its calls during May. This was a decrease in the normal number of calls answered by 25.2% and 15.9%, respectively.
70. In the []CCD, the percentage of calls answered averaged 83% during the pre- and post-strike months. From April 13 to April 30, 74% were answered and in May, it was 78%. This was a decrease of 10.8 % and 6.0% of the []CCD's normal rate of answering calls during these strike periods.
71. In its LiveSource centers, the daily average percentage of directory assistance calls answered was 99.3% during the three full months before and after the strike. The daily average from April 13 to April 30 was 97.6% and in May, it was 98.7%, showing a decrease of 1.7% and .6% of its normal answering rate, respectively, during the strike period.
72. Another performance measure normally used in the call centers is the average time it takes to answer a call that's placed in the queue. In the CSSC, the average speed of answer during the three full months before and after the strike was 58 seconds. It was 206 seconds from April 13 to April 30 and 182 seconds in May, which reflects a 255.1% increase during the first two weeks of the strike and a 213.7% increase in May.
73. The average speed of answer in the BSBC during the three full months before and after the strike was 57 seconds. It was 589 seconds from April 13 to April 30 and 424 seconds in May, which is an increase of 933.3% during the April strike weeks and an increase of 643.8% in May.
74. In the []CCD, the average speed of answer was 193 seconds during the three full months before and after the strike. The average was 329 seconds from April 13 to April 30 and 254 seconds in May, which is a 70.5% increase during the two April weeks and a 31.6% increase in May.
75. The average speed to answer directory assistance calls in its LiveSource centers was 6.3 seconds during the pre- and post-strike months. From April 13 to April 30th and in May, the average time was 13.8 and 9.9 seconds, respectively. This is a 119.0% increase in time during the strike weeks of April and a 57.1% increase during May.
76. The average speed to answer requests for call completion was 6.8 seconds during the same months before and after the strike, 8.1 seconds from April 13 to April 30, and 6.0 seconds in May. This was a 19.1% increase in average speed to answer in the first two weeks of the strike, but an 11.8% decrease in May, as compared to the non-strike months.
77. The Company also measures call center performance by the average time that a CSR spends on the telephone handling a customer's call. In the CSSC, the average call handling time during the three full months immediately before and after the strike was 738 seconds. From April 13 to April 30, the average was 1,119 seconds and in May, the average was 919 seconds.

This was an increase of 51.6% in call handling time during the first two weeks of the strike and a 24.5% increase in May from the periods before and after the strike.

78. In the BSBC, the average call handling time during the three full months immediately before and after the strike was 744 seconds. From April 13 to April 30, the average was 1,117 seconds and in May, it was 1,137 seconds. This reflects an increase of 50.1% during the first two weeks of the strike and 52.8% in May.
79. The average call handling time in the [] CCD during the three full months immediately before and after the strike was 636 seconds. The average time was 949 seconds from April 13 to April 30 and 717 seconds during May. The average call handling time thus increased 49.2% during the April strike weeks and 12.7% in May from the periods before and after the strike.
80. In its LiveSource centers, the average time to handle a directory assistance call was 23 seconds during the pre- and post-strike periods. During April 13 to April 30 and May, the average time was 54.34 and 44.56 seconds, respectively. Thus, there was an increase of 136.3% in the average time to serve a customer seeking directory assistance in the first two weeks of the strike and an increase of 93.7% in May.
81. The average time to handle a call completion request during the three full months before and after the strike was 17.1 seconds. It was 31.8 seconds during April 13 to April 30 and 23.7 seconds in May. This reflects an 85.9% increase in the April strike weeks and a 38.5% increase in May.²⁰

Fleet Operations

82. The Company's fleet operations is responsible for maintenance and repair of the Company's 2,500 vehicles and equipment in Massachusetts and Rhode Island. These include cars, vans, pickup trucks, bucket trucks, underground service modules, plant placers, trailers, and digging equipment. Bargaining unit employees are the mechanics who repair and perform the regular preventative maintenance and inspections. Approximately 42% of their work is repair and 58% is preventative maintenance.²¹
83. Because the Company shut down most of its garages and was not using most of its vehicles and equipment during the strike, there were fewer breakdowns and little need for repairs. It hired contractors and outside vendors to perform bargaining unit work during the strike. Although it remained current in its required state and ANSI inspections, it fell behind in preventative maintenance. The average number of vehicles for which scheduled preventive maintenance was completed during the three full months before and after the strike was 440 vehicles per month. In April, the Company performed preventive maintenance on 221 vehicles. In May, it completed 339. This constituted a 49.8% and 23% decrease, respectively, in the average number of vehicles for which schedule preventative maintenance was performed

²⁰ For this LiveSource call completion metric, we used national data in order to be consistent. The Company's Massachusetts numbers closely track the national performance levels. See Exhibit 88.

²¹ The employer's testimony indicated that this breakdown was an estimate, a "best guess." We accept these rough percentages as they are based upon the seven years of experience and observations of the Company's Senior Manager for fleet operations.

during the strike period. However, since preventive maintenance was only 58% of the bargaining unit fleet work, these figures represent a 28.9% decline in total fleet bargaining unit work in April and a 13.3% decline in May.²²

84. In 2015, bargaining unit mechanics completed preventative maintenance on 580 and 633 vehicles in April and May, respectively. In comparison, there was a decrease of 61.9% and 46.4% during the April and May, 2016 strike months. However, of the total bargaining unit fleet work, this was a decline of 35.9% and 26.9%, respectively.

Customer Satisfaction

85. To address marketplace competition, the employer devotes resources to measure customer satisfaction and to drive consumer demand.
86. The net promoter score ("NPS") is a standard business measure of customer satisfaction. Immediately after an order, installation, or repair is completed, an email survey is sent to the customer. The survey asks how likely the customer is to recommend the Company to a friend or colleague. Dissatisfied and ambiguous customers are subtracted from promoters. The net score informs the Company how it is doing in comparison to competitors. A positive score indicates that customers are pleased with the Company. A negative score indicates that they are not.²³
87. The average monthly NPS score in Massachusetts in 2015 was 3.9. In the three full months prior to the 2016 strike, the total NPS scores were 3.0, 1.4, and 1.2, respectively, an average of 1.9. In April, the total score dropped to (7.7) and in May, the score dropped further to (19.3). This was an average of (13.5) during these two months. After the strike, the scores were (2.9) in June, .6 in July, and (.2) in August, or an average of (.8) per month. Compared to the combined pre- and post-strike monthly average NPS score of .5, customer satisfaction dropped 14 points, a 2,800% decrease during the strike.

Non-bargaining unit operations

Engineering

88. The employer's engineering department designs the physical network and the work needed to augment network capacity. If an order for service requires the placing of fiber, the engineering department assigns it to the construction unit for technicians to place cables from the Company's central office to the existing street facilities or to splice existing cables to connect service from the network to a customer's location. During business as usual, engineering

²² This includes combined Massachusetts and Rhode Island data. The Company maintained only about 425 vehicles in Rhode Island. Therefore, we assume that the metrics are representative of the strike's impact on the fleet operations in Massachusetts.

²³ The employer presented After Call Survey results derived from an automated outbound call to a customer immediately after a call center call is completed. See Exhibits 96 and 97. The results of this survey also reflect a decline in customer satisfaction during the strike, but it is limited to the call center agents' performance. Because the NPS score captures the customer's experience with a broader range of products and services, and, theoretically, includes any prior interaction with a call center agent to place an order or seek a repair, we have focused on the NPS as a measure of goodwill.

releases about 1,300 jobs per month to construction. It also performs work on the Company's strategic initiatives.

89. During the strike, about two-thirds of its engineers were sent out on EWAs. Because installations and construction had declined during the strike, the demand for engineering also declined. With reduced demand and use of overtime and contractors, the engineering department was able to keep up with much of its work during the strike.
90. From April 13 through 30, 2016, engineering released approximately 80 jobs. In May, it released approximately 260 jobs, a decline of 80.0% from business as usual. These jobs were primarily for damages to poles or facilities.
91. All engineering work on the Company's network transformation initiative, as well as on the strategic FTTP and FTTC programs were put on hold during the strike. Also, engineering work performed in connection with the [City A] fiber project progressed, but it was not released because the construction force was unavailable.

Marketing

92. Many marketing activities stopped during the strike because approximately 58% of non-union marketing employees were out on EWA and because the Company did not want to drive demand in the face of its inability to handle the customer call volume and installations. Activities that were put on hold included both targeted consumer correspondence, (e.g., emails, direct mail, and vendor booths at exhibition centers), retention offers to counter a competitor's offer, and general media advertising to promote the employer's brand. Several major initiatives geared toward CMB customers were delayed until after the strike, (e.g. a special offer for a network transformation customer, planning for the Thanksgiving — Christmas holiday offer, and an offer to enable customers to easily transfer their services to a new address). The marketing department pulled its Father's Day gift-giving circular, cancelled its pricing campaign to win back market share in the [City B] metropolitan area, stopped all television media buys, and delayed the launch of advertising a new software application for fiber TV customers, as well as a campaign geared toward certain prospective minority customers.

Human Resources

93. Losing approximately 55% of its personnel to EWAs, the human resources department was unable to perform certain recruiting and training functions during the strike, because it was busy hiring temporary employees. The recruiting staff stopped military recruiting, cancelled the spring 2016 campus recruiting for interns and new hires, and delayed the launches of a more efficient mobile application for on-line job applicants and a recruiter portal to create a central repository for system access, data, metrics, training, and tools. Presumably, it continued to perform its other business as usual functions, such as payroll and benefits.
94. During the strike, the human resource training staff functioned with 22% of its normal workforce to train replacement EWAs and new [JES hires, manage contractors hired to develop training content, manage the training of agents and partners that train end users, and

maintain its learning management system. The staff was unable to develop training for new products, the training development for an online tool used in the call centers, the training for diagnostic tools for the FSC, the work on a learning portal that would integrate outside training resources, and the training on a program about the appropriate use of content and confidentiality for []ES customers overseas.

Information Technology

95. The information technology unit (“IT”) lost 3,300 of its 8,887 non-bargaining unit staff to EWAs. During the strike, the remaining IT staff supported the data systems used by all of the employer’s 18,000 EWAs, provided system access for the EWAs in their new roles, provided and decommissioned access for EWA replacements, created replacement tablets for EWAs in the field, and fixed system breakdowns. Because of the strike, all IT development and enhancements stopped, which, in turn, affected projects in other business units. For example, the strike delayed moving the Company’s infrastructure to the public cloud. It also delayed the Company’s Rapid Delivery project, a project to condense all services to Enterprise customers onto one platform, and the enhancements to the employer’s human resources PeopleSoft system. The latter prevented other system enhancements to payroll and the grievance process.

Product & New Business Development

96. The PNB team is responsible for generating new revenue streams. It sent 550 of approximately 4,000 non-bargaining unit employees out on EWA. All work to refine or develop future products, which required coordination with engineering, IT, and training teams that also lost staff to EWAs, stopped during the strike. This, in turn, delayed the release of a new enhanced set top box for fiber video customers, the launching of a product that doubled the internet speed of the Company’s existing product, and a media guide menu upgrade for fiber customers.²⁴

Corporate Security, Legal, and Finance

97. Routine active investigations in the employer’s corporate security department were put on hold during the strike as its staff focused on maintaining security of the physical plant, contractors, and EWAs.
98. Of the legal department’s 700 lawyers and support staff, 363 were given an EWA. During the strike, the remaining staff was unable to respond to customer requests to ensure that confidential information traveling over international borders complied with data security and privacy laws. It was also unable to perform its routine contract work because the contract group was working on contracts for temporary hires. Legal settlements were delayed and many were processed with errors. Some legal work, which would normally be done in-house, was referred to outside counsel.
99. The wireline finance business unit lost half of its 400 non-union staff to EWAs. It did not perform budget transfers for headcount or capital expenses, nor do any internal reporting.

²⁴ Forecasts for its new set top box were a revenue stream of \$[] million during the first four months of launch.

Activity on middle-period forecast adjustments was reduced, establishing a baseline for 2017 budgeting was more difficult, and other essential functions were performed with less detail and analysis than usual. The Company's local, state, and federal regulatory filings were completed on a timely basis.

[]ES

100. Within the []ES global operations business group, 2,800 of its 9,400 employees were assigned to EWA. The transfer of personnel out of a facility which had been sold and the consolidation of employees in leased facilities were delayed by several months due to the loss of staff to EWAs. It also delayed updating and testing emergency contingency plans for centers in its worldwide operation.

Ruling of the Board

In this appeal, the Board must determine the claimants' eligibility for unemployment benefits under G.L. c. 151A, § 25(b). This provision states, in relevant part, as follows:

Section 25. [N]o 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

(Emphasis added.)

(1) *Hearing de novo.*

The employer prevailed at the DUA adjudications level, where the DUA determined that the claimants were not entitled to benefits while they were on strike ("DUA determination"). On appeal, the employer argues that it was not necessary for the Board to conduct a hearing *de novo*. Essentially, the employer suggests that we should have simply reviewed the materials that the parties provided to the DUA and which the DUA relied upon in rendering its determination that the strike caused a stoppage of work. We disagree.

Quoting G.L. c. 151A, § 41(b), the employer asserts that the Board's authority is simply to "inquire whether the commissioner's decision was founded on the evidence in the record and was free from any error of law affecting substantial rights" and that the provision does not compel a hearing *de novo*. Subsections 41(a) and (b) pertain to an appeal of a hearing decision.²⁵ Procedurally, the appeal before us does not arise from a hearing decision. It arises directly from a determination. The commissioner referred the claimants' requests for a hearing on that determination directly to

²⁵ G.L. c. 151A, § 39(a) instructs the DUA to render a determination as to whether unemployment benefits are payable to a claimant. Subsection 39(b) permits the non-prevailing party to request a hearing of that determination before the commissioner's representative. In the DUA, these hearings are conducted by review examiners in its hearings department. Where an appeal follows this course, G.L. c. 151A, § 40 authorizes the non-prevailing party to appeal the hearing decision to the Board of Review for a second level appeal.

the Board, pursuant to G.L. c. 151A, § 39(d), for a Board hearing pursuant to G.L. c. 151A, § 41(d).²⁶

G.L. c. 151A, § 41(d) directs the Board to conduct a fair hearing. Nothing in § 41 or the administrative regulations that govern unemployment appeal proceedings requires the Board to limit its fact-finding to what was before the DUA when it issued the underlying eligibility determination.²⁷ Provided the Board conducts an evidentiary hearing, it is free to make its own findings of fact. *See Dir. of Division of Employment Security v. Fingerman*, 378 Mass. 461, 463 (1979). Further, G.L. c. 151A, § 41(e) states that the Board's hearing must conform to § 39(b), which affords the parties a full opportunity to present evidence and cross-examine witnesses. That section also requires that "[t]he decision of the commissioner or his authorized representative shall be based solely on the testimony, evidence, materials and issues introduced at the hearing." Thus, just as hearings conducted by review examiners pursuant to § 39(b) are *de novo*, the Board must conduct a hearing *de novo* when the commissioner refers a request for a hearing of an eligibility determination under G.L. c. 151A, § 25(b) directly to the Board.

(2) *Burden of proof*

The employer maintains that neither the statute nor any court case supports assigning the burden to prove that the strike caused a stoppage of work to the employer, the non-appealing party. As we have explained,²⁸ even though G.L. c. 151A, § 25(b) does not expressly assign the burden of proof, we assign the burden to the employer based upon guidance from the Supreme Judicial Court ("SJC"), legislative intent, and principles of statutory construction.

Certain provisions of G.L. c. 151A expressly assign the burden of proof. Others do not. The only provision under G.L. c. 151A, § 25(b) that does so is G.L. c. 151A, § 25(b)(4), which affords the employer an opportunity to prove an exception to the award of benefits if there has been a lockout.²⁹ With respect to showing a stoppage of work, the statute is silent.

Where the statutory provision is silent as to burden of proof, the SJC has turned to the Legislature's intent. *Cantres v. Dir. of Division of Employment Security*, 396 Mass. 226, 230 (1985) (assigning the burden of proof under G.L. c. 151A, § 25(e)(2) to the employer). Since the claimants in this labor dispute voluntarily went on strike, the employer argues that they abandoned their jobs and, therefore, the Board should follow the language of G.L. c. 151A, § 25(e)(1), which expressly assigns the burden to the claimants. The primary flaw in this argument is that the basic premise of § 25(b) is that the claimants' qualification for benefits is not dependent upon whether or not they voluntarily chose to strike, as discussed below. Accordingly, the voluntary quit disqualification in § 25(e) and whatever burden of proof it assigns simply have no bearing on assigning the burden of proof under § 25(b).

²⁶ G.L. c. 151A, § 39(d), provides, "Whenever a determination involves the application of clause (b) of section twenty-five, the commissioner may immediately refer the case or cases to the board of review for hearing and decision in accordance with clause (d) of section forty-one."

²⁷ See 801 CMR 1.02.

²⁸ See Board of Review Decision M-63772, et al. (Apr. 24, 2013), pp. 11–13, (the "Board's 2013 Decision"), *aff'd*, [*Corporation A*] v. Mass. Exec. Office of Labor and Workforce Development, Nos. 14-P-129, 14-P-194, 2015 WL 3476959 (Mass. App. Ct. June 3, 2015), *summary decision pursuant to rule 1;28, further app. rev. den'd*, 31 N.E.3d 1107 (2015).

²⁹ There is no suggestion that the employer locked out the claimants during the labor dispute at issue in this case.

In addition, under standard principles of statutory construction, the burden of proof is properly assigned to the party most likely to have access to the relevant evidence. Cantres, 396 Mass. at 231, *citing* P.J. Liacos, *Massachusetts Evidence* 41 (5th ed. 1981). For purposes of § 25(e), the claimant who has voluntarily quit presumably has the best access to his or her own reasons for doing so and the statute sensibly assigns the claimant the burden to produce that evidence. In contrast, under § 25(b), it is the employer who has far easier access to the information that will determine whether a stoppage of work has occurred. As the SJC stated, “the term ‘stoppage of work’ . . . refers to the effect upon the employer’s operations produced by the labor dispute” General Electric Co. v. Dir. of Division of Employment Security, 349 Mass. 358, 363 (1965) (citations omitted). There is no question that the employer is the party most likely to have access to the information about whether its operations were substantially curtailed. This was borne out during the proceedings before us, where the employer used 34 witnesses to describe the strike’s impact on its business operations. The claimants’ opportunity to verify the evidence presented by the employer through the use of voluntary discovery and subpoenas may create a burden of rebuttal once the employer has established a *prima facie* case, but it would be highly inefficient to place that initial burden on parties who lack control of the potentially vast universe of underlying data.

Finally, as stated in Cantres, the party raising the exception or defense generally bears the burden of proof. Cantres, 396 Mass. at 231 (citations omitted). To qualify for unemployment benefits, the claimant has the initial burden to establish monetary eligibility under G.L. c. 151A, § 24. *See Id.* at 231. The provisions under G.L. c. 151A, § 25 set forth circumstances that constitute exceptions to that eligibility. G.L. c. 151A, § 25(b) disqualifies strikers *only if* the strike caused a stoppage of work. Since it is the employer who contends that the strike caused the disqualifying work stoppage,³⁰ the employer bears the burden of proof.³¹

(3) *Federal pre-emption*

As in the 2013 labor dispute involving the same parties, the employer urges the Board not to grant benefits to the striking claimants under principles of federal pre-emption. Specifically, the employer argues that a state’s unemployment statute interferes in the “free play of economic forces” between labor and management that Congress intended to be left unregulated. Based upon its determination of whether the claimants’ strike substantially curtailed the employer’s business, the employer asserts that the Board is placing its thumb on one side of the scale, undermining the essential neutral protections of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (“NLRA”).

³⁰ We also reject the employer’s argument that the claimants should bear the burden of proof because they are the appellants. The burden to prove a work stoppage is the employer’s, regardless of which party prevailed below.

³¹ In its brief, the employer misstates the holding of Martineau v. Dir. of Division of Employment Security to be that the general rule is an individual who is out of work due to a labor dispute is ineligible for benefits, *citing* 329 Mass. 44, 51 (1952). Martineau states, “Section 25 provides generally that benefits are not to be paid to a person where his unemployment is ‘due to a stoppage of work which exists because of a labor dispute.’” *Id.* (emphasis added). Nor does Martineau stand for the principle that the claimants bear the burden of proof under § 25(b). The holding in Martineau is specific to the exceptions defined in subsections (1) and (2) of G.L. c. 151A, § 25(b). These subsections are important only after a ruling is made as to stoppage of work. They lay the burden on a claimant to establish that he or she is not directly interested in the labor dispute or does not belong to the class of workers who participated in the labor dispute. *Id.*; *see Cantres*, 329 Mass. at n. 7, *citing Martineau*, 329 Mass. at 51. Again, neither issue is before the Board.

A similar argument was raised to the SJC in Westinghouse Broadcasting Co., Inc. v. Dir. of Division of Employment Security, 378 Mass. 51, 56–57 (1979), but the SJC declined to decide that issue, noting that it was more properly decided in a related pending federal case. In affirming its adherence to the judicial construction of “stoppage of work” under G.L. c. 151A, § 25(b), the SJC took note of the U.S. Supreme Court’s then recent decision in New York Telephone Co. v. New York State Department of Labor, 440 U.S. 519, 540–544 (1979), where it held that the legislative history of both the NLRA and the Social Security Act showed no intent by Congress to deny states the power to provide unemployment benefits to striking workers. The Supreme Court observed in New York Telephone that “Congress was aware of the possible impact of unemployment compensation on the bargaining process,” and on two subsequent occasions, Congress had considered and rejected amendments to federal statutes that would have excluded strikers from receiving unemployment benefits. Id. at 544–545 n. 44.

The employer contends that New York Telephone does not specifically address the work stoppage test at issue here, but rather a more “bright line” provision that either authorized or prohibited striking workers from receiving benefits. In fact, the U.S. Supreme Court in New York Telephone expressly noted that “many States, pursuant to the so-called ‘American rule,’ allow strikers to collect benefits so long as their activities have not substantially curtailed the productive operations of their employer.” The Supreme Court then pointed out that it had previously upheld (by dismissing an appeal for want of a substantial federal question) a New Mexico decision holding that its award of benefits to strikers under a substantial curtailment provision was not preempted. Id. at 534 n. 24.

As we did in the Board’s 2013 Decision, we conclude that the employer’s pre-emption argument has no merit, and we shall continue to follow Massachusetts jurisprudence, which has, for over 60 years, interpreted and applied the substantial curtailment standard to the award of benefits in labor disputes.³²

(4) *Work stoppage*

a. Meaning of “work stoppage”.

The phrase “stoppage of work” is not defined in the statute. In an early case, the SJC stated, “the board was right in holding in effect that where a labor dispute blocks a substantial amount of work which would otherwise be done it has stopped that much of the work and there is therefore a ‘stoppage of work which exists because of a labor dispute.’” Adomaitis v. Dir. of Division of Employment Security, 334 Mass. 520, 524 (1956). The court has also long made it clear that the term “stoppage” does not mean “the cessation of work by the individual employee or employees....[I]f those leaving work are immediately replaced, or if the dispute does not otherwise interfere with production or operation and these are not diminished, there is no stoppage of work and hence no disqualification.” Westinghouse, 378 Mass. at 54, *quoting* General Electric Co.,

³² This argument was also recently rejected by the First Circuit Court of Appeals in Verizon New England, Inc. v. Rhode Island Department of Labor and Training, 723 F.3d 113, 118 (1st Cir. 2013), and it was raised and rejected by a panel of the Massachusetts Appeals Court that heard the appeal of the Board’s 2013 Decision. [Corporation A], *supra* note 28, at *2.

349 Mass. at 363 and n. 4. These early formulations suggest that striking employees should be disqualified only so long as their refusal to work is preventing the work from being done. Strikers should be allowed benefits if their labor is or becomes unnecessary to the employer, generally where the striker's work has been replaced and such replacement has not in turn substantially curtailed work elsewhere in the employer's operations. Once the strikers are no longer needed to perform the employer's work, they should no longer be disqualified for refusing to do that work.

Over time, the terminology referring to the work stoppage issue has become confusing. Instead of focusing on the *work* that is or is not getting done, some of the case law has analyzed the work stoppage issue in terms of the curtailment of "production" on the one hand, and "support operations," on the other, with the primary inquiry being on the disruption of production. *See, e.g.,* Board of Review Decision M-63500, *et al.* (August 23, 2012) ("[W]e need not examine these support functions because we were able to measure the labor dispute's impact based upon the employer's production output," *citing* Hertz, 437 Mass. at 297). At one time, the term "production" generally referred to the output of a manufacturing work force. Today, the relationship between "production" and "work" is less clear, especially in industries, like this one, where the ultimate product is so automated that output can be maintained for some length of time with only limited human labor. As manufacturing has receded in proportion to other types of business in the economy, the court has cited a variety of factors that may be considered in determining whether a strike has caused the employer's "operations" to be "substantially curtailed." *See, e.g.,* Hertz, 437 Mass. at 297, *citing* Reed I, 388 Mass. at 338; Boguszewski v. Comm'r of Department of Employment and Training, 410 Mass. 337, 344 (1991). The court in Boguszewski seems to use the term "production" to refer to the electric company's ultimate output, i.e., the delivery of power to customers. Since the company in Boguszewski experienced no substantial curtailment to the ultimate delivery of power to customers, the court looked at the employer's other "operations," which it found had been substantially curtailed.

We note, however, even in the cases that discuss "production" and "support operations," that most of the criteria the court has articulated in fact involve a decrease in work performed, either the work normally performed by the striking employees or the work normally performed by other employees who are redeployed during the strike. In Hertz, for example, the court pointed out that the employer's primary business of renting cars was not curtailed, because non-striking workers and management personnel performed the bargaining unit work (counter sales, upkeep of vehicles, paperwork, and driving the courtesy buses) that kept the customers supplied with functioning vehicles. 437 Mass. at 296–297. While the diversion of the non-striking employees left some "holes" in the work they normally performed, these deficits were not substantial enough to establish a work stoppage. *Id.* at 299–300. In the car rental business, where revenues have a direct relationship to work involved in renting vehicles to customers, the fact that revenues did not decline went a long way to show that the strikers' work was getting done without them. In contrast, the employer's billing and revenues were not substantially affected in Boguszewski, where the electric utility company at issue was able to maintain the flow of electricity and billing to its customers even though two-thirds of the entire work force was on strike. Nonetheless, because there was a substantial curtailment of the *work* normally performed in maintenance, inspection, testing, installation, replacement, clerical, and administration, the court in Boguszewski agreed with the Board that there had been a work stoppage. Boguszewski, 410 Mass. at 345.

Given the focus on “stoppage of work” in the language and purpose of § 25(b), we think it makes sense to look first at what happened to the work normally performed by the striking employees (*i.e.*, bargaining unit work), rather than to examine the evidence in the more confusing terms of “production” and “support operations.” If the employer cannot show that bargaining unit work was substantially curtailed, then it will have to establish that the strike measurably and substantially disrupted the work of the non-bargaining unit work force.³³ Evidence regarding such factors as business revenue and customer satisfaction, that do not necessarily reflect a quantum of work, may support a conclusion about whether or not there has been a decrease in work performed, depending on the nature of the business. But, it is the curtailment of work that ultimately must be shown. Approaching the evidence in this way clarifies the analysis and makes it more faithful to the language and purpose of the statute. This analytical framework is also largely consistent with the way in which the evidence in this case was actually presented.

In this case, as the [Union B] points out, it is undisputed that voice and data continued to flow across the Company’s copper lines and that voice, data, and video were transmitted continuously across its fiber network. It is also true that billing and revenues related to these uninterrupted services were equally unaffected. This is certainly the bulk of the Company’s day-to-day output and revenues. As in Boguszewski, the Company’s ability to maintain this flow of basic service and data reflects that a relatively small portion of the Company’s work force is required to maintain such continuity (at least for the period of time at issue here). It may also show that the Company chose to or was required to give priority to the work necessary to maintain such continuity.³⁴ In this sense, the employer’s business functioned much like the electric company in Boguszewski. As in that case, the “work stoppage” analysis will primarily depend upon a comparison of the work the Company was able to maintain during the strike as compared with business as usual, and less upon the employer’s ability to continue transmitting services over its network or to generate revenues.

b. How much curtailment is “substantial”?

³³ Nothing in this record suggests that the employer intentionally left bargaining unit work undone or made other decisions about the deployment of its staff that were deliberately designed to avoid the payment of unemployment compensation benefits or to prolong the strike. If such evidence existed, the Board might have to approach the work stoppage analysis differently.

³⁴ The court’s decision in Boguszewski took account of the fact that the employer in that case was a public utility and thus required to maintain electric service to customers. The [Union B] urges the Board not to follow Boguszewski in this case because the Company here is not a public utility in the same sense or degree. First, we note that the Boguszewski court stated that its observation about the employer’s status as a public utility was not intended to create a special rule for public utilities. 410 Mass. at 345. Second, the facts show that a large portion of the employer’s business is government regulated and does function like a utility. As the incumbent local exchange carrier for most of the state, the Company has a legal obligation to provide telephone service. The Massachusetts DTC requires that the employer’s network be reliable, imposing minimum quality standards, and requires the employer to provide parity of service to the Company’s Wholesale customers. DTC also oversees the forced migration of copper customers to the fiber network, retaining jurisdiction over those customers who purchase fiber-based telephone service without also buying fiber-optic data and television, as well as service disconnection. *See* Exhibit 109. Another large portion of the Company’s business, primarily the bundled fiber-optic products and services sold to CMB customers, remains unregulated. *Id.* In our view, it is not pivotal whether or not the Company is a public utility. For our purposes, it functioned like the business in Boguszewski, though instead of maintaining electric service for its customers during the strike, the Company maintained voice, data, and video services.

The court has firmly established that the employer's operations need not be completely halted. Rather, "[t]he question of how much disruption of normal operation is necessary to constitute a 'stoppage of work' is of course a matter of degree," Westinghouse, 378 Mass. at 55–56, and "there is no percentage threshold or numerical formula." Hertz, 437 Mass. at 297. The court has been careful to avoid setting a rule and has directed the Board to "follow an empirical approach, evaluating each situation on its facts." Boguszewski, 410 Mass. at 344. Thus, the SJC has 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, 334 Mass. at 522–524. The court has also affirmed the Board's determination that a 25% drop in production at a single plant, "without more," did not constitute a work stoppage. Reed National Corp. v. Dir. of Division of Employment Security, 393 Mass. 721, 724 (1985) ("Reed II"). In Boguszewski, the court held that the Board properly considered the company's two-thirds reduction in workforce and the fact that support operations were either not performed or were performed at levels ranging from 3% to 50%, in concluding that there had been a stoppage of work. 410 Mass. at 345–346. In a prior Board decision involving a gas and electric company strike, the Board found a substantial curtailment where all work ceased in engineering and construction for new customer work orders, routine and preventive maintenance, non-emergency customer service requests, shut-offs for non-payment, investigations of reported theft, audit team projects, hiring, and filing mandatory reports, and that other business functions were carried out 16% to 81% of business as usual (*e.g.*, sending credit notices to delinquent customers, fleet maintenance, meter readings, customer call answering promptness, information technology projects, and employee training). See Board of Review Decision M-61684, *et al.*, at 13 (December 11, 2008).³⁵

c. Significance of evidence arising outside of Massachusetts.

The [Union B] argues that the Board must decide this case based upon whether there was a substantial curtailment to the employer's larger corporate operations, whose wireline and wireless services extend across the United States and overseas, and which owns and partners with companies that provide wholly unrelated products and services. We disagree. G.L. c. 151A, § 25(b), 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. Here, the claimants worked for the employer's wireline and wireless business units in Massachusetts. If the employer can establish that the strike substantially stopped the work normally accomplished in its wireline and wireless operations in Massachusetts, it need not establish that all of its other operations were substantially disrupted.³⁶

On the other hand, the [Union A] would have the Board exclude any evidence that shows an impact to the employer's business operations outside of Massachusetts. This approach is too narrow. The SJC directs us to determine whether there was a substantial curtailment "in the context of all the

³⁵ Compare the Board's 2013 decision, where the employer's failure to show which specific work functions were not done or were done at measurably reduced levels during its 2011 strike contributed to the Board's conclusion that the labor dispute did not cause a substantial curtailment of its internal business operations. Board's 2013 Decision, *supra* note 28, at 12.

³⁶ This does not mean that the Board's inquiry stops at the Massachusetts border. A Massachusetts employer that is able to maintain its usual productivity by transferring the work normally done in Massachusetts to its plants located elsewhere would not be able to establish that the Massachusetts work has been stopped. See discussion, below, regarding call center work.

circumstances, including the overall status of the corporation's operations." Reed I, 388 Mass. at 340. Many of the employer's non-bargaining unit functions are normally centralized and performed at the national level or in other states during business as usual. If those functions are critical to the employer's Massachusetts operations, we will consider the labor dispute's impact on this work.

The claimants have devoted considerable attention to whether or not individuals from these centralized business units were given EWAs in Massachusetts and to whether the work they left undone had anything to do with Massachusetts. It makes no difference to our analysis. It is sufficient that, during business as usual, a proportionate amount of the work in many of these centralized business units served Massachusetts. For example, some of the human resource recruiting was targeted for Massachusetts vacancies. It is not necessary for the employer to connect each and every work task to a local impact. Barring any evidence that the employer did anything to prolong the work stoppage,³⁷ and we see none, it is not within our purview to question the employer's decisions about how to divert its resources during the labor dispute.

During the strike, the employer also centralized some Massachusetts bargaining unit functions at the national level, particularly call center work. We approach this evidence much as we did in Board of Review Decision M-0064 (Sept. 23, 2014) (incorporating the measurable production transferred from the company's Massachusetts struck facility to its non-striking plant in Florida). Where an employer has shifted its bargaining unit operations outside of Massachusetts during the strike, the employer must establish that, despite such shifting, the Massachusetts work was substantially curtailed.

d. Composition of the data.

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. For the most part, we have compared the seven-week strike period at issue with both the same period in 2015 and with the non-strike periods in 2016, immediately before and after the strike.³⁸

The [Union A] urges the Board to reject any metrics which are not broken down into weekly units, arguing that G.L. c. 151A, § 25(b) requires the Board to evaluate whether there was a work stoppage in *any week*. To be sure, unemployment benefit eligibility is determined on a weekly basis and the data must reasonably relate to each week at issue. It would also be important to show that a stoppage of work ended during a particular week that the workers were on strike. "A 'stoppage of work' begins with a 'substantial curtailment of the employer's operations, and the stoppage of work ends when that substantial curtailment no longer exists.'" Reed I, 388 Mass. at 338; *see also* Reed II, where the Board did not award benefits until five months into the strike, when the employer had returned to substantially normal production, 393 Mass. at 725. In the present case, while the Company's performance of some work improved as the strike progressed,

³⁷ See Reed II, 393 Mass. at 723.

³⁸ We have not done so where the comparable data from 2015 was unavailable or where the average volumes across 2015 were so different as to make a comparison of little value.

there is no evidence that the substantial curtailment ended at any point during the seven-week strike. *Compare* Board of Review Decision M-63500 *et al.*, where the Board decided that, by week nine of the strike, the employer had made changes in its work force within the plant sufficient to recreate an equilibrium with its normal production, thus ending the work stoppage disqualification. Nor was there evidence of a particular event in this case, other than the strike, that might have caused a disruption to operations in any week. *Compare* the Board's 2013 Decision, where the employer was unable to distinguish whether disruptions were due to the two-week strike or to a hurricane and tropical storm that battered Massachusetts around the same period.

There is also nothing in G.L. c. 151A, § 25, or the relevant case law, which dictates that the Board may only consider weekly data in rendering its determination. The standard in this administrative proceeding is that the Board's decision must be supported by substantial evidence. G.L. c. 30A, § 14(7). "'Substantial evidence' is 'such evidence as a reasonable mind might accept as adequate to support a conclusion,' taking 'into account whatever in the record detracts from its weight.'" Lycurgus v. Dir. of Department of Employment Security, 391 Mass. 623, 627–628 (1984), *quoting* New Boston Garden Corp. v. Assessors of Boston, 383 Mass. 456, 466 (1981) (further citations omitted). Particularly as to those metrics where the employer does not keep weekly data in the ordinary course of business, and where it has offered adequate indicia of reliability as to the data it has submitted, we accept the larger view as the best available evidence. As we have done in the Findings of Fact in this case, we generally have used monthly averages to compare the level of disruption in various operations, even where the employer supplied weekly data, and we have not rendered separate findings of fact as to each particular week of the strike.³⁹

The [Union A] asserts that the employer deliberately decided not to offer weekly data in most of its exhibits, and where it did so, the employer failed to offer comparison data from 2015. During the hearing, the [Union A] had an opportunity to cross-examine the employer's witnesses about the 19 exhibits that counsel now objects to in his brief. With one exception,⁴⁰ the [Union A] did not object to the lack of weekly data in those exhibits.⁴¹ Since the union did not press this concern during the hearing, when the employer or the Board could have considered whether further evidence was necessary, we would be hard pressed to reject the employer's exhibits now. Under these circumstances, we find no basis to conclude that the employer's failure to present certain weekly metrics was deliberate.

Finally, the [Union B] also asks the Board to reject those exhibits that present data in summary form, asserting that such evidence is unreliable without the underlying business records, further arguing that the unions are without power to obtain that underlying evidence through formal discovery. Summary evidence is a valid and valuable tool for analyzing voluminous business records and highly appropriate in these proceedings. While it is true that the evidentiary hearing was governed by the informal hearing rules under 801 CMR 1.02, the claimants were responsible

³⁹ The underlying Board decision in Reed measured the impact to the employer's operations on a monthly basis. *See Reed I*, 388 Mass. at 337; *see also* Board of Review Decision M-0064 (Sept. 23, 2014).

⁴⁰ The [Union A] objected to the fact that Exhibit 53 did not include the 2015 targets for net adds to billing.

⁴¹ It did not raise an objection on this basis to exhibits 35, 47, 56, 59a, 62, 65, 70, 73, 74, 76, 83, 87, 88, 90, 93, 95, 97, and 98a.

for obtaining and presenting evidence to rebut the employer's evidence, as permitted under 801 CMR 1.02(10)(g).⁴²

e. Application of the work stoppage criteria.

Consistent with our analysis, above, which focuses on the work performed during the strike as compared with business as usual, we begin with an examination of the work normally performed by the claimants — that is, bargaining unit work in Massachusetts and the evidence showing a measurable impact due to the labor dispute.

As to the employer's wireless business, there was no evidence pertaining specifically to the strike's impact on the bargaining unit work performed in the single [Company B] store in [Town B], or to any other effects of the strike there except for expenses for police details at that location. *See* Exhibit 79. Accordingly, we conclude that there is insufficient evidence of a stoppage of work due to the strike by the six [Company B] claimants.

As to the bulk of the claimants, who work for the employer's wirelines business, the employer has met its burden to show that the absence of two-thirds of that work force caused a substantial reduction in the performance of bargaining unit work as compared to the non-strike periods.

Even though the Company addressed emergencies and largely avoided a degradation of its physical plant during the strike, routine maintenance work was substantially impaired. As compared to business as usual before and after the strike, though its repair volume dropped only 9% in the MCO, it dropped 22% in the central offices, and in the field, dispatched repairs declined 28% and the replacement of poles and transfer of facilities dropped 54%–65%. Overall, this reflects a substantial decline in repair volume. Repairs also took much longer than before or after the walkout. The mean time to repair increased 188% in the MCO and 34%–147% for truck roll repairs. As compared to 2015, the volumes and mean times to repair during the strike showed similar changes. The Company was able to continue keeping the copper network inside its central offices dry, but it stopped maintaining its underground copper network and fell behind 21% in scheduled fleet maintenance.

In suggesting that the Board observed the same “quantum of effect” in repair metrics in its 2013 Decision, the [Union A] infers that we should reach the same outcome, i.e., there was no work stoppage. The cases presented to the Board for the 2011 strike and today are not the same. Here, the employer's evidence is more extensive, consistent, and there were no external factors, such as storms, to create ambiguity about what drove the change in metrics during the strike period.

The strike also substantially hindered the Company's ability to expand its network through the construction, provisioning, and installation work normally performed by the strikers. The Company's average monthly volume of placed cable and spliced fiber declined 74%–76% as

⁴² Both unions were able to avail themselves of voluntary discovery in this case. The Board made all of the employer records submitted to the DUA available to counsel on August 22, 2016, and urged them to begin voluntary discovery immediately. *See* Exhibit 7; 801 CMR 1.02(8)(a). The parties agreed upon a deadline of October 21, 2016 to present requests for production of documents or interrogatories. *See* Exhibit 11. During mediated efforts to refine its pre-hearing subpoenas, [Union B] chose to defer inquiries about the employer's records until the hearing, rather than seek judicial enforcement of its subpoenas, as permitted under G.L. c. 30A, § 12.

compared to before and after the strike and dropped 69%–74% from the prior year. Provisioning and installation work declined 42%–80% from the pre- and post-strike levels, and 31%–77% from 2015.⁴³ This translated into a decline in average weekly net adds to billing for the CMB products at levels ranging from 18%–1,100% of pre- and post-strike levels.⁴⁴

Construction on the Company's Network Transformation Project and on its initiative to expand its fiber network into the [City A], both of which were to begin in April, were delayed until after the strike. The [Union A] argues that deferred operations do not constitute curtailed activity, where they are not quantifiable. However, the inability to perform any work on a task that would have been performed business as usual during the strike period means performance at 0%, a substantial curtailment of that activity. It also makes no difference whether, after the strike, the company made up for the decrease in work performed during the strike or picked up where it had left off with a project put on hold. The focus here is the impact on the employer's operations during the claimants' seven-week strike.

Similarly, the Company has shown that its call answering services were substantially curtailed as compared to business as usual. This is not because the employer increased its use of vendors in the CSSC, BSBC, and [JCCD] during the strike; it is unclear whether that helped or hindered its overall call center performance. Despite the fact that the Company dead-ended some calls in its busiest call centers, the vendors appear to have sustained the Company's ability to answer a large majority of calls. However, the increased vendor use also may have contributed to substantial increases in the amount of time a customer had to wait in the calling queue and spend on the phone once they reached an agent. To be sure, there were pockets of impressive strike coverage. In May, for example, the [JCCD] call handling time was only 13% longer and the LiveSource center's average speed to answer requests for call completion actually improved by 12%. But, these were only two metrics in the lower volume call centers. Otherwise, callers had to wait 214%–933% longer during the strike for an agent in the highest volume CSSC and BSBC. The CSSC and BSBC call handling times increased 25%–53%, and the time to handle all other LiveSource calls increased 39%–136%.

The Company has shown that its performance in areas of bargaining unit work that directly affected customer service during the strike, such as installations, repairs, and call center services, negatively affected the customer experience. To the extent that goodwill is measurable, we

⁴³ In the 2011 labor dispute, the employer presented an even sharper decline of installations of its CMB products during a two-week strike, but we declined to find a substantial curtailment of this metric given the marginal impact on its total lines in service. *See* Board's 2013 Decision, p. 19. In 2016, we again see no discernable impact to the total lines in service due to the strike. *See* Exhibit 49. However, we do not think the Board's 2013 Decision on this particular point was correct, to the extent it compared the number of installations during the strike to the employer's existing infrastructure, rather than to the amount of installation work that would have been done but for the labor dispute. On a more tangential note, the employer in the present case has also more effectively tied its decline in installations of these and other products to the Company's decline in profitability.

⁴⁴ We are unpersuaded by the [Union A]'s arguments that the employer has failed to connect its decline in net adds to billing to the labor dispute. During the hearing, the employer explained that net adds to billing rise and fall from week to week during business as usual due to marketing campaigns, people moving after school lets out, or when weather events interfere with installations. For this reason, it is important to look at trends. The trends show a much deeper drop in net adds to billing for the Company's growing fiber products during the seven-week strike, when there were no weather events, schools had not yet let out, and the employer had stopped doing marketing. The reasonable inference is that the declines were due to the strike.

consider it another factor showing that the work normally done by the strikers was being done less effectively during the strike, particularly where, as here, the business is customer-oriented. The Company provided metrics of its NPS, a standard used by many companies to gauge customer satisfaction. Although the Company's NPS scores in Massachusetts have gone up and down, the trends over time generally showed a positive average score in the non-strike periods. In contrast, its Massachusetts NPS score declined sharply during the strike months of April and May, declining 2,800% from the average pre- and post-strike period score. On this record, nothing other than the effects of the strike would account for this extreme decline in customer satisfaction as measured in accordance with the employer's business-as-usual methodology.

Thus, the level of impact to bargaining unit work in most areas meets or exceeds the 25%–35% guidelines set forth under Adomaitis and Reed II, as well as the 3%–50% curtailment found in Boguszewski.

We decline to treat the 28 warehouse workers in [Union A] differently from the remainder of claimants who worked for the Company. Regardless of the specific work assignments any particular claimants had been performing immediately before the strike, they were employed, they participated in the labor dispute, and the employer has demonstrated that the labor dispute substantially curtailed the Company's operations. We take a similar approach to the work performed by other discrete categories of workers noted in the [Union B]'s brief (*i.e.*, those who worked in the [Town C] Data Center, the [Town D] Video Hub, administrative assistants, special assistants, building equipment mechanics, material attendants, and drivers) or any subset of workers who had been assigned to discrete operational units that did not, by themselves, experience as much curtailment as others.

In this case, the evidence of a significant decline in profitability is consistent with the metrics showing a decline in the amount or quality of the work normally performed by the strikers. The net effect of a drop in revenue and increase in strike-related expenses caused a 58% decline in EBITDA and 59% decline in profit margin from the quarters immediately before and after the strike, or a drop of 54% and 52%, respectively, as compared to the year before. The record does not suggest that any factor other than the strike might have affected these numbers so significantly.

As for its non-bargaining unit operations, the evidence shows that, owing to the redeployment of non-bargaining unit personnel during the strike, the employer ceased performing entirely many significant activities or projects that would have continued, but for the strike. The employer has also demonstrated that the suspension of critical activities, such as all IT development and enhancements, in turn had a ripple effect onto the ability of other business units to perform their usual functions. Although the employer has shown that the strike's diversion of non-striking staff affected important segments of the Company's business, it did not, in each instance, establish which activities or what portion of regular work continued in these non-bargaining unit operations during the strike. For this reason, it remains difficult to measure the overall impact to the centralized non-union portion of its business. Nevertheless, because the employer has produced substantial evidence that the labor dispute significantly curtailed the Company's bargaining unit operations, we need not decide whether the disruptions to its other business units in themselves were substantially curtailed.

Conclusion

In sum, we conclude as a matter of law that the employer has established that the labor dispute caused a stoppage of work to the Company's wireline business, within the meaning of G.L. c. 151A, § 25(b). We further conclude that the employer has not established that the labor dispute caused a stoppage of work to its wireless store in [Town B].

The DUA's determinations denying benefits to the six claimants employed by [Company B] are reversed. These six claimants are eligible for benefits for the weeks ending April 16, 2016 through June 4, 2016, if otherwise eligible.

The DUA's determinations denying benefits to the remaining 4,057 claimants are affirmed. These claimant are denied benefits for the weeks ending April 16, 2016 through June 4, 2016.

BOSTON, MASSACHUSETTS
DATE OF DECISION - August 18, 2017



Paul T. Fitzgerald, Esq.
Chairman



Judith M. Neumann, Esq.
Member



Charlene A. Stawicki, Esq.
Member

**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

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.

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