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M-62772—M-69116 (Apr. 24, 2013) – Board awarded benefits to workers at a telecommunications company during a two week strike, concluding that (1) federal labor law does not pre-empt a determination as to whether the claimants’ strike caused a stoppage of work under G.L. c. 151A, § 25(b); (2) the labor dispute constituted a strike, not a lockout; (3) the employer had the burden to prove that the strike caused a substantial curtailment of its operations; and (4) the employer failed to show that claimants’ unemployment was due to a stoppage of work within the meaning of G.L. c. 151A, § 25(b). *[Note: The Appeals Court affirmed the Board of Review’s Decision and the Supreme Judicial Court denied further appellate review.]*

M-63772 – M-69116

Introduction and Procedural History of this Appeal

The employer appeals a decision by the Department of Unemployment Assistance (DUA) to award unemployment benefits to 5,343 claimants during the two weeks ending August 13 and 20, 2011 under G.L. c. 151A, § 25(b). Pursuant to our authority under G.L. c. 151A, § 41, we affirm.

In a determination issued on June 29, 2012, benefits were awarded after the DUA concluded that the employer had failed to prove that the claimants’ participation in a strike during the period from August 7, 2011 through August 22, 2011 resulted in a stoppage of work under G.L. c. 151A, § 25(b). The employer appealed, and the DUA referred the employer’s appeal directly to the Board of Review, as permitted under G.L. c. 151A, § 39(d). The claimants and the employer participated in a hearing before the Board, with the parties represented by counsel. Our decision is based upon our 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 is pre-empted by federal labor law from determining whether the labor dispute resulted in a stoppage of work; (2) whether the labor dispute resulted in a lockout or a strike; (3) if it was a strike, which party has the burden of proof; and (4) if it was a strike, whether the strike caused a substantial curtailment of the employer's business such as to constitute a work stoppage within the meaning of G.L. c. 151A, § 25(b).

Findings of Fact

1. The employer is a telecommunications company, which had 8,313 employees performing services at 213 locations in Massachusetts during August, 2011. This included 2,207 managers and 6,106 bargaining unit employees.
2. The 5,343 claimants were members of [Union A], or [Union B]. [Union A] represented approximately 800 bargaining unit workers. [Union B] represented the balance.
3. In August, 2011, 5,338 of the claimants were employed by one of three different employer entities: [Unit A], [Unit B], or [Unit C]. Of the total claimants, 4,535 worked for [Unit A], which builds, installs, and maintains the employer's outside telecommunications plant in New England; 539 worked for [Unit B], which builds, installs, and maintains the employer's inside telecommunications plant in New England; and 264 worked for [Unit C], which is responsible for corporate assets (e.g., motor vehicles, corporate lines, finance, and real estate.)¹
4. In 1999, the employer was a regulated phone company providing primarily [copper wire network] and additional lines for fax and high-speed internet connections over a network of copper lines. Over time, due to innovations in the telecommunications industry and competition, this core business began to decline rapidly. Over the last ten years, the employer has lost 50% of these core access lines. Consequently, in 2004, the employer decided to invest in new technology, launching its [fiber optic network].
5. The employer has, to date, invested \$24 billion nationwide in building out its [fiber optic network].

¹ The employer questions the accuracy of DUA records showing that 4 of the claimants were employed by [Unit D] and that 1 claimant was employed by [Unit E] at the time of the strike. Since there is no dispute that these 5 claimants worked for the employer or that they participated in the strike, this distinction is immaterial for purposes of our decision.

6. The employer continues to provide core voice and high-speed internet (currently called “HSI” or Digital Subscriber Line “DSL”) services to households and businesses over its existing copper network.
7. In Massachusetts, the employer offers [fiber optic network] services on a community by community basis and does not provide this service to all communities. The company pursues a deliberate business strategy to build the [fiber optic network] network in areas of high customer population density. When approximately 40% of customers in a [fiber optic network] service area sign up for those services, the employer begins to see a positive return on its investment.
8. In August, 2011, the employer had 1,462,400 copper lines in service (385,200 DSL and 1,077,200 voice) and 1,000,100 [fiber optic network] lines in service (342,100 data, 310,600 video, and 347,400 voice) in Massachusetts.
9. The portion of the employer’s business that is regulated includes its copper line services and its [fiber optic network] voice lines that are serviced over a switch. The record did not reflect how many of its 347,400 [fiber optic network] voice lines in service in August, 2011 were serviced over a switch.
10. The unregulated portion of the employer’s business includes its [fiber optic network] data and video services, and its [fiber optic network] voice lines serviced over an Internet Protocol. In August, 2011, the employer had 342,100 [fiber optic network] data lines in service and 310,600 [fiber optic network] video lines in service. The record does not reflect how many of the 347,400 [fiber optic network] voice lines in service in August, 2011 were serviced over an Internet Protocol.
11. Average gross revenues for a [fiber optic network] customer are approximately \$145 per month and for a copper customer approximately \$30 per month.
12. In Massachusetts, 90% of all new installations are fiber installations, 10% are copper.
13. The employer’s operation is divided into 19 business units, including: [Operating Unit A], [Operating Unit B], [Operating Unit C], [Operating Unit D], [Operating Unit E], [Operating Unit F], [Operating Unit G], [Operating Unit H], [Operating Unit I], [Operating Unit J], [Operating Unit K], [Operating Unit L], [Operating Unit M], [Operating Unit N], [Operating Unit O], [Operating Unit P], [Operating Unit Q], [Operating Unit R], and [Operating Unit S].
14. [Operating Unit R] is the employer’s largest business unit, employing 3,166 bargaining unit members before the strike. This unit provided installation and maintenance services for households and small businesses.

15. [Operating Unit O] is the business unit that provides telephone, data, and video services the employer's large business and government accounts. It employed 236 bargaining unit members at the time of the strike.
16. [Operating Unit P] is the business unit that provides these same services to other telecommunications companies that buy service from the employer. This unit employed 223 bargaining unit members at the time of the strike.
17. Bargaining unit members performed a number of different functions. Approximately 630 workers in the employer's call centers answered in-bound calls from household or business customers, including negotiating service packages, fielding calls for upgrades, directory assistance, billing questions, repairs, and scheduling service to be performed by the employer's technical staff.
18. The majority of the employer's bargaining unit employees were technicians, including splice service technicians, outside plant technicians, central office equipment installation technicians, central office technicians, and contract work inspectors. These technicians built, installed, maintained, and repaired the employer's core and [fiber optic network] networks.
19. Smaller groups of bargaining unit employees provided accounting services, administrative support for field operations, and materials handling and maintenance services in the employer's warehouse.
20. Beginning in June, 2011, the parties were engaged in negotiations over the terms of a new collective bargaining agreement, but were unable to reach an agreement. On August 6, 2011, the [Union A] and [Union B] collective bargaining agreements expired. On August 7, 2011, shortly after midnight, members of [Union A] and [Union B] went on strike.
21. Members who called [Union B] around midnight on August 6, 2011, reached a taped telephone message stating that they were on strike.
22. The claimants were on strike for two weeks until their unions and the employer signed return to work agreements, providing for night shift employees to return to work on the evening of August 22 and the bulk of employees to return on August 23, 2011.
23. On August 28, 2011, Hurricane Irene reached Massachusetts, causing flooding, downed trees, poles, and power lines. The hurricane was followed by Tropical Storm Lee on or about September 5, 2011, which brought more rain, flooding, and loss of telephone service. The storms caused a significant increase in repair and maintenance costs.

24. Of the employer's 213 Massachusetts facilities, 193 facilities were staffed with bargaining unit members. During the strike, the employer closed 35 facilities.
25. The employer closed or consolidated some of its operations in light of the reduction of personnel reporting to those facilities during the strike.
26. The employer closed its [Call Centers A] in [Location A] and [Location B] and both of its [Call Centers B] in [Location B] and [Location C] for the duration of the strike.
27. During the last shift before the anticipated strike, the employer required bargaining unit members to turn in their employer-issued communication devices, testing gear, lap tops, gas credit cards, keys, and employer ID's for security purposes and in order to be able to redeploy the equipment to replacement managers, if necessary.
28. No member of the bargaining units informed the employer that he or she wanted to work, but was prevented from doing so.
29. At least one bargaining unit member crossed the picket line and worked during the strike.
30. In response to alleged picket line misconduct, the employer sought and obtained a Temporary Restraining Order on August 16, 2011, and a Preliminary Injunction on August 19, 2011, from the Massachusetts Superior Court.
31. In anticipation of the strike, the employer moved managers out of their regularly assigned business units and into other business units in an effort to perform work normally performed by bargaining unit members, with a priority on performing repairs to its copper and [fiber optic network] networks. A total of 1,858 managers performed bargaining unit work in Massachusetts during the strike. Some of these managers had prior experience performing the bargaining unit functions; others did not.
32. As a result of the disruption caused by striking workers and reassigned managers, the employer's business units were staffed at levels of 0% - 88% of its regular workforce during the strike.
33. Based upon its normal business projections, the employer estimates that its inability to perform its anticipated level of [fiber optic network] data and video installations in its [Operating Unit R] during the strike resulted in the loss of \$2.6 million in revenue relative to projection.

34. During the non-strike months of May-July and September-November, 2011, the total Massachusetts average monthly revenue in the employer's [Operating Unit O] and [Operating Unit P] was \$67.7 million. In its [Operating Unit R], the total combined Massachusetts and Rhode Island average monthly revenue for the same months for [fiber optic network] services was \$67.1 million. The total combined Massachusetts and Rhode Island average monthly revenue for the same period for copper line services was \$69.1 million.
35. During August, 2011, the total Massachusetts revenue in the employer's [Operating Unit O] and [Operating Unit P] was \$67.5 million. In its [Operating Unit R], the total combined Massachusetts and Rhode Island monthly revenue for August, 2011 for [fiber optic network] services was \$67.3 million. The total combined Massachusetts and Rhode Island monthly revenue for August, 2011 for Copper line services was \$69.2 million.
36. The employer estimates that it incurred \$10.9 million in expenses for its Massachusetts operation due to the strike. This included the cost of extra manager training, lost work time, overtime and the extra pension and benefits attributable to the overtime, as well as manager travel costs, police and private security details, and other miscellaneous expenses.
37. The employer continued to transmit uninterrupted dial tone, data, and video over its copper or [fiber optic network] transmission lines during the two weeks of the strike.
38. From the employer's call centers, which are all located in Massachusetts, the 12-20% of call volume typically sent to vendors increased to 25-30% during August, 2011. This constituted a 50-100% increase in the number of calls sent to vendors over the employer's normal monthly rate.
39. In the [Call Centers C] during 2011, the employer was able to answer, either through its own staff or vendors, 98% of the calls in May, June, and July, 84% of the calls in August, 93% in September, 90% in October, and 97% in November. The employer measures a caller's wait time in seconds. The average wait time at the [Call Centers C] was 17.8 , 18.3, 16.7, 155.1, 69.0 43.0, and 35.0 seconds in May, June, July, August, September, October, and November, respectively.
40. In its [Call Centers D] during 2011, the average wait time was 3.6 seconds in May, June, and July, and 6.4, 3.3, 3.8, and 3.3 seconds in August, September, October, and November, respectively.
41. In the [Call Centers E] during 2011, the employer was able to answer, either through its own staff or vendors, 95% of the calls in May, June, and July, 92% of the calls in August, 91% in September, 94% in October, and 93% in November. The average wait time was 64.0, 62.9, 62.6, 94.7, 113.0, 59.0, and 66.0 seconds in May, June, July, August, September, October, and November, respectively.

42. In its [Call Centers B] during 2011, the employer was able to answer, either through its own staff or vendors, 99% of the calls in May, 98% of the calls in June, 97% in July, 95% in August, and 98% in September, October, and November. The average wait time was 6.0, 22.0, 32.0, 53.0, 24.0, 26.0, and 17.0 seconds in May, June, July, August, September, October, and November, respectively.
43. Calls to the employer's [Call Centers F] were not transferred to vendors. The employer answered 96% of the calls in May, 97% of the calls in June, 96% in July, 73% in August, 87% in September, and 85% in October and November. The average wait time was 16.0 seconds in May and June, and 20.0, 117.0, 86.0, 87.0, and 105.0 seconds in July, August, September, October, and November, respectively.
44. During the strike, the employer began to "dead-end" many in-coming calls to its call centers. Dead-ended calls generated automated messages directing callers to use the employer's website for service. The employer did not track its dead-ended calls or present evidence showing the change in work flow through its website during the comparable time period.
45. In its Massachusetts [Operating Unit O] and [Operating Unit P] in 2011, the number of completed maintenance orders were as follows: 4,246 in May; 4,467 in June; 4,270 in July; 4,798 in August; 4,801 in September; 4,419 in October; and 4,324 in November. The employer measures mean time to repair in hours. The mean time to repair for each order was 6.4 hours in May, 8.0, 6.6, 19.1, 10.7, 7.0, and 6.5 hours in June, July, August, September, and November, respectively.
46. In its Massachusetts [Operating Unit O] and [Operating Unit P] in 2011, the number of completed installation orders were as follows: 3,189 in May; 3,188 in June; 3,021 in July; 868 in August; 3,187 in September; 3,064 in October; and 2,779 in November.
47. Employer data showed Massachusetts weekly maintenance ticket completions in its [Operating Unit R] during the non-strike week of July 24, 2011, as follows: 1,423 DSL; 132 [fiber optic network] data; 383 [fiber optic network] video; 421 [fiber optic network] voice; and 4,899 [copper wire network].
48. Employer data showed Massachusetts weekly maintenance ticket completions in its [Operating Unit R] during the non-strike week of July 31, 2011, as follows: 1,585 DSL; 99 [fiber optic network] data; 352 [fiber optic network] video; 349 [fiber optic network] voice; and 4,891 [copper wire network].
49. Employer data showed Massachusetts weekly maintenance ticket completions in its [Operating Unit R] during the strike week of August 7, 2011, as follows: 133 DSL; 49 [fiber optic network] data; 154 [fiber optic network] video; 264 [fiber optic network] voice; and 1,521 [copper wire network].

50. Employer data showed Massachusetts weekly maintenance ticket completions in its [Operating Unit R] during the strike week of August 14, 2011, as follows: 339 DSL; 62 [fiber optic network] data; 136 [fiber optic network] video; 251 [fiber optic network] voice; and 1,949 [copper wire network].
51. Employer data showed Massachusetts weekly installations in its [Operating Unit R] during the week of July 24, 2011, as follows: 938 DSL; 1,529 [fiber optic network] data; 1,552 [fiber optic network] video; 1,396 [fiber optic network] voice; and 997 [copper wire network].
52. Employer data showed Massachusetts weekly installations in its [Operating Unit R] during the week of July 31, 2011, as follows: 1,156 DSL; 1,421 [fiber optic network] data; 1,401 [fiber optic network] video; 1,312 [fiber optic network] voice; and 1,107 [copper wire network].
53. Employer data showed Massachusetts weekly installations in its [Operating Unit R] during the week of August 7, 2011, as follows: 2 DSL; 1 [fiber optic network] data; 1 [fiber optic network] video; 0 [fiber optic network] voice; and 13 [copper wire network].
54. Employer data showed Massachusetts weekly installations in its [Operating Unit R] during the week of August 14, 2011, as follows: 2 DSL; 51 [fiber optic network] data; 49 [fiber optic network] video; 44 [fiber optic network] voice; and 11 [copper wire network].
55. The total number of [fiber optic network] data lines in service in Massachusetts during the following months of 2011 was: 333,100 in May; 338,100 in June; 342,900 in July; 342,100 in August; 347,800 in September; 354,100 in October; and 359,100 in November.
56. The total number of [fiber optic network] video lines in service in Massachusetts during the following months of 2011 was: 301,600 in May; 306,500 in June; 311,300 in July; 310,600 in August; 316,000 in September; 322,300 in October; and 327,400 in November.
57. The total number of DLS lines in service in Massachusetts during the following months of 2011 was: 398,900 in May; 394,500 in June; 391,300 in July; 385,200 in August; 382,700 in September; 377,900 in October; and 374,600 in November.
58. The total number of voice lines ([fiber optic network] and copper) in service in Massachusetts during the following months of 2011 was: 1,454,100 in May; 1,446,800 in June; 1,440,200 in July; 1,424,700 in August; 1,419,200 in September; 1,412,500 in October; and 1,406,800 in November.
59. From 2010 to 2011, there was a steady monthly increase in total [fiber optic network] lines in service and a steady monthly decline in total copper lines in service.
60. In the [Operating Unit R], there was also a steady monthly increase in combined Massachusetts and Rhode Island total revenue from [fiber optic network] lines in service from 2010 to 2011.

61. Overall call volume into the employer's Repair, [Call Centers D], [Call Centers E], and [Call Centers B] was significantly higher during the months May-November, 2010 than during the same months in 2011. In the [Call Centers F] call center, the overall volume was higher in 2011.
62. During 2010 and in the months preceding the strike in 2011, the employer reduced its workforce through the declaration of surpluses, offering incentive packages which induced bargaining unit members to voluntarily separate from employment.
63. In a June 29, 2012 determination, DUA concluded that under G.L. c. 151A, § 25(b), the claimants were eligible for unemployment benefits for the weeks ending August 13 and 20, 2011, because the employer had neither shown that it suffered a loss of revenue and production, nor demonstrated a substantial curtailment of its business operations.

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 provides, 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; . . .

In addition to the foregoing, an employee shall not be denied benefits as the result of an employer's lockout, whether or not there was a stoppage of work, if such employees are ready, willing and able to work . . .

A lockout, as used in this subsection, shall exist whether or not such action is to obtain for the employer more advantageous terms when an employer fails to provide employment to his employees with whom he is engaged in a labor dispute, either by physically closing his plant or informing his employees that there will be no work until the labor dispute has terminated.

I. The application of G.L. c. 151A, § 25(b) is not pre-empted by federal labor law.

As a threshold issue, 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 may not interfere in the "free play of economic forces" between labor and management that Congress intended to be left unregulated. To the extent that the Board will

award or deny unemployment benefits pursuant to G.L. c. 151A, § 25(b), based upon its determination of whether the claimants' strike substantially curtailed the employer's business, the employer argues that the Board is placing its thumb on one side of the scale or the other, undermining the essential neutral protections of the National Labor Relations Act ("NLRA").

A similar argument was raised to the SJC in Westinghouse Broadcasting Co., Inc. v. Director 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 Supreme Court's then recent decision in New York Tel. Co. v. New York State Dept. of Labor, 440 U.S. 519, 540-544 (1979), where the Supreme Court 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/substantial curtailment at issue here, but rather a more "bright line" provision that either authorized or prohibited striking workers from receiving benefits. In fact, however, the 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.

Therefore, we shall continue to follow Massachusetts jurisprudence, which has, for over sixty years, interpreted and applied the substantial curtailment standard to the award of benefits in labor disputes.

II. The claimants were not locked out.

Under G.L. c. 151A, § 25(b), a lockout exists "when an employer fails to provide employment to his employees with whom he is engaged in a labor dispute, either by physically closing his plant or informing his employees that there will be no work until the labor dispute has terminated." In the present case, the unions argue that because the employer closed some of its call centers for the duration of the strike and took away those employees' cell phones, lap tops, gas credit cards, keys, and employer ID's, the employer essentially locked out those employees who normally report to those locations for work. We disagree.

First, return of employer-issued communication devices, laptops, testing gear, gas credit cards, keys, and employee ID's, was required of *all* bargaining unit members, not simply of those workers who reported to the closed facilities. Second, this was done in furtherance of legitimate business concerns to secure identifications and equipment and so that the company could redeploy the equipment to replacement managers, if needed.

There is no evidence that the intent was to prevent employees from working, if they wanted to do so. The record fails to establish that the employer informed the unions or its members that it was locking them out or that it would not provide work until the strike ended. Most significantly, the evidence suggested that the striking workers were *not* ready and willing to work for the employer. There was no evidence that any bargaining unit member communicating a desire to work was turned away. Moreover, at least one bargaining unit employee crossed the picket line and worked during the strike.

Given these facts and given the testimony that the union itself characterized the work stoppage as a strike from its inception, we conclude that during the relevant period, the claimants were unemployed due to a strike, not a lockout².

III. The burden of proof to show there was a work stoppage rests with the employer.

In its determination, the DUA asserted that the burden of proving a work stoppage under G.L. c. 151A, § 25(b), rests with the employer. We agree.

The term “stoppage of work” is not defined in the statute. However, it has acquired a very definite meaning through judicial construction. As the Supreme Judicial Court has stated, in order for there to be a “‘stoppage of work,’ operations must be ‘substantially curtailed.’” Hertz Corporation v. Acting Director of the Division of Employment and Training, 437 Mass. 295, 297 (2002), *citing* Reed Nat’l Corp. v. Director of the Division of Employment Security, 388 Mass. 339, 338 (1983)(Reed I). “How much disruption is required to constitute a substantial curtailment is a fact-specific inquiry; there is no percentage threshold or numerical formula.” Hertz, 437 Mass. at 297. It is a matter of degree. Westinghouse, 378 Mass. at 55-56.

² In support of its argument that the employer locked out a number of bargaining unit employees, the unions refer to a decision rendered on May 22, 2012, by the Rhode Island Board of Review. We are unpersuaded by this decision inasmuch as the provisions under RI’s unemployment statute for the payment of benefits in the event of a labor dispute are markedly different from those under G.L. c. 151A, § 25(b). RI disqualifies claimants who are unemployed due to a strike without regard to whether the strike causes a substantial curtailment of operations. *See* R.I. Gen. Laws § 28-44-16(a)(1985). On the other hand, RI’s “lockout” provision awards benefits and deems a “lockout” to have existed if the employer either withheld employment in order to resist or gain collective bargaining concessions, or failed to extend the terms and conditions of the expired collective bargaining agreement. *See* R.I. Gen. Laws § 28-44-16(b)(1985). The employer’s negotiating strategy is expressly disregarded under G.L. c. 151A, § 25(b)(4).

“[T]he term “stoppage of work” . . . refers to the effect upon the employer’s operations produced by the labor dispute . . . It does not refer to the cessation of work by the individual employee or employees.” General Electric Co. v. Director of Division of Employment Security, 349 Mass. 358, 363 (1965). Unlike most other unemployment insurance eligibility questions, where an employee is discharged or leaves work voluntarily and our focus is on the employee’s actions, our focus in labor disputes is centered upon the *employer’s* circumstances.

It is precisely this focus on the impact to the employer’s operations which undermines the employer’s assertion that the claimants bear the burden of proof to show a work stoppage. Although 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), which expressly assigns the burden of proof is G.L. c. 151A, § 25(b)(4), which provides the employer an opportunity to prove an exception to the award of benefits in a lockout. With respect to showing 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. Director 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. We see several flaws with this argument.

When a claimant quits a job and contends that the separation was for good cause attributable to the employer under G.L. c. 151A, § 25(e)(1), the inquiry is on the employee’s reason for leaving and the parties’ conduct *prior* to the separation. Conlon v. Director of Division of Employment Security, 382 Mass. 19, 23 (1980). However, in a labor dispute under G.L. c. 151A, § 25(b), our role is not to decide the reasons for the employees’ decision to go on strike—we focus simply on the strike’s impact to the employer’s operation *after* the claimants stopped working. General Electric, 349 Mass. at 363.

We also consider principles of statutory construction, which the SJC relied upon in Cantres. One such principle dictates that the party raising the exception or defense must bear 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), does not disqualify claimants who are out of work due to a strike; rather it does so *only if* the strike caused a stoppage of work—a substantial curtailment of operations. Thus, in order to prove the exception under G.L. c. 151A, § 25(b), a party must prove that the strike caused a substantial curtailment of the employer’s operations. Since the employer urges the Board to rule that the August, 2011 strike caused a substantial curtailment, the employer bears the burden of proof.

Finally, as the Cantres Court pointed out, the burden of proof should be assigned to the party most likely to have access to the relevant evidence. Id. at 231, *citing* P.J. Liacos, Massachusetts Evidence 41 (5th ed. 1981) (“burden of persuasion is on the party . . . who has freer access to the evidence.”) There is no question that the employer is the party most likely to have access to the information bearing on whether its operations were substantially curtailed³. This was borne out during the proceedings in the matter before us.

IV. The employer did not demonstrate that there was a stoppage of work.

a. Measuring stoppage of work in light of the employer’s business.

The nature of the employer’s business very much affects how we measure substantial curtailment. In 1991, the SJC had occasion to consider how to measure “stoppage of work” in the context of a strike against a public utility, which had a duty to maintain essential services to its customers. Boguszewski v. Commissioner of Department of Employment and Training, 410 Mass. 337, 345 (1991). Unlike a manufacturing firm in a labor dispute, which might be more likely to curtail output of its end product, the SJC suggested that the Board might be justified in placing more weight on the impact to overall operations as opposed to end production and revenue. Id. Careful to avoid setting a rule, the Court instructed the Board to “follow an empirical approach, evaluating each situation on its facts.” Id. at 344. Since Boguszewski, we have done so.

Thus, in a 2008 Board decision involving a large public service entity, we found that a substantial curtailment existed where the employer continued to transmit gas and electricity to its customers without interruption and its revenue stream was largely unaffected, but the employer’s internal business operations and support functions were dramatically curtailed, performing at 0% - 58% of its normal levels. (M-61684 – M-63251, Dec. 11, 2008.) In contrast, in a 2012 decision involving a supermarket chain, we relied upon measurable levels of disruption to revenue and production in a labor dispute involving a strike against the employer’s refrigerated warehouse. (M-63500 – M-63768, Aug. 23, 2012.)

In the present case, the facts show the employer’s business to be somewhat of a hybrid. It is undisputed that in 1999, when the employer’s business involved providing [copper wire network], fax, and internet services over its copper lines, it was a regulated telephone company. However, the employer’s business has changed dramatically since then. Over the last ten years, it has lost 50% of its copper-based lines. Consequently, it has invested heavily in the unregulated [fiber optic network] side of its business. Of its 2,462,500 total lines in service in August, 2011, 652,700 [fiber optic network] Data and Video lines as well as an unknown portion of its 347,400 [fiber optic network] Voice lines were unregulated. Thus, at the time of the labor dispute, somewhere between 652,700 and 1,000,100 of its total lines, or 27% - 41% of its operation, were *not* regulated. This trend continues as 90% of all new installations in Massachusetts are [fiber optic network].

³ We also agree with the DUA that the claimant is the party most likely to have access to the information relevant to whether he or she was participating in the strike under G.L. c. 151A, § 25(b)(1), and whether he or she belonged to the grade or class of workers participating in the strike under G.L. c. 151A, § 25(b)(2). See Cantres, 329 Mass. at n. 7, *citing* Martineau v. Director of Division of Employment Security, 329 Mass. 41, 51 (1952).

In any event, whether the employer had a legal duty to maintain most of its services or not, it was undisputed that during the strike, voice and data continued to flow across the employer's regulated copper lines and that voice, data, and video were transmitted continuously across the employer's unregulated [fiber optic network] network. "As production increasingly represents less than [sic] totality of the employing unit's performance, decreases in business revenue, services rendered, marketing, research, and maintenance, transportation, and construction activities have come to the fore as indicia of substantialness." Boguszewski, 410 Mass. at 344, quoting Lewis, The "Stoppage of Work" Concept in Labor Dispute Disqualification Jurisprudence, 45 J.Urb.L. 319, 332 (1967). Therefore, evidence showing the strike's impact on all three criteria—revenue, production, and internal business operations—must be considered.

In Reed I, the SJC instructed the Board to determine substantial curtailment by comparing the employer's data during the period of the labor dispute with the same weeks or months in the previous year, but to do so "in the context of all the circumstances, including the over-all status of the corporation's operations." 388 Mass. at 340. In Hertz, the SJC looked to measure a normal rate of customer complaints by comparing the levels during the strike with those during the period before and after the strike in the same year. 437 Mass. at 299. In our recent decision involving a retail grocery chain, we chose not to compare strike levels with those from the prior year, because we found an overall downward trend in the size of employer's workforce and operations from the prior year. Under those circumstances, we believed that a more accurate measure of the labor dispute's impact would be to compare the weeks during the strike with non-strike levels immediately before and after the strike. See M-63500 – M-63768.

Similarly, the evidence in the present labor dispute tended to show that the employer's overall operation in terms of staffing, revenue, and production changed between 2010 and 2011, separate and apart from the labor dispute. The 2010 [Operating Unit O] and [Operating Unit P] installation figures for Massachusetts were unavailable. Total lines in service showed a steady increase in [fiber optic network] lines in service and a steady decline in copper lines in service from 2010 through 2011. The same trend appeared in the revenue data for the [Operating Unit R]. A comparison of overall call volume to most of the employer's call centers tended to show reduced numbers in most call centers from 2010 to 2011. The record also included evidence that the employer progressively reduced its workforce during 2010 and 2011 through the declaration of surpluses, offering incentive packages which induced bargaining unit members to voluntarily separate from employment. These trends suggest that market influences or business decisions rather than the strike were primarily responsible for disparities between the 2010 and 2011 data. For this reason, we have relied upon the data from 2011, comparing the period affected by the labor dispute to the non-strike periods immediately before and after the strike.

b. Measurable impact on revenue.

As reflected in findings # 34 and 35, the employer provided revenue figures pertaining to three of its business units—[Operating Unit R], [Operating Unit O], and [Operating Unit P]. These are summarized below.

Total average monthly revenue May – July and September – November, 2011

MA only—[Operating Unit O] and [Operating Unit P]	\$ 67.7 million
MA & RI—[Operating Unit R] – [fiber optic network]	\$ 67.1 million
MA & RI—[Operating Unit R] – Copper	+ \$ 69.1 million
	\$ 203.9 million

Total monthly revenue August, 2011

MA only—[Operating Unit O] and [Operating Unit P]	\$ 67.5 million
MA & RI—[Operating Unit R] – [fiber optic network]	\$ 67.3 million
MA & RI—[Operating Unit R] – Copper	+ \$ 69.2 million
	\$ 204.0 million

These figures show that overall revenue was not curtailed, but, rather, increased slightly during the month of the strike. Based upon its normal business projections, the employer's asserted inability to perform its anticipated level of [fiber optic network] data and video installations in its [Operating Unit R] resulted in the estimated loss of \$2.6 million in projected revenue growth. But, even accepting this actual versus projection frame of analysis, in light of the employer's overall monthly revenues of over \$200 million, a loss of projected installation revenue of \$2.6 million is simply not substantial, as it represents a loss of only 1.3% of the employer's total revenue base.

The employer also urged the Board to consider the additional "mitigation" costs it incurred as a direct result of the strike. Specifically, the employer presented documents reflecting \$10.9 million spent in Massachusetts due to the strike, including the estimated cost to train managers to perform bargaining unit work and their lost work time due to that training, the cost of overtime wages and the extra pension and benefits attributable to the overtime paid to managers, as well as the managers' travel costs, payments for strike-related police and private security details, and other miscellaneous expenses. It argues that these were expenses to mitigate the disruption to the employer's operation and should be considered in evaluating how substantial an impact the strike had on the employer. However, the testimony revealed that certain of these expenses, such as pension contributions, were not credited against those that would have otherwise been incurred. Moreover, evidence showing how much the employer saved by not paying wages to over 5,000 bargaining unit members for two weeks was not submitted. Lacking the total picture of costs and savings attributable to the labor dispute, significant weight cannot be assigned to these asserted strike-related costs.

We note as well that even if we were to accept the \$10.9 million in mitigation costs as a valid offset, in and of itself, to the employer's gross revenue, this still leaves the employer far short of demonstrating a substantial loss in revenue, as the \$10.9 million is only a bit over 5% of the employer's total \$200 million monthly revenue base.

c. Measurable impact on production.

The employer provided evidence showing the performance for some aspects of its business during the strike and non-strike periods. This included the number of maintenance and installation orders completed in the [Operating Unit O] and [Operating Unit P] side of the business. It also included the number of maintenance and installation orders completed as well as certain call center functions performed in its [Operating Unit R]. Unfortunately, because most of this data was kept and produced on a monthly basis, and the employer acknowledged that its operations were also impacted by the storms that hit the region at the end of the summer, the record does not support assigning all of the impact to just the labor dispute.

The employer's call centers were responsible for handling business and customer in-bound telephone calls for sales, service, and repair. Normally, each month 12-20% of the call volume was typically sent to vendors, but it increased to 25-30% during August, 2011. Thus, during August, 2011, the number of calls to vendors doubled over the employer's normal rate. However, even at these increased levels, "outsourced" calls never exceeded a small fraction of the employer's total call number volume. *Compare General Electric*, 349 Mass. at 362 ("work stoppage" existed where the employer outsourced its entire welding function).

Exhibit 111 shows the total number of in-bound calls to each of the employer's different call centers, the number that were answered either by the employer's staff or vendors, as well as the number of calls abandoned⁴ and the average speed of answering.

[Employer] Call Centers—2011

		May	June	July	Aug.	Sept.	Oct.	Nov.
[Call Centers C]	Calls	89,671	101,208	89,665	111,450	109,897	96,307	88,704
	# answered	88,011	99,420	88,036	93,755	102,273	87,000	86,124
	% answered	98%	98%	98%	84%	93%	90%	97%
	Speed (seconds)	17.8	18.3	16.7	155.1	69.0	43.0	35.0
[Call Centers D]	Calls	17,421	17,912	16,536	16,433	15,788	15,206	14,956
	# answered	*	*	*	*	*	*	*
	% answered							
	Speed (seconds)	3.6	3.6	3.6	6.4	3.3	3.8	3.3
[Call Centers E]	Calls	254,455	257,313	256,933	217,569	282,052	274,500	245,888
	# answered	241,943	244,192	244,294	199,503	257,788	258,682	229,693
	% answered	95%	95%	95%	92%	91%	94%	93%

⁴ The impact from the number of abandoned calls is difficult to measure, because during the strike, the employer began to "dead-end" many of these calls. These were automated messages directing callers to use the employer's website for service. The employer did not track the number of such calls or present evidence of increased work performed through its website during the comparable time period.

		May	June	July	Aug.	Sept.	Oct.	Nov.
	Speed (seconds)	64.0	62.9	62.6	94.7	113.0	59.0	66.0
[Call Centers B]	Calls	33,232	33,712	28,385	30,311	32,270	30,193	29,076
	# answered	33,003	33,061	27,628	28,673	31,639	29,484	28,488
	% answered	99%	98%	97%	95%	98%	98%	98%
	Speed (seconds)	6.0	22.0	32.0	53.0	24.0	26.0	17.0
[Call Centers F]	Calls	32,697	32,603	29,441	30,002	39,637	36,145	34,582
	# answered	31,532	31,469	28,307	21,935	34,382	30,652	29,266
	% answered	96%	97%	96%	73%	87%	85%	85%
	Speed (seconds)	16.0	16.0	20.0	117.0	86.0	87.0	105.0

* = data not provided

The table above shows that the percentage of calls which the employer was able to answer during August, 2011 dropped, but did so only marginally. The [Call Centers C] answered on average 96% of its calls each month during the period May-July and September-November, 2011 and 84% of the calls in August—which is to say that in August, the [Call Centers C] handled call volume at 88% of its normal monthly rate. The [Call Centers E] answered an average of 94% of incoming calls each month from May-July and September-November, 2011 and 92% of the calls in August—reflecting that in August, the [Call Centers E] handled call volume at 98% of its normal monthly rate. In the [Call Centers B], an average of 98% of incoming calls were answered each month from May-July and September-November, 2011 and 95% were answered in August—answering calls in August at 97% of its normal monthly rate. The [Call Centers F] answered an average of 91% of its calls each month from May-July and September-November, 2011 and 73% of the incoming calls in August—answering calls in August at 80% of its normal rate. Thus, the call centers were able to answer incoming call traffic during August, 2011 at 80%-98% of their normal monthly performance levels.

Exhibit 111 showed that the speed with which the employer's call centers were able to answer calls slowed dramatically during the month of August, 2011. The average monthly speed to answer calls during May-July and September-November, 2011 compared to the speed of answering calls in August, 2011 was as follows:

Monthly average speed of answer (seconds) in call centers

	May-July and Sept. – December	August
[Call Centers D]	3.6	6.4
[Call Centers E]	71.3	94.7
[Call Centers B]	21.2	53.0
[Call Centers F]	55.0	117.0
[Call Centers C]	33.3	155.1

These figures show that the response time increased by a third at [Call Centers E], by more than two-thirds for calls for [Call Centers D], more than doubled at [Call Centers F] and the [Call Centers B], and, significantly, nearly quadrupled at the employer's [Call Centers C].

This data does not explain why it took so much longer to answer calls in August at the [Call Centers C], [Call Centers E], and [Call Centers F]. In these centers, the rates remained elevated during September and, in [Call Centers C] and [Call Centers E], continued at substantially higher levels in October and November—long after the center's bargaining unit staff had returned to work and the center was fully staffed.

There is a similar trend with the number of calls to the [Call Centers C] increasing dramatically in August and remaining fairly high in September. At the [Call Centers E] and [Call Centers F], the number of calls surged in September and October. It is at least as likely that it was not the strike, but it was the hurricane in late August followed by the tropical storm in early September, which downed poles, lines, and service, causing a large increase in calls for repairs and delayed service, and forcing customers to wait longer for available staff to answer.

Aside from the impact on the call centers, the employer presented evidence as to the number of maintenance and installation orders completed during the period before, during, and after the strike. Some of this data reflected weekly production levels and other reflected monthly levels.

[Operating Unit O] and [Operating Unit P]—2011 completed maintenance and installation orders

	May	June	July	August	September	October	November
Maintenance Orders	4,246	4,467	4,270	4,798	4,801	4,419	4,324
Mean time to repair (hourly)	6.4	8.0	6.6	19.1	10.7	7.0	6.5
Installation Orders	3,189	3,188	3,021	868	3,187	3,064	2,779

On the [Operating Unit O] and [Operating Unit P] side of the business, during the months of May – July and September – November, 2011, the employer completed a total of 26,527 maintenance orders, or an average of 4,421 orders per month. In August, 2011, the employer completed 4,798 maintenance orders—demonstrating that it completed 9% *more* in August than the average number completed in the months before and after the strike. The data also shows that there was a significant rise in the average time to repair from 7.5 hours per order during May-July and September-November, 2011 compared to 19.1 hours in August, 2011—it took more than twice as long to complete a repair in August than it had in prior and successive months. However, the mean time to repair continued to be elevated in September (10.7 hours per order), after the bargaining unit had returned. Because weekly data for the [Operating Unit O] and [Operating Unit P] was not submitted, and the monthly figures show a sharp rise in repairs and repair time during August and September, when the two storms hit the region, the employer has not demonstrated that the increase in repairs and repair time was attributable to the labor dispute rather than to the storms.

On the other hand, the installation performance in these business units notably decreased in August. From May-July and September-November, 2011, the employer's [Operating Unit O] and [Operating Unit P] completed a total of 18,428 installation orders, an average of 3,071 per month. In August, 2011, it completed 868 installations—dropping 72% from its average level. Since the number of installations seemed to bounce back in September, it is likely that the drop in the [Operating Unit O] and [Operating Unit P] installation performance during August, 2011 was attributable to the labor dispute.

The employer produced a number of exhibits in an effort to show the labor dispute's impact on the [Operating Unit R]. Exhibit 109 purports to capture the separate weekly installation and maintenance figures for DSL, [fiber optic network] data, [fiber optic network] video, [fiber optic network] voice, and [copper wire network] from July-September, 2011 in the [Operating Unit R]. The total weekly installation and maintenance numbers in Exhibit 109 do not match the total monthly figures in Exhibit 111.⁵ Nonetheless, for the sake of argument, we shall accept the employer's weekly installation and maintenance numbers for the two weeks of the strike, August 7 and 14, 2011, and for the two weeks before the strike, when the employer was fully staffed and there was no hurricane or tropical storm. These figures are as follows:

Weekly completions in [Operating Unit R]

	Installation					Maintenance				
	DSL	[fiber optic network] data	[fiber optic network] video	[fiber optic network] voice	[copper wire network]	DSL	[fiber optic network] data	[fiber optic network] video	[fiber optic network] voice	[copper wire network]
Week of 7/24/11	938	1,529	1,552	1,396	997	1,423	132	383	421	4,899
Week of 7/31/11	1,156	1,421	1,401	1,312	1,107	1,585	99	352	349	4,891
Week of 8/7/11	2	1	1	0	13	133	49	154	264	1,521
Week of 8/14/11	2	51	49	44	11	339	62	136	251	1,949

This data shows that during the two weeks before the strike, the employer averaged a total of 6,405 installations of DSL, [fiber optic network] data, video, voice, and [copper wire network] a week. During the strike, it averaged 87 per week, representing a 99% curtailment in the employer's installations in its [Operating Unit R] during the strike.

However, given that the employer had 2,462,600 total lines in service in August, 2011, the curtailment of new installations in its [Operating Unit O], [Operating Unit P], and [Operating Unit R]s combined had a very small impact.

⁵ For example, Exhibit 111 shows 35,888 total dispatched installation orders in the [Operating Unit R] for July, 2011. In Exhibit 109, the total installation completions, (described by the employer's witness as individual truck rolls for a technician being dispatched to a customer's location to fix or install service) for the weeks of July 3, 10, 17, and 24 add up to 22,880.

Total 2011 lines in service (thousands)

	May	June	July	August	September	October	November
[fiber optic network] data	333.1	338.1	342.9	342.1	347.8	354.1	359.1
[fiber optic network] video	301.6	306.5	311.3	310.6	316.0	322.3	327.4
DSL	398.9	394.5	391.3	385.2	382.7	377.9	374.6
Voice ([fiber optic network] & Copper)	1,454.1	1,446.8	1,440.2	1,424.7	1,419.2	1,412.5	1,406.8

The employer's total lines in service barely changed in August. The employer had a monthly average of 345,900 [fiber optic network] data lines in service during May-July and September-November, 2011; it had 342,100 [fiber optic network] data lines in service during August—a drop of 1%. It had a monthly average of 314,200 [fiber optic network] video lines in service during May-July and September-November, 2011 and 310,600 in August—also a drop of 1%. The calculations for DSL and Voice ([fiber optic network] and Copper) show a drop of less than 1%.

If we accept the employer's weekly figures showing the number of maintenance tickets completed in its [Operating Unit R] in during the two weeks before and during the strike, the chart above does show a significant drop in the number of repairs performed for DSL, [fiber optic network], and [copper wire network]. Thus, the employer has shown a substantial reduction in this function in this business unit during the strike.

d. Measurable impact on employer operations.

At the hearing sessions, the employer introduced evidence detailing the number of non-bargaining unit personnel who were redeployed from each of these business units, and in its brief the employer describes the normal work functions of each of these units. However, the employer has done nothing more than make a blanket assertion that because of the reductions in managerial employee headcounts in these units, much of the work normally performed within them stopped. No evidence at all was introduced that showed which specific work functions that would normally have been performed in these units were not done at all, which were done at reduced levels, and if the latter, how much they were reduced due to the redeployment of personnel out of them.

The employer's failure in this case to demonstrate any measurable impact of staff redeployment on the company's internal business operations stands in stark contrast to both the Boguszewski case, 410 Mass. 337 (1991), and our own 2008 decision involving the electric and gas supplier (M-61684 – M-63251). Notably, in both of those cases, although there was no substantial reduction in either revenue or production as a result of the labor dispute, there was a finding that a substantial curtailment in the employers' operations had occurred, largely because the

employers identified specific back-office functions that either completely ceased or were performed at considerably reduced levels, and they were able to specify the extent of these performance reductions.⁶ In the absence of a similar showing by this employer, we are unable to conclude that the company's internal business operations were disrupted or curtailed to any substantial degree.

Finally, the employer has urged the Board to weigh the impact of alleged picket line misconduct on the ability of its non-union staff to function during the strike. Even if we accept that there was some interference from picket line activity, and that some of the behaviors exhibited by some picketers were egregious, we have been given no yardstick by the employer with which to measure the extent to which this misconduct disrupted or curtailed the employer's ability to run its business. There is no evidence that it had a *measurable* impact on the employer's operations.

e. Total measurable impact.

Ultimately, the employer has not proven that the strike caused a substantial curtailment of its operations. During the strike, there was *no* disruption to the flow of [fiber optic network], data, video, or voice, or to the copper line voice or high-speed internet transmissions. Overall revenue increased during the month of the strike. Moreover, the decrease in revenue growth relative to projection was only 1.3% of their total revenue base. Maintenance to the lines in the employer's [Operating Unit O] and [Operating Unit P] increased 9% during the same period.

At its call centers, the percentage of incoming calls that the employer was able to answer dropped only marginally. The number of calls sent to outside vendors during the strike increased by 50% - 100% over the employer's normal rate, but never exceeded 30% of total call center volume. Monthly figures show that the employer was able to answer incoming call traffic at 80%-98% of its normal monthly performance rate. By themselves, these disruptions fall short of the levels found to constitute a work stoppage. See Adomaitis, 334 Mass. at 522-524 (Court agreed with the Board's ruling that a drop of about 35% from normal production at a wool processing plant constituted a work stoppage); Reed National Corp. v. Director of Division of Employment Security, 393 Mass. 721, 724 (1985) ("Reed II"); see also Reed I, 388 Mass. at 340 (citing with approval cases in other jurisdictions where a "substantial curtailment" had been found to exist on a drop in production of 20% - 30%).

⁶ Thus, in Boguszewski, "[I]nspection, testing, installation, replacement, clerical, and administrative functions... were all either not performed during the strike or were performed at levels ranging from 3% to 50% of normal." 410 Mass. at 345. Similarly, in our gas and electric company decision, we found based on facts stipulated to by the parties that "work ceased entirely on the following: work in engineering and construction on new customer work orders; routine and preventative maintenance; all service requests from existing gas and electric customers except those arising from emergencies and gas orders; customer shut-offs for non-payment; investigations into reported theft; audit team projects; hiring; filing mandated reports.... Other business functions did not stop being performed altogether but were carried out at significantly reduced levels. The employer's ability to send out credit notices to delinquent customers was reduced to 58% of pre-strike norms. The employer completed only 47.8% of its fleet vehicle maintenance work orders during the strike period. The volume of meter readings was reduced to 81.2% of normal pre-strike levels; customer call answering promptness dropped to 80.5% of normal, and billing of 'Time of Use' customers dropped to 75% of normal. Performance on information services technology projects fell to 34.5% of normal; employee training dropped to 16.1% of normal." M-61684-M-63251, at 13.

In the employer's [Operating Unit O] and [Operating Unit P], it took more than twice as long to complete maintenance orders during August, 2011 than it did during the months immediately before and after the strike. It also took considerably longer to answer calls coming into its [Call Centers C], [Call Centers E], and [Call Centers F] Call Centers, with the monthly speed of answer doubling and quadrupling. These are substantial performance declines, but because the employer did not isolate the data to the weeks of the strike, the dramatic monthly increases in speed to answer calls and performing repair work could easily be attributable to the surge in needed repairs and delayed service stemming from the two storms that hit Massachusetts during the same period.

Installations in the employer's [Operating Unit O] and [Operating Unit P] dropped 72% during August, 2011 from the average rate in the months immediately before and after August. On the [Operating Unit R] side, installations were curtailed 99% during the two weeks of the strike. However, in the context of the total number of lines in service in Massachusetts, the impact of these reduced installation levels was marginal—only a 1% decrease in the employer's total lines in service.

Although the employer showed that its 19 business units were staffed at reduced levels of 0% - 88% of normal staffing levels, it failed to prove how the reduced manpower had a measurable impact on its internal business operations.

The employer did prove that it sustained a substantial curtailment to functions in two areas as a result of the labor dispute. The average speed to answer calls coming into its [Call Centers D] and [Call Centers B] increased by two-thirds and twice the normal time to perform this service, respectively. As well, the employer's weekly data suggested a significant drop in the number of repairs for DSL, [fiber optic network], and [copper wire network] performed by the employer's [Operating Unit R] during the strike. However, in light of the lack of evidence showing that the strike caused a substantial curtailment to revenue, to any of its other business functions, or in any measurable way to its internal business operations, the significant reductions in these two areas did not amount to a substantial curtailment of the employer's overall operations.

Conclusion

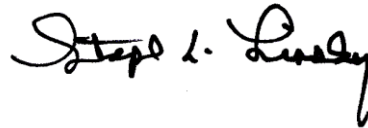
We, therefore, conclude as a matter of law as follows: (1) federal labor law does not pre-empt a determination as to whether the claimants' strike caused a stoppage of work under G.L. c. 151A, § 25(b); (2) the labor dispute in August, 2011 constituted a strike, not a lockout; (3) the employer had the burden to prove that the strike caused a substantial curtailment of its operations; and (4) the employer failed to show that claimants' unemployment was due to a stoppage of work within the meaning of G.L. c. 151A, § 25(b).

The DUA's determination is affirmed. The claimants are entitled to receive benefits for the weeks ending August 13 and 20, 2011, and for subsequent weeks, if otherwise eligible.



John A. King, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF MAILING - April 24, 2013



Stephen M. Linsky, Esq.
Member

Member Judith M. Neumann, Esq. did not participate in this decision.

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS DISTRICT COURT
(See Section 42, Chapter 151A, General Laws Enclosed)

LAST DAY TO FILE AN APPEAL IN COURT- May 23, 2013

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

ab/ JV