

IN THE  
SUPREME COURT OF MISSOURI

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No. SC92682

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REVA BILLINGS and WILLIAM MORRISON,

Appellants,

vs.

DIVISION OF EMPLOYMENT SECURITY,

Respondent.

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Appeal from the Labor and Industrial Relations Commission

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**SUBSTITUTE  
REPLY BRIEF**

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## ARGUMENT

### I. Introduction

In appellants' substitute brief, Reva Billings ("Billings") and William Morrison ("Morrison") argue that the Labor and Industrial Relations Commission ("Commission") erred in denying their claims for Trade Act benefits, because the undisputed facts are either that:

1. the last day they worked was after July 15, 2008, the date when the United States Department of Labor ("USDOL") certified that foreign competition had first adversely impacted Western Union's workers at the Bridgeton, Missouri, Call Center; or,
2. because the last day they would have worked, had they not been on employer-authorized leaves of absence, was after the impact date, July 15<sup>th</sup>.

In disputing these conclusions, Respondent, the Division of Employment Security of the Missouri Department of Labor and Industrial Relations (the "Division") fails to address the Commission's failure to make any findings concerning Billings' and Morrison's job duties during the period that began on July 3<sup>rd</sup>. This is the date when

these workers were notified that they would be laid off several weeks hence. Contrary to the correct standard of review, it attempts to judge the weight of the evidence of those duties, even though the Commission received and did not reject this undisputed evidence. The Division confuses the issues for decision by making reference to the irrelevant facts that Billings and Morrison received severance pay and pay for accrued vacation after they were laid off.

It fails to liberally construe the Trade Act to serve its purpose of aiding those displaced by foreign competition by discounting Billings' and Morrison's activities during the weeks before they were laid off, while on the payroll, on call, and subject to company rules, as being too minimal to be described as "work." It supports this conclusion with its characterization of Billings' and Morrison's activities as too "inactive" to be called work, a description of its own invention found nowhere in the law.

It suggests that the purpose of the rule limiting aid to those workers affected by foreign competition no longer than one year before the filing of a Trade Act petition with the USDOL is this: to encourage workers to seek assistance promptly at the time it would do the most good. It mistakenly elevates the unstated purpose of this subordinate rule over the clearly stated purpose of the Trade Act: to help affected workers.

If its analysis were accepted, the administrative processes of the Division and the

comparable agencies of other states would be greatly vexed by requiring the triers of fact to weigh the tasks performed by workers while on regular company payroll to determine if those tasks were sufficiently “active” to be considered “work.”

By rejecting claimants’ alternate conclusion that they were on leaves of absence on July 15<sup>th</sup>, and, thus, within the coverage of the Trade Act, the Division fails to construe the Act and its regulations to achieve its dominating purpose of aiding workers harmed by foreign competition. It also ignores the undisputed evidence that Billings and Morrison would have worked on and after the impact date, had they not been on leave, in that the Call Center was not shuttered until several weeks later.

## **II. Standard of Review**

The Division, correctly states that this Court reviews Trade Act cases in the same manner as it does claims for unemployment compensation. 19 U.S.C. § 2311(e)(a copy is included in Respondent’s Appendix at page (“Resp’t. A”) 14). (Respondent’s Substitute Brief (“Resp’t. Br.”) at 12). It acknowledges that this Court reviews questions of law *de novo*. (*Id.*). Though it concedes that this Court must reverse, if “the decision is not supported by the facts, or if the decision is not supported by sufficient competent evidence in the record,” it omits mention that this Court also must reverse, if “the facts found by the [C]ommission do not support” the Commission’s decisions. Section 288.210, R.S.Mo. (2000)(a copy is attached as an appendix to this reply brief at page (“RA”) 1). (Resp’t Br. at 12).

While this Court must view the evidence in the light most favorable to the Commission's findings, *e.g.*, *Shultz v. Division of Employment Security*, 293 S.W.3d 455, 459 (Mo.App. E.D. 2008), any analysis of these decisions must begin with a careful consideration of what findings the Commission actually made.

### **III. Ambiguous and Incomplete Findings**

#### **A. Findings As To the Date of Layoffs**

Though the Division notes the evidence, Western Union letters, that Billings and Morrison were not laid off until after the July 15, 2008 impact date (Resp't Br. at 7), it fails to mention, much less defend, the Commission's ambiguous, if not conflicting, findings as to layoff dates. (*Compare* Resp't Br. at 16, 17 n. 6, 18 *with* Appellants' Substitute Brief ("Appellants' Br.") at 13, 14). Given that the Commission failed to state clearly what facts it found as to the dates of the layoffs, its findings do not support its decisions, which, therefore, must be reversed. Section 288.210. (RA1).

#### **B. No Findings As to Claimants' Duties After July 3<sup>rd</sup>**

Again, while it discusses in detail the evidence that Billings and Morrison were on call and subject to company rules after July 3<sup>rd</sup>, the Division neglects to explain how this Court can affirm the Commission's decisions, in light of § 288.210, when the Commission made no findings whatsoever as to Billings' and Morrison's duties, if any, during this notice period. (*Compare* Resp't Br. at 6, 7, 9, 10, 18, 20 n. 8, 23, 26, 27, 29 *with* Appellants' Br. at 14, 15)

#### IV. Undisputed Evidence of Job Duties After July 3<sup>rd</sup>

Assuming, *arguendo*, that, despite these conflicting and sparse findings of fact, it is appropriate to review the record to determine if the Commission's rulings are supported by competent and substantial evidence, we must correct the Division's discussion of the layoff and of notice period job duties.

First, without defining what it means by "layoff," it implies that the wages that Billings and Morrison received after July 3<sup>rd</sup>, when they were sent home, were "wage payments made after a layoff. . . ." (Resp't Br. at 16). This use of "layoff" is a contortion of the common understanding of that term as a suspension of both work and regular wages. *E.g.*, 20 C.F.R. § 617.3(o) (2011) ("Employment means any service performed . . . for wages.") and (z) ("Layoff means a suspension of or separation from employment . . . for lack of work. . . .") (A20). It also does nothing to advance the central inquiries here: were the claimants either working or on leaves of absence after they were sent home on July 3<sup>rd</sup> and until they stopped receiving their regular wages weeks later?

It is undisputed that, on July 3<sup>rd</sup>, Billings and Morrison were taken aside, told that they would be laid off several weeks hence, excluded from their regular work areas at the Call Center, asked to turn in their badges, and sent home. (*e.g.*, Tr. 1/136<sup>1</sup>, 1/162, 2/264-65, 2/284, 2/355). Characterizing the July 3<sup>rd</sup> events as a "layoff" is more confusing than enlightening in analyzing the fundamental and relevant facts. The Division seems to

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<sup>1</sup>The number before the "/" is the volume and the number after is the page.

acknowledge as much. (Resp't Br. at 17 n. 6).

Second, the Division makes the mistakes of judging whether certain evidence had a proper foundation and whether other evidence is persuasive. (Resp't Br. at 20 n. 8). It attempts to minimize the evidence that Billings and Morrison were subject to non-compete, non-disparagement, or other employer rules after July 3<sup>rd</sup>, by saying that only one of 26 claimants so testified, that the claimant who said this did not say that a Western Union representative had so informed her, and that the letters that Western Union gave the workers when they were sent home made no mention of such requirements. *Id.* It concludes by saying that it thinks it “unlikely that any non-compete rule retained any vitality . . . (and that) there is no evidence that the employer could have stopped the terminal pay to anyone breaching the rule or had any other means to enforce it.” *Id.*

Had the Commission rejected this evidence on grounds of admissibility, assuming the correctness of such rulings, or rejected it as not credible and persuasive, we would have been required to ignore it under our standard of review. Section 288.210. Likewise, if there were conflicting evidence of the claimants' duties after July 3<sup>rd</sup> and had the Commission made clear findings of fact that they had no such duties, we would have been obliged to disregard this testimony. *Id.* But, because the Commission did neither, we must accept, as fact, this undisputed evidence of what transpired between July 3<sup>rd</sup> and the layoff dates (July 20<sup>th</sup> for Billings (Tr. 2/351 (A24)) and August 7<sup>th</sup> for Morrison (Tr. 4/655 (A25))):

1. they remained on the regular payroll (*e.g.*, Tr. 2/351, 2/355, 4/655);
2. they were not asked to return to the Call Center and were not assigned their regular duties (*e.g.*, Tr. 2/284);
3. they were on call (Tr. 1/200);
4. they were subject to Western Union rules and regulations, including:
  - a. the rule against working for a Western Union competitor; and,
  - b. the rule against disparaging the company (Tr. 2/248-49); and,
5. they were not yet eligible to receive payment for accrued and unused vacation pay due to employees who have been laid off. (Tr. 5/875-76).

The Commission never mentions this evidence (L.F. 6-17, 30-41 (A2-9, A11-18)). Since it did not reject it, we must consider whether it supports the decisions as to when was Billings and Morrison's last day of work, whether they were on leave until after July 15<sup>th</sup>, and, if so, when would have been their last day of work. 20 C.F.R. § 617.3 (A19).

## V. Last Day Worked

### A. Physical Presence at Call Center and “Active Work”

#### 1. No Authority Makes Such Distinctions

There is no dispute that, if Billings and Morrison were “in employment status,” as that term is used in 20 C.F.R. § 617.3(l)(1)(i) (A20), at the time they were separated from employment, they are eligible for Trade Act benefits only if the last day they worked was on or after July 15<sup>th</sup>. (Appellants’ Br. at 13, 16-20; Resp’t Br. at 17-25). In considering this question, the Commission opined that July 3<sup>rd</sup> was the key date, because it was the “last *physical* day of work. . . .” (L.F. 9 (A5); L.F. 33 (A14)(emphasis added)).

Instead of speaking of “*physical*” work, the Division uses the word “active”: “[i]f the employee is not actively providing services. . .” (Resp’t Br. at 19); “a worker no longer performing active services. . .” (*Id.*); “minimal employer restrictions while not actively working. . .” (*Id.*); “the last day an employee actively provided services. . . .” (Resp’t Br. at 23); “any active services.” (*Id.*); “non-active duties. . . .” (Resp’t Br. at 24); “active services. . . .” (Resp’t Br. at 25); “actively provided services. . . .” (*Id.*); “actively engaged in services. . . .” (Resp’t Br. at 26); and, “actively performed services. . . .” (Resp’t Br. at 34).

By drawing this distinction between the employees’ “active” and “non-active” services, the Division attempts to discount Billings’ and Morrison’s on-call<sup>2</sup>, non-compete,

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<sup>2</sup>The Division writes of an employee being “subject to recall. . . .” (Resp’t Br. at 19); the testimony was that the employees were “on call.” (Tr. 1/200) The difference,

and non-disparagement duties during the notice period as so minimal that they cannot be said to have been working. (Resp't Br. at 19-20).

Just as the Commission invented the requirement that claimants be “physically” present at the Call Center in order to be “working” (Appellants’ Br. at 17-20), the Division, without citation to the Trade Act, its regulations, or any other authority that makes such a distinction, conjures up this new hurdle to claimants’ applications for Trade Act assistance. (Resp’t Br. at 19-28). The authorities it cites do not support its argument.

## 2. *Figas*

The Division’s reliance on *Figas v. Labor and Industrial Relations Commission*, 628 S.W.2d 731 (Mo.App. E.D. 1982), is misplaced. In *Figas*, the employee was laid off on March 26<sup>th</sup>, but, thereafter received accrued vacation pay until May 12<sup>th</sup>. *Id.* The court rejected his contention that he was not separated from employment until he got his last vacation payment. *Id.*, at 732. It reasoned that he “performed no service for [his employer] for wages” after he was laid off. *Id.* Our facts are different. Here Billings and

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though subtle, is important. One who is “on-call” must be available and ready to come in to work on short notice. *See, e.g., Brown v. Bailey*, 210 S.W.3d 397, 402 (Mo.App. E.D. 2007) (neurosurgeon on call at hospital). A “recall” is the re-hiring of an employee who has been “laid off.” *See, e.g., Lorenz v. Filtronetics, Inc.*, 913 S.W.2d 51, 54 (Mo.App. W.D. 1995)(worker laid off during work slowdown had expectation of being “recall[ed]” or “re-hire[d]”).

Morrison were not laid off, were paid their usual wages, and continued to perform some, albeit less than their usual, services until after the July 15<sup>th</sup> impact date. (Tr. 1/136-38, 1/200, 2/248-49, 2/284-85, 2/351 (A24), 4/655 (A25)).

### 3. Severance and Accrued Vacation

#### Payments Are Not at Issue

The Commission obscured the issue by mixing in vague references to irrelevant facts concerning “[f]urlough force reduction, vacation pay, [and] severance [pay with its discussion of] notice pay. . . .” (L.F. 12 (A8), 36 (A17)). So, too, has the Division confused the question. It mistakenly claims that Billings and “Morrison would interpret ‘last day worked’ to mean the last day in which any remaining employment connection continued. . . .” (Resp’t Br. at 23). It repeatedly lumps together payments for severance and accrued vacation with the regular wage payments Billings and Morrison got after they were given notice but before they were laid off (*e.g.*, Resp’t. Br. at 21).

Billings and Morrison received severance pay and payments for their accrued vacation only at the end of the notice period when the layoffs took effect. (Tr. 2/315 (A24), 4/655 (A25), 5/866-68, 5/873-76). They make no claim that the severance pay and accrued vacation pay which Billings received on or after she was laid off on July 20<sup>th</sup> and which Morrison received on or after he was laid off on August 7<sup>th</sup> (*Id.*), have any bearing on the question of whether they were working on July 15<sup>th</sup>.

4. “On Call” Not “Subject to Recall”

Ignoring the fact that Billings and Morrison were still on the regular payroll on July 15<sup>th</sup>, the impact date, (e.g., Tr. 2/351, 2/355, 4/655), the Division impliedly characterizes them as simply being “subject to recall” during this period. (Resp’t Br. at 19-20). This is a misdescription, as “recall” implies that the employee had ceased receiving regular pay and had been laid off. *Supra* at 8, n. 2.

5. Callahan

Turning next to *Westinghouse Electric Corp. v. Callahan*, 105 Md.App. 25, 28, 658 A.2d 1112, 1114 (1995), the Division argues that Billings and Morrison’s efforts to comply with Western Union’s rules against working for a competitor and disparaging the company were not enough to be called “work.” [Resp’t Br. at 19-20]. But *Callahan*, a Maryland state law unemployment compensation appeal, offers little guidance in this Trade Act case for several reasons.

First, unlike our case, in *Callahan* there was no evidence that the employees were on call, were required to refrain from working for a competitor, and were required to adhere to any code of conduct in speaking of their company. *Id.*

Second, unlike our case, in *Callahan*, the administrative decision did include specific factual conclusions that the employees, who had been given access to a company resource center to assist them in finding other employment, did not perform any services for the employer. *Id.*, 105 Md.App. at 29-36, 658 A.2d at 1114-117.

And, third, in upholding the claimants' award of unemployment compensation, the *Callahan* court noted that its law "should be liberally construed" to provide weekly benefits to those who become unemployed through no fault of their own. *Id.*, 105 Md.App. at 36, 658 A.2d at 1117 (citations omitted). By liberally construing the Maryland statute, the *Callahan* court affirmed the *approval* of the award of benefits to the displaced workers. Ironically, the Division seizes upon this case to support the Commissions's *denial* of benefits to displaced workers, despite the Trade Act's comparable requirement that it be "liberally construed" so as to assist those displaced by foreign competition. *E.g.*, *Shultz*, 293 S.W.3d at 456 (citing 20 C.F.R. § 617.52(a)(A22)). Given the mandate to liberally construe the Trade Act in favor of finding eligibility for benefits, we might well have expected that the Westinghouse employees would have been found to still be "working," though not performing their usual duties but attending the resource center at full pay, if *Callahan* were a Trade Act case.

**B. Purpose of Trade Act and One-Year Rule**

**1. Trade Act Assists Workers Adversely**

**Affected By Foreign Competition**

In its discussion entitled "Purpose of Trade Act," (Resp't Br. at 21), the Division never states that purpose: "The Act created a program of trade adjustment assistance . . . to assist individuals, who became unemployed as a result of increased imports<sup>3</sup>, return to suitable employment." 20 C.F.R. § 617.2. *Accord*, *Shultz*, 293 S.W.3d

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<sup>3</sup>The Trade Act was expanded in 2009 to provide benefits to workers in the service

at 456 (citations omitted).

## 2. Prompt Relief To Displaced Workers

Instead, the Division focuses on what, it contends, is the purpose of what it calls the “one-year rule,” that is, the rule limiting eligibility for Trade Act benefits to those workers displaced not more than one year prior to the date of filing of an application seeking a determination that the group of workers were adversely affected by foreign competition.

Though the Trade Act “is silent on the purpose of the one-year limit,” *Lloyd v. United States Department of Labor*, 637 F.2d 1267, 1270 (9<sup>th</sup> Cir. 1980), one court, as the Division notes (Resp’t. Br. at 15), has opined, based on the legislative history, that the rule encourages discharged workers to claim benefits promptly after discharge, when they most need help in retraining and relocation. *Id.*, at 1270-71.

## 3. One Cannot Serve Two Masters

Even if, *arguendo*, we accept *Lloyd*’s interpretation, we must recognize that a rule that achieves the purpose of the one-year rule might, in some situations, defeat the purpose of the Trade Act. In those situations, we must ask, in the hierarchy of purposes, does the purpose of the Trade Act as a whole, as explicitly stated in the regulations, trump the

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sector who lose their jobs as a result of outsourcing. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, Div. B, Title I, §§ 1801(b), (c), (e)(2), 1801, 1802, 123 Stat. 367, 370, 371 (2009)(codified as amended at 19 U.S.C. § 2272 (2006 and U.S.C.A. Supp. 2012).

purpose of a particular provision, not explicitly stated anywhere, but divined from the legislative history? It seems only sensible to conclude so.

Ours is such a case. There is no dispute that Billings and Morrison, employees who both had worked for Western Union for more than seventeen years (Tr. 1/136, 2/284), were among 800 workers who lost their jobs when the work they did was outsourced to a foreign country (*e.g.*, Tr. 3/473, 4/792, 4/658 (A29)). It is just such workers whom Congress had in mind when it created the Trade Act Adjustment Assistance, such as training, job search assistance, and relocation allowances, and weekly Trade Readjustment Allowances (*e.g.*, Tr. 4/656). To deny them the aid the Trade Act provides, on the grounds that being on call, refraining from competing, etc., is not work, even though they were still on the regular payroll, and that their last day of work was twelve days too soon, is a harsh and hypertechnical application of a subordinate rule that defeats the purpose of the Trade Act.<sup>4</sup>

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<sup>4</sup>The Division acknowledges that, on July 16, 2009, Billings and Morrison's union, the Communications Workers of America ("CWA"), filed a petition with the United States Department of Labor seeking a certification that Western Union's Bridgeton Call Center workers were eligible for Trade Act benefits. (Resp't. Br. at 8). And, it correctly states that, due to the statutory amendments expanding Trade Act coverage to service sector workers, neither CWA nor the employees themselves could have done so at any time before May 18, 2009. (Resp't. Br. at 26-27). The interpretation of this rule which the Division advocates would have made little practical difference in propelling Billings

#### 4. Vacation Pay Is Irrelevant

In its analysis of the issue of whether Billings and Morrison were working on July 15<sup>th</sup>, the Division, again, fails to focus by needlessly mixing in references to irrelevant facts: “accrued vacation payments (or some other job benefit or statutory or contractual obligations). . . .” (Resp’t. Br. at 21). Billings and Morrison’s receipt of vacation pay after they were laid off, on July 20<sup>th</sup> (Tr. 2/351 (A24)) and August 7<sup>th</sup> (Tr. 4/655 (A25)), respectively, has no bearing on their status on July 15<sup>th</sup>.<sup>5</sup> *Supra* at 10.

#### 5. Western Union Could Have Given Notice Weeks Earlier

Ignoring that the claimants were on call and had other continuing duties to Western Union, the Division proclaims that Billings and Morrison’s “American productivity came to an end” on July 3<sup>rd</sup>. (Resp’t. Br. at 21). But, this conclusion ignores

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and Morrison to apply promptly to get Trade Act assistance, as they were both out of work for more than nine months before the Trade Act was amended to cover their employment. Given the obvious difficulties of transitioning to a new statutory scheme, leniency in the application of the rules of eligibility is warranted.

<sup>5</sup>Billings and Morrison concede, as the Division argues (Resp’t. Br. at 21-28), that Trade Act regulations, as they have developed, do not allow workers to claim, based on their receipt of payments for severance or for accrued vacation, that their “last day worked” extends beyond the dates of their layoffs.

the reasonable inference that Western Union must have had a reason to keep Billings and Morrison on the payroll and on standby after July 3<sup>rd</sup>. It could have complied just as easily with the collective bargaining agreement's requirement of fifteen days written notice (Tr. 2/365), by giving them notice in the middle of June and requiring them to report to the Call Center for their usual duties until July 3<sup>rd</sup>.

That Western Union chose, for whatever reasons, to have Billings and Morrison serve it by simply remaining on call and subject to its rules does not mean that they were not serving Western Union in the role it had assigned them. By doing what Western Union asked of them, between July 3<sup>rd</sup> and the dates of their layoffs, they contributed to Western Union's "American productivity." (Resp't. Br. at 21). As the poet John Milton reminds us, in "On His Blindness": "They also serve who only stand and wait."

#### **6. "Work" Is Anything Done For Wages**

It is neither necessary nor wise to go so far as the Division urges in disregarding Billings' and Morrison's duties during the notice period. The test for what is and what is not "work" ought to be easy for the average worker and trier of fact to understand. A reasonable bright-line test for what is "work" and what is not, and something any worker should understand, is this: something both requested by the employer and done by the employee for wages prior to a layoff or termination of employment. The difference between regular employment, with usual wages, and lump sum severance and accrued vacation payments after layoff is clear.

On the dates that workers are laid off or terminated, they know that, if they wish to work, they need to find another job. This is the time when the one-year limit ought to begin, and when they should take action to obtain Trade Act benefits. But, before they are laid off, even if they have been given notice that they will be, they have not finally lost their jobs and there remains the possibility, however remote, that they will be called back. Until they know for certain that they are out of work, the need promptly to take action to obtain Trade Act benefits does not yet arise.

**7. Tasking the Fact Finder To Evaluate  
The Nature, Quantity, and Difficulty of  
Services For Which An Employer Willingly  
Paid Wages Adds An Unnecessary Burden  
To the Administration of the Trade Act**

The Division's suggestion that this Court accept its characterization of Billings' and Morrison's duties after July 3<sup>rd</sup> as too *de minimis* to be called "work" creates more problems than it solves. The Division's approach would entangle the fact finder in fact-intensive inquiries to evaluate whatever services the employee performed for the employer for wages or salary prior to the actual date of termination. Should the fact finder have to weigh and measure the nature, quality, amount, and value of services for which the employer willingly paid the employee in order to determine whether what the employee did was "work"? Is it not best and simplest to let the employers, who have many reasons not to

throw money away, decide what tasks are worth assigning their employees while the employees are still on the regular payroll? It should not be the place of the fact finder to second-guess the employers' decisions and to say that the employees, though on the payroll, were not doing enough to call it "work."

**C. Liberal Construction**

While conceding that the interpretation of "last day worked" would produce a "harsh result" for Billings and Morrison (Resp't. Br. at 28), the Division, nevertheless, dismisses the contention that the Commission failed to "liberally construe," the Trade Act and its regulations, as required by 20 C.F.R. § 617.52(a)(A22). (Resp't. Br. at 25-28). The purpose of the Trade Act, to aid workers displaced by foreign competition, 20 C.F.R. § 617.2, would be best served, in this case, and in any future cases, by interpreting the "last day worked" as the last day Billings and Morrison performed "any service . . . for wages." 20 C.F.R. § 617.3(o)(A19-20). This both did, by being on call and subject to company rules, well past the impact date. This is what a liberal interpretation of the Trade Act and its regulations requires.

**VI. Leave of Absence**

**A. "Leave of Absence" Must Be Construed**

**To Serve Purpose of Trade Act**

The Division rejects Billings' and Morrison's alternative argument that they were on an "employer-authorized leave of absence" on the July 15<sup>th</sup> impact date. (Resp't. Br.

at 28-29). It correctly states that the Trade Act and its regulations list specific types of leaves of absence: “for purposes of vacation, sickness, injury, maternity, or . . . military service. . . .”. 19 U.S.C. § 2291(a)(2)(A) (Resp’t. A9) and 20 C.F.R. § 617.11(a)(2)(iii)(B)(1)(i)<sup>6</sup>. Accurately stating that none of these examples describe the situation in which Billings and Morrison found themselves on July 15<sup>th</sup>, the Division concludes that Congress must have intended that they be ineligible for Trade Act benefits. The Division attempts to justify this conclusion in two ways.

First, it says that the common feature of each type of leave described in the Trade Act is an expectation that the employee will be returning to work. It says that, because Billings and Morrison had no such expectation, their absences from the Call Center are not the types of “leave of absence” that meet the requirements of the Trade Act. While Billings and Morrison agree that, in most instances, those absent for vacation, sickness, injury, maternity, or military service, expect to return to work and that they did not, they disagree with the notion that their absences from the Call Center and those of workers on the types of leaves mentioned do not share anything in common. Just as those who are on vacation, on sick, maternity, or military leave are absent from work with the permission of the employer, so,

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<sup>6</sup>20 C.F.R. § 617.11 reads as follows: “Qualifying requirements for TRA . . . (i) Is on employer-authorized leave from such adversely affected employment for purposes of vacation, sickness, injury, maternity, or inactive duty or active duty military service for training. . . .”

too, Billings and Morrison were absent from the Call Center on July 15<sup>th</sup> with the permission of Western Union.

Second, invoking the canon of statutory construction that the expression of one thing implies the exclusion of other things not expressed, the Division contends that Billings' and Morrison's absences from the Call Center on July 15<sup>th</sup> cannot be fairly described as a qualified type of employer-authorized leave. But, there is a difficulty in such a conclusion. As this Court observed in *Six Flags Theme Parks, Inc. v. Director of Revenue*, 179 S.W.3d 266, 269-70 (Mo. banc 2005):

[T]he maxim *expressio unius est exclusio [alterius]* (or omissions shall be understood as exclusions) . . . is to be used with great caution. The maxim should be invoked only when it would be natural to assume by a strong contrast that that which is omitted must have been intended for the opposite treatment.

*Id.* (citations and internal quotations omitted). Can we say with confidence that Congress intended that employees such as Billings and Morrison, sent home by their employer but still on the payroll and subject to company rules, not qualify for Trade Act benefits?

In one of the cases the Division cites, *Watt v. GMAC Mortgage Corp.*, 457 F.3d 781, 783 (8<sup>th</sup> Cir. 2006), the court explained that this axiom of statutory construction, like others, must be "subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose." *Id.* (citations and internal quotations

omitted). The dominating purpose of the Trade Act is to provide aid to those displaced by foreign competition. 20 C.F.R. § 617.2. Invoking this canon of construction to deny benefits to Billings and Morrison, workers who are exactly of the type that Congress intended to assist, would defeat the purpose of the Trade Act. Thus, we must reject the Division's narrow interpretation of "leave of absence."

**B. Last Day Billings and Morrison Would  
Have Worked Is When Call Center  
Closed Weeks After the Impact Date**

The Division contends that, even if we were to consider Billings and Morrison as having been on leaves of absence after July 3<sup>rd</sup>, they would still be ineligible for benefits, because, it contends, the last day they would have worked, had they not been on leave, was before the July 15<sup>th</sup> impact date. (Resp't. Br. at 29-30). It bases this conclusion on the contention that, after July 3<sup>rd</sup>, Western Union "had no work for them. . . ." (Resp't. Br. at 30). But, it neglects to cite any finding by the Commission of this fact or anything in the record that this is so.

It overlooks the undisputed evidence that the Western Union Call Center where both Billings and Morrison worked was not completely shuttered until at least August 6<sup>th</sup> (Tr. 4/792), weeks after the July 15<sup>th</sup> impact date. As Billings and Morrison remained on call until they were laid off late July or early August (*e.g.*, Tr. 1/200), and Western Union continued to conduct business at the Call Center at least until August 6<sup>th</sup>, the last day that

Billings and Morrison would have worked was when they were finally laid off, dates well past the impact date and dates that make them eligible for benefits.

## **VII. Equitable Tolling**

Though Billings and Morrison have not argued that this Court should invoke equitable tolling to allow them to qualify for Trade Act benefits, the Division takes pains to point out that this doctrine has no application to the facts presented. (Resp't. Br. at 30-33). While Billings and Morrison have never contended that they or their union were misled by anyone about filing with the USDOL the application for certification of eligibility or raised any other reason to toll the one-year rule, they must dispute the Division's conclusion that "there was an ample opportunity to file a Trade Act petition that could have covered [them]." (Resp't. Br. at 32-33). The CWA acted diligently in filing its application only 59 days after the law changed expanding the Trade Act coverage to service sector workers such as those at Western Union's Call Center. *Supra*, at 14, n. 4. Though this circumstance might not warrant the invocation of equitable tolling, it does underline the unfairness of the Commission's ruling and the need to liberally interpret the various eligibility requirements, especially in this case.

## **CONCLUSION**

For the foregoing reasons, Appellants Reva Billings and William Morrison request that the decisions of the Labor and Industrial Commission denying their Trade Act claims be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH  
RULE 84.06(c)

The undersigned counsel of record hereby certifies that the foregoing brief includes the information required by Rule 55.03, was prepared in proportional typeface of 13 points, that the word processing system used to prepare the brief is WordPerfect X6 in Times New Roman, and that the brief contains 5,619 words as determined by the WordPerfect X6 word counting system.

/s/ Canice Timothy Rice, Jr.

CERTIFICATE OF SERVICE

I certify that a copy of Substitute Reply Brief was served by ECF Notice of Electronic Filing to Michael Pritchett and Shelly A. Kintzel, Attorneys for Respondent, 421 East Dunklin Street, P.O. Box 59, Jefferson City, Missouri, 65104, who participate in the ECF System, this 18<sup>th</sup> day of December, 2012.

/s/ Canice Timothy Rice, Jr.