

**IN THE MATTER OF AN ARBITRATION UNDER THE
LABOUR RELATIONS CODE of BRITISH COLUMBIA, R.S.B.C. 1996 c.244**

BETWEEN: WESTERN FOREST PRODUCTS INC.
(the "Employer")

AND: UNITED STEELWORKERS, Local 1-1937
(the "Union")

(Nanaimo Sawmill/Planer Grievance)

ARBITRATOR: David C. McPhillips

COUNSEL FOR THE EMPLOYER: Thomas A. Roper, Q.C.

COUNSEL FOR THE UNION: Sandra I. Banister, Q.C.

DATES AND PLACE OF HEARINGS: October 25 and 28, 2011
Nanaimo, BC

November 10, 2011
Vancouver, BC

DATE OF DECISION: February 17, 2011

The parties agree this Board has the jurisdiction to address this matter. This grievance involves a claim for severance pay for certain employees at the Company's Nanaimo operations related to a "permanent partial closure" of the planer mill at that site.

FACTS:

In December 2008, Western Forest Products curtailed production at its Nanaimo operations and laid off all the employees at the site. Then in late November, 2010 the Employer reactivated only the sawmill portion of the operation and began operating the saw with twenty employees on one shift on one head rig. The sawmill had previously operated on three shifts with three head rigs and the Union has filed a "bad faith" grievance in that regard but that is the subject of a different proceeding.

The Company did not restart the planer mill nor did it recall any employees involved in that aspect of the operations. The Union filed this present grievance claiming just under one million dollars (plus interest) as severance pay for those employees pursuant to the "permanent partial closure" language in the 2010 – 2014 Collective Agreement. The relevant provisions of the 2010 – 2014 Agreement are the following:

ARTICLE XXXIII – SEVERANCE PAY FOR PERMANENT PLANT OR LOGGING CAMP CLOSURE

- (a) Employees terminated by the employer because of permanent closure of a manufacturing plant or a logging camp shall be entitled to severance pay equal to ten (10) days' pay for each year of continuous service and thereafter in increments of completed months of service with the Company. A day's pay shall continue to include daily overtime or other premiums or add-ons as in the past, as applicable. However, where alternate shifts are in effect (e.g., 10-hour or 12-hour shifts) under Article V, Section 2 and Supplement No. 8, the severance pay available shall not exceed the maximum severance pay based on an eight-hour shift equivalent. ...

ARTICLE XXVIII – PERMANENT PARTIAL CLOSURES

- (a) A permanent partial closure occurs when a major operating component of a manufacturing facility is declared closed by the Company or has not operated for a period of 24 months. The major operating components of a manufacturing facility are defined as a sawmill, planer mill and dry kiln.
- (b) A permanent partial closure in logging occurs when a logging operation as referenced in SCHEDULE "A" has not operated for a period of 24 months.
- (c) In the event a permanent partial closure is declared by the Company, or the facility has not operated for a period of 24 months the employees who were employees of record at the commencement of the closure are entitled to

severance pay. Severance pay is calculated on the basis of the employee's seniority at the date of the layoff, not the date of the permanent partial closure.

- (d) Employees who are terminated by the Company because of a permanent partial closure shall be entitled to severance pay equal to ten (10) days for each year of continuous service and thereafter in increments of completed months of service with the Company. A day's pay shall continue to include daily overtime or other premiums or add-ons as in the past, as applicable. However, where alternate shifts are in effect (e.g., 10-hour or 12-hour shifts) under Article V, Section 2 and Supplement No. 8, the severance pay available shall not exceed the maximum severance pay based on an eight-hour shift equivalent.
- (e) Severance pay is not payable where a part of a manufacturing facility or logging operation is relocated and the employees involved are not required to relocate their place of residence and are not terminated by the Company.
- (f) Severance pay is not payable if an employee affected by a permanent partial closure is offered a position within the same operation of the Company.
- (g) The application of this Article becomes effective upon ratification of the 2010 Collective Agreement. There is no retroactivity of application of this Article affecting events occurring prior to ratification.

Each of the parties are of the view that the language of Article XXVIII dealing with permanent partial closures supports its position in this case. As well, the Company argues the extrinsic evidence related to collective bargaining supports its conclusion while the Union submits that this extrinsic evidence does not demonstrate any mutual consensus by the parties.

To put this dispute in context, some background facts are required. In March, 2008 a different local of the USW (Local 1-85) was faced with a closure situation at the Somass mill. In that case the company shut down the planer mill but kept part of the sawmill operations running. The company subsequently did shut down the sawmill but then reopened it again in February, 2010. After 24 months had expired (March, 2010) the Union filed a grievance claiming severance pay related to the planer mill closure based on the permanent partial closure language which was identical to the language that was in the 2007 – 2010 Agreement between these parties. The applicable provisions in the 2007 – 2010 Collective Agreement are the following:

**ARTICLE XXXIII – SEVERANCE PAY FOR PERMANENT PLANT
OR LOGGING CAMP CLOSURE**

- (a) Employees terminated by the employer because of permanent closure of a manufacturing plant or a logging camp shall be entitled to severance pay equal to ten (10) days' pay for each year of continuous service and thereafter in increments of completed months of service with the Company. A day's pay shall continue to include daily overtime or other premiums or add-ons as in the past, as applicable. However, where alternate shifts are in effect (e.g., 10-hour or 12-hour shifts) under Article V, Section 2 and Supplement No. 8, the severance pay available shall not exceed the maximum severance pay based on an eight-hour shift equivalent. ...

ARTICLE XXXIV - PERMANENT PARTIAL CLOSURES

- (a) A permanent partial closure occurs when the principal processing and production part of a plant has not operated for 24 months.
- (b) A temporary partial closure may become a permanent partial closure once the conditions are met for a permanent partial closure. In these circumstances, the employees who were employees of record at the commencement of the temporary closure, and had 5 years continuous service with the Company as of that date, are entitled to severance pay. Severance pay is calculated on the basis of the employee's seniority at the date of the layoff, not the permanent partial closure.
- (c) Employees with 5 years seniority or greater who are terminated by the Company because of a permanent partial closure shall be entitled to severance pay equal to ten (10) days for each year of continuous service and thereafter in increments of completed months of service with the Company. A day's pay shall continue to include daily overtime or other premiums or add-ons as in the past, as applicable. However, where alternate shifts are in effect (e.g., 10 hour or 12 hour shifts) under Article V, Section 2 and Supplement No. 8, the severance pay available shall not exceed the maximum severance pay based on an eight-hour shift equivalent.
- (d) Severance pay is not payable where a part of a plant is relocated and the employees involved are not required to relocate their place of residence and are not terminated by the Company.
- (e) Severance pay is not payable if an employee affected by a permanent partial closure is offered a position within the same operation of the company.
- (f) The application of this Article becomes effective upon ratification of the Coast Master Agreement. There is no retroactivity of application of this Article affecting events occurring prior to ratification.

Local 1-85 subsequently withdrew the grievance related to the Somass operation acknowledging that it had no claim under this language as the planer mill was not "the principal processing and production part of a plant".

Harold Mercer, the Manager of Labour Relations for Western Forest Products, testified about the inclusion of clause (f) in that 2007 – 2010 Agreement. That contract was negotiated between Forest Industrial Relations (FIR) and the Union following a thirteen week strike. The matter was settled by discussions between the parties including a Saturday night conversation between Ross Stryvocke of FIR and Bob Matters from the United Steelworkers District 3 office. Mr. Mercer testified the Union wanted to have severance pay apply to partial plant closures but Mr. Stryvocke was very concerned that there were many mills in the province in various stages of operation or closure. As he was unaware of the details of each, he felt the provision for severance pay for permanent partial plant closure could not be made retroactive and must be applied only to events which occurred in the future. Mr. Mercer testified that position was communicated to the Union and subsection (f) was agreed upon by the parties.

The 2007 – 2010 Collective Agreement expired during 2010 and bargaining for a new agreement commenced in April of that year. On this occasion, Western Forest Products negotiated directly with the Union as it was no longer a member of FIR. The Chief Spokesperson for the Company was Mr. Mercer and also generally in attendance for the Company were Len Smith, WFP Director of Labour Relations, Mark Kenny from Operations, Iain Donaldson from Logging and Michelle Connelly from the Labour Relations Department who recorded the minutes for the Company. For the Union, the Chief Spokesperson was Bob Matters and also in attendance were Darrel Wong, the President of Local 1-1937, Manjit Sidhu, the President of Local 1-2009 and Dave Steinhauer, the President of Local 1-85. At most of the negotiating sessions, John Mountain from District 3 was also present and he took notes and produced typed minutes for the Union.

In terms of general concerns during this round of bargaining, it is agreed the Company emphasized repeatedly that it was in financial difficulty and did not wish to add more costs under the Agreement. For its part, the Union was concerned with the closing down of various Company operations and, as a result, severance pay for its members was a major consideration. Specifically, there were concerns expressed with regard to the Duke Point, Nanaimo and Andy's Bay Log Sort operations.

With respect to the operation in Nanaimo (also referred to as the Mayo Mill), the Company had curtailed all its operations there in December, 2008. The evidence is that there were ongoing discussions between parties about this and the Union had concluded this would likely be a permanent closure in Nanaimo; it was thought that it was likely that the Duke Point operations would be more viable in the long run as the Company owned the land on that site. Mr. Wong testified that the Union had thus expected the Nanaimo mill would not reopen.

As well, as of the time of the negotiations, the Andy's Bay Log Sort had totally ceased operations (as of January 2009) and that had occurred under the terms of the 2007 – 2010 Agreement. Duke Point had ceased its sawmill operations (although the planer was continuing to operate) and this situation would be covered under a closure of "the principal processing and production part of the plant" in the 2007 – 2010 Agreement

Not surprisingly, there were many contractual issues discussed during the course of the 2010 bargaining sessions but only those discussions that directly relate to the closure issues will be referred to here. At the first negotiation meeting on April 19, Mr. Wong stated that the Mayo Mill had been down for some time and wondered what the Company had planned. Mr. Wong stated it appeared the City of Nanaimo did not want the mill on City property any longer. There was a brief response to that question given at the following meeting by Steve Frasher (CEO of Western Forest Products) who was in attendance indicating that the Company was still in the process of deciding what to do with the Duke Point and Nanaimo mills.

Another meeting was held on May 5, at which time formal bargaining proposals were exchanged. In that meeting the Union initiated discussions about the relationship between retention of seniority during layoff and severance pay, about the level of severance benefits and about the definition of a partial closure. The Union's notes, which have numbered paragraphs, indicate the following exchanges occurred:

16. Bob Matters raises two significant demands regarding the provision in Article XX – Seniority in Section 3: Retention During Lay-off where the union wants a clarifying statement that confirms all employees who had seniority retention as of June 15, 2008 retain their seniority for the duration of the current agreement and the next new agreement. He says that this statement will not eliminate the employee's right to severance should the company decide to terminate their employment after their operation has been down for 24 months. Bob continues by saying that in Paragraph (c) severance pay in amounts

stipulated in Article XXXIII shall still be payable to an employee upon the expiry of their seniority retention rights.

...

20. Bob Matters speaks to a significant demand regarding a provision for the payment of severance in Article XXXIII – Severance for Permanent Plant Closure and Logging Camp Closure where the union demands any employees terminated by the employer because of permanent closure of a manufacturing plant or a logging camp shall be entitled to severance pay equal to twenty days pay rather than ten days pay for each year of continuous service.

21. Bob Matters also points out along the same lines as the previous demand, that under Article XXXIC – Permanent Partial Closures the union demands changes to Paragraphs (a), (b), and (c) that would define what a permanent partial closures actually is – a processing and/or production part of a plant or logging operation or logging phase has not operated more than 10% of the available work days in any 24 month period; would define who is covered by under the language – the employees who were employees of record at the commencement of the temporary closure are entitled to severance pay; and finally some language that captures employees who get bumped onto the street – employees that are displaced as a result of the application of seniority rights consequential to the permanent partial closure will be entitled to severance pay equal to twenty days for each year of continuous service as well.

As can be readily seen, the discussion during this exchange focused on the timing of permanent plant closures, the definition of what a partial closure was and the amount of severance pay. The Company subsequently made proposals on these issues as follows:

... 26. ARTICLE XXXIV – PERMANENT PARTIAL CLOSURES

(a) A permanent partial closure occurs when a processing and/or production part of a plant or logging operation or logging phase has not operated more than 10% of the available work days in any 24 month period.

27. ARTICLE XXXIV – PERMANENT PARTIAL CLOSURES

(b) A temporary partial closure may become a permanent partial closure once the conditions are met for a permanent partial closure. In these circumstances, the employees who were employees of record at the commencement of the temporary closure are entitled to severance pay. Severance pay is calculated on the basis of the employee's seniority at the date of the layoff, not the permanent partial closure.

28. ARTICLE XXXIV – PERMANENT PARTIAL CLOSURES

(c) Employees who are terminated by the Company because of a permanent partial closure, including employees displaced as a result of the application of seniority rights consequential to the permanent partial closure, shall be entitled to severance pay equal to twenty (20) days for each year of continuous service and thereafter in increments of completed months of service with the Company. A day's pay shall continue to include daily overtime or other premiums or add-ons as in the past, as applicable.

However, where alternate shifts are in effect (e.g., 10 hour or 12 hour shifts) under Article V, Section 2 and Supplement No. 8, the severance pay available shall not exceed the maximum severance pay based on an eight-hour shift equivalent.

Later in that bargaining session there were additional discussions concerning the viability of the mills, particularly the Nanaimo operation. Mr. Matters stated that he hoped an announcement would be forthcoming soon and Mr. Mercer replied that the fact the Company did not own the land “complicates any re-start scenarios”. It is agreed that the discussion was focused on a total closure of Nanaimo and there never was any discussion, at this meeting or any other, about a partial closure at the Nanaimo mill.

The next meeting was on May 12 and at that there was a comment by Mr. Mercer that WFP believed the severance provisions in the contract were too expensive. As well, the Somass plant was discussed and Mr. Mercer remarked that severance had not been payable there “because the principle processing and production part of the plant is the sawmill and it’s still operating”.

At the next meeting there was further discussion of what would constitute a “partial closure” of an operation. At this session, the Union introduced the concept of the closing of a “discreet” part of the operations as being the potential criterion for a partial closure. The next meetings of relevance to this dispute occurred on June 2 and 3 during which the Union made the suggestion that it might propose a version of a “final document” covering all the outstanding issues. The Employer responded with a list of what it viewed to be the outstanding matters in dispute.

There were further meetings held on June 4, 7 and 13 but they did not address the issue of plant closures in any substantive way. Then, on June 14, Mr. Mercer introduced the notion of potentially defining a partial plant closure as the shutdown of either a sawmill, a planer or a kiln. Minutes taken by management indicate the following was stated:

H – I’m going to float something here re permanent partial closure. If we were to entertain discussion on that and what you’re negotiating elsewhere as discrete parts of an operation, we’re talking about sawmilling and manufacturing – sawmill, planer or kiln – and should decide to close either one or all of these in excess of 2 years, senior employees have to exercise bumping rights. Tied to that severance is 7 days/year of service to a maximum of 30 weeks. That would come into effect the date of ratification. Defined as shut down. Talking about Somass, under the current Collective Agreement, if the planner is not restarted,

they're not eligible for severance as the planer not the primary operation. From the date of ratification onwards, they would then be covered because it was a key component of the operation.

Mr. Mercer testified that at this juncture he was putting out "feelers" in an attempt to reduce costs for the Company. He testified that the Company was worried that the term "discreet" might encompass too many things and that he was indicating to the Union that the new language would cover a "Somass type" situation from the date of ratification, thus on a "go forward basis". Mr. Smith indicated during his testimony that the phrase events "going forward" meant that they were referring to any curtailments which would occur after the ratification of the new Agreement. Mr. Wong, during his cross-examination, agreed that Mr. Mercer was very clear at this point that the "shut down" would have to occur "on or after the date of ratification".

There had also been discussions between the parties away from the table about the fact there was no definition in the language relating to when a permanent plant closure occurred. Unlike the situation with a partial plant closure where after 24 months a partial plant closure is deemed to have occurred, there was no time frame defined in the Agreement for total closures. During those discussions, John Pletz, a Human Resources Advisor with the Company, indicated that WFP was prepared to apply the 24 month criterion to total plant closures as well. This became known between the parties as the "Pletz Amendment" and it was adopted although it was not included in the language of the new Agreement.

The "Pletz Amendment" was referenced in the bargaining meeting on June 15. As well, there was further discussion about the definition of partial plant closure. The Company minutes indicate Mr. Mercer stated:

H – I'm the one who is least experienced in manufacturing plants. In my mind, a sawmill is 3 major components – the sawmill itself, the drying of the timber (kilm), and the planers. If there's a decision to shut down any of those, it's a permanent partial closure. If we were to shut it all down, it's a permanent closure. If this language had been in the current agreement, the Somass planer guys would have been covered. We perceived the tech change or change of work covers off concerns you may have. We can't give you comfort that when every employee loses their job, we can give them severance, and we can't have grievances or arbitrations over every case.

There were then discussions about which employees would be attached to which sections of the mill for severance purposes in the event of a closure of one of the

components. At one point, Mr. Wong stated that this language would result in “no more Somass situations” and that, although Somass could not be fixed, it would “fix it going forward”.

At the June 28 meeting, the Company tabled a proposed offer of settlement. With respect to partial plant closures, the proposal stated:

ARTICLE XXXIV – Permanent Partial Closure

Amend as follows:

- a. A permanent partial closure occurs when a major operating component of a manufacturing facility is declared closed by the Company or has not operated for a period of 24 months. The major operating components of a manufacturing facility are defined as a sawmill, planer mill or dry kiln.
- b. In the event a permanent partial closure is declared by the Company, or the facility has not operated for a period of 24 months the employees who were employees of record at the commencement of the closure are entitled to severance pay. Severance pay is calculated on the basis of the employee’s seniority at the date of the layoff, not the date of the permanent partial closure.
- c. Employees who are terminated by the Company because of a permanent partial closure shall be entitled to severance pay equal to seven (7) days for each year of continuous service and thereafter in increments of completed months of service with the Company to a maximum of thirty (30) weeks pay. Where alternate shifts are in effect (e.g., 10 hour or 12 hour shifts) under Article V, Section 2 and Supplement No. 8, the severance pay available shall not exceed the maximum severance pay based on an eight-hour shift equivalent.
- d. Severance pay is not payable where a part of a plant is relocated and the employees involved are not required to relocate their place of residence and are not terminated by the Company.
- e. Severance pay is not payable if an employee affected by a permanent partial closure is offered a position within the same operation of the company.
- f. The application of this Article becomes effective upon ratification of the 2010 Collective Agreement. There is no retroactivity of application of this Article affecting events occurring prior to ratification.

Mr. Wong testified that, as a result of the proposal, there was now on the table a definition of what constituted a permanent partial closure (any one of the three components), that the 24 months would be calculated from the date of the lay-offs and the Company was still holding to its calculation of severance pay based on the “tech change” language of 7 days for each year to a maximum of 30 days. As well, Mr. Wong testified that the reference to retroactivity was taken by him to apply to the Somass situation and

he noted that there was no longer a five (5) year service requirement to be eligible for severance pay. Mr. Smith testified that paragraph (f) from the old Agreement indicated that whatever was agreed to would not be retroactive prior to the date of ratification. Mr. Smith testified that the Union never stated to the Company that it was their understanding that it was the passage of the 24 months that had to have occurred prior to the ratification.

There was extensive discussion of these issues around partial plant closures in the next bargaining session on June 29. The minutes taken at this meeting are particularly germane to the issue in dispute here and will be reproduced extensively.

The notes taken by Mr. Mountain on behalf of the Union state:

23. Bob Matters reviews the company language proposal and notes that they have only identified three areas of the sawmill operation as the sawmill, planer, and the dry kilns. He says that while he was initially defending the word "discrete", the union was talking about something more definitive than just three categories. Bob says its easy to identify a dry kiln but it gets dicey when the focus switches to a planer and even more so when you look at sawmills which have separate primary breakdown lines. He says the union is focusing on a primary production parts and then in moving the lens to Western Forest Products, includes a view of logging operations as well. Bob says that the company language does not cover any logging components and that is a problem for the union. He continues by pointing out that the 30 weeks cap was not there in the existing agreement and that severance pay would not be paid if the employee is offered a position within the company – obviously a gray area there that needs to be kicked around a bit. Bob says that in the end, the focus on just three areas doesn't do it for the union.
24. Harold Mercer says that we looked at how this would effect our employees and in addition, looked at the abuses of the language. He says the experience that Western has would be Dave's local in Somass and says that if the company shut-down a component part now there would be a cost factor. Harold says the additional cost would be spread around and one of the ways would be to use the technological change aspect where it moves from 7 to 10 days. He continues that they don't want to get into a big dust-up on this but there are things that they want to put in as an after-thought and now they can't do it. He says he has to be careful when talking about shut-downs because there are some active files that he is involved in. He adds that he wonders why the union was silent on a response on this issue.
- ...
29. Bob Matters says that Canfor has a pref hire process and continues by pointing out that the union was looking for 20 days and getting rid of the 5 years, and it seems that we are not as far apart as you might think we are.
30. Harold Mercer reflects back on when they made the settlement document and when the union accused them of patterning after West Fraser, he says that he did not copy anything from West Fraser or any other association and

adds that they got out of employer associations. Harold says that they would like to receive a counter-proposal on permanent partial plant closure.

31. Bob Matters believes that we can do that but wonders where this might leave the Nanaimo Sawmill guys with regard what is happening at this operation.
32. Harold Mercer says that this language on a go forward basis would fix a Somass situation.
33. Bob Matters asks if after 24 months of being shut-down whether severance would kick in for instance at an operation like Duke Point and Harold Mercer says yes.
34. Bob Matters would like to know how the company sees the new language effecting the Nanaimo May mill and if the retro activity clock would start ticking today for 24 months or if it would be covered by the existing language.
35. Harold Mercer says the Nanaimo mill is a full closure and has been down for 18months completely and when December 15th 2010 rolls around and nothing has changed, then what will happen if those guys would fall under permanent closure language.
36. Bob Matters says that under this new language that after 24 months the severance will be paid. He says the union is uncomfortable because they don't know where the clock starts ticking now or when the mill was shut-down or the language is ratified or whenever.
37. Len Smith says a major operating component is the sawmill and it is listed in the company language as a major component.
38. Bob Matters says that the union is concerned that if only one of the three components found in the same operation is down then the union thinks that the company language would only allow severance to be provided to the one component that is down and not the other.

...

45. Harold Mercer begins by returning some answers to questions that the union has requested earlier. He says he wants to clearly be heard and for this reason asks that Michelle Connelly record his remarks verbatim. With regard to the Nanaimo sawmill, Harold says that under the terms of the last agreement, as of December 15th 2010, if we haven't started that mill, it is permanent closed and the employees will be eligible for severance. With regard to the Somass mill, Harold says – while not sure of the date – that the principle part of the mill was shut-down and the employees were eligible for severance. He continues that in February of 2010 we restarted the sawmill portion of the mill and not the planer and took the position at that time that it would not be eligible for severance under permanent partial closure because the planer is not the principle processing or production part of the plant under the existing language. With regard to the Duke Point sawmill, he says it was shut-down – the sawmill being the principle processing and production part of the plant – but we are running the planer mill and as a result the planer employees will not be eligible for severance. Harold says they made a proposal to the union which identifies three

components of the mill and if any are shut down, then the employees will attract severance from the date of ratification onwards. He says that he is making these statements in order to show that the language going forward is good language.

46. Bob Matters wonders what will happen with Nanaimo if it doesn't restart with regard to the employees receiving severance pay – the question that the union is kicking around is which language will cover the situation and further they wonder if the retro-active would apply; and if the company accepts the union proposal, would the 20 days be in effect or the 10 days be in effect. He also asks when the 24 month clock starts ticking – would that be from the day of last shut-down or the time of the announced permanent closure.
47. Harold Mercer says that you have the answer and it starts ticking on the day of the shut-down and you have it in the minutes.
48. Darrel Wong wonders how all this effects the Duke Point planer.
49. Len Smith says that the Duke Point operations fits perfectly with the permanent partial plant closure language and is the opposite of the Somass situation. He says that if the Somass planer started up once the new language is in effect, then they would reset the clock under the new language.

USW Requested Break: 2:50 pm
Meeting Resumes: 3:00 pm

50. Harold Mercer says the severance formula that applies will be the permanent partial plant closure language that is in effect on the day that it is shut-down.
51. Bob Matters says he understands that the existing severance language would be followed for those who have been shut-down during the term of the existing collective agreement and that those who have been shut-down after the new agreement was ratified, they would be under the terms of the new agreement.

Meeting Adjourned: 5:05 pm

CONCLUSIONS

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4. Western Forest Products responds to the union's clarifying questions on a permanent partial plant closure and how it might effect the existing operations that are permanently or partially closed by stating with regard to the Nanaimo sawmill that under the terms of the last agreement, as of December 15th 2010, if Western Forest Products hasn't started that mill, it is permanently closed and the employees will be eligible for severance. With regard to the Somass mill that in February of 2010 Western Forest Products restarted the sawmill portion of the mill and not the planer and took the position at that time that it would not be eligible for severance under permanent partial closure because the planer is not the principle processing or production part of the plant under the existing language. With regard to

the Duke Point sawmill, Western Forest Products is running the planer mill and as a result, the planer employees will not be eligible for severance.

The Company notes covering these same exchanges on June 29 reflect the following remarks being made (paragraph numbers have been added for ease of reference):

1. BM – This ties into the last section (f) on your proposal. The application of this article becomes effective on ratification and no retroactivity. What does that do with this operation in town here?
2. HM – Here’s my thought process – what I was driving at was Somass.
3. BM – This language, on a go-forward, would fix a Somass on a go-forward basis. So if Duke were to shut down a section after 24 months, severance kicks in. So we have an entire facility down for 18 months. What do you believe to be the status if it was down for 2 years and a day – what are the company’s obligation? With this having no retroactivity, does that mean start today on anything partially down or wouldn’t apply to anything – does the clock start ticking today for something down today – 24 months from heron in or if it goes down the day after ratification?
4. HM – Down for 18 months completely. December 15 comes around and nothing has changed.
5. BM – Are they entitled to severance pay on December 15?
6. HM – We owe you an answer on that.
7. BM – We can respond clearly when we have those answers.

...

8. BM – When you give us the answers we asked for, we can develop language on permanent partial closure.
9. LS – We’ll have an answer to your questions when we come back at 2:00.

BREAK

10. HM – I’m going to attempt to give you the interpretation of the questions you asked and therefore it’s the Company’s. I’ve asked Michelle to carefully record what I’ve said and to read it back to you for the minutes. Nanaimo sawmill – under the terms and conditions of the 2007 – 2010 Collective Agreement, which is in effect until we negotiate a new one, as of Dec. 15, 2010, if we haven’t started that mill, it’s permanently closed and the employees are eligible for severance.
11. LS – December 15th is an approximate date. We’re not sure of the exact date of the shutdown.
12. HM – The Somass mill, I’m not sure of the shutdown date. Because the principle part – the sawmill – was shut down, employees were eligible for

severance. In February or March of 2010, we restarted the sawmill portion of the mill. We did not restart the planer. We took the position at the time, and it's contractually correct, that those employees are not entitled to severance under permanent partial closure.

13. The Duke Point Sawmill – we shut that mill down. The saw, which is the principle component of the mill, is covered under permanent partial closure. We are now running the planer mill only – the planer people are not eligible for severance. They've been recalled to work.
14. We've made a proposal to you. What we're saying is that in our mills, there are 3 main components – saw, planer, drying. If any or either are shut down, employees attract severance from the date of ratification onwards. For example the planer mechanics at the Somass sawmill have no claim to severance because the decision was taken at a time in the agreement when a principle portion of the mill was shut down.
15. I am the manager of Labour Relations at Western Forest Products, as of this date, as a matter of record. Anything else you've heard surrounding permanent or permanent partial closure is dispelled. This is comfort for you in developing better language going forward for permanent partial closure. It also has something, I believe, on permanent closure.
16. BM – I have a few other questions. Nanaimo sawmill – if it doesn't restart, those employees are entitled to severance pay? [HM – correct] Those folks who are sitting at home, hoping to get recalled but if not, then they're expecting severance pay. If that operation doesn't restart on or about Dec. 15, they get severance pay. If worse comes to worst 6 months, they get severance of 10 days no cap according to current the current Collective Agreement. Your proposal says 7 days and 30 day cap is not retroactive. If we negotiate the 20 days pay no cap we want on a go forward basis, in the 2010 agreement, they will be eligible for new severance of 20 with no cap, or will it be the 10 days in the old agreement? The other question was starting the clock ticking now and with your answer – the clock started ticking when the mills went down. [HM – that's the Carrier decision isn't it?] The 24 month clock in your proposal, does it start upon ratification or the time of the shutdown? [HM – it starts when last shut down happened and starts reticking if we restart the place.]
17. DW – Re Duke Point. The sawmill is down, planer is running off and on?
18. HM – It's running according to orders.
19. LS – Duke Point fits perfectly into permanent partial closure.
20. HM – It's the exact opposite of Somass. There are no tricks here. We're being straightforward with you.
21. DW – So then what would happen with Duke? If the sawmill doesn't run, at end of 24 months, sawmill workers only would be eligible for severance? Somass – isn't it the same?
22. LS – The principal component, the sawmill, was running, the planer went down. So the language doesn't fit that.
23. HM – Nor will it in the new contract.

24. BM – The planer’s still there. So theoretically you could start the planer next week and then new language cuts in. [HM – correct] The old layoff is water under the bridge. [HM – correct]
25. HM – The company position is, as of June 29 in bargaining, the minutes reflect the contractual interpretation. Don’t worry about what people outside this room are saying.
26. [At the request of Harold Mercer, Michelle Connolly read back his comments regarding severance pay and permanent partial closure.]

Caucus

27. HM – To answer your question, the severance formula is the picture that was taken when the closure occurred. Whatever we negotiate here – your 20 day, our 7 day – will affect whatever decisions were taken here onwards.
28. BM – You have some operations down today. The clock started ticking when they went down and the Collective Agreement that was in place, those are the rules for severance rates? If we were successful in negotiations today, 20 days would apply to any operation that is operating when we ratify and subsequently shuts down.
29. LS – Or our 7 days with a cap kicks in.

...

Mr. Wong testified in direct that these discussions meant to him that the “clock starts ticking at the date of shut down”. When questioned further, he stated that the shut down could also refer to the actual announcement of the closure and that the clock started ticking at the time of the “lay off” or when the operation stops. He also stated that the Company committed to pay severance at Nanaimo after 24 months based on the Pletz Amendment. He also agreed that the Employer stated (Union notes – para. 32) that this would fix “on a go forward basis a Somass situation”.

With respect to the critical discussion recorded at paragraphs 47 – 52 of the Union notes, Mr. Wong agreed in cross-examination that Mr. Matters on behalf of the Union agreed that it was the time of the “shut down” that would determine which collective agreement would apply. He also agreed no one from the Union side ever stated that it was the expiry of the 24 months that constituted the “shut down”.

Mr. Wong also testified with respect to the comments referred to in point 4 of the “conclusions” of the Union’s notes and indicated he took them to mean that the Company was committing to pay severance at Nanaimo in the event of a permanent partial closure.

Mr. Wong also testified that “at some point” during these discussions agreement was reached that the five year precondition would not be applied to the Nanaimo situation.

Mr. Smith’s evidence about these exchanges is that it was clearly indicated by the Company when the parties were discussing the Somass situation that the new language would apply only if an operation restarted after the date of ratification and then closed subsequently. Mr. Smith testified that he was convinced after the exchange which was recorded at paragraphs 47 – 52 of the Union notes that “Bob (Matters) got it” and that “he understands our proposal”, specifically that the initial shut down or curtailment had to occur after the ratification of the Agreement.

Mr. Smith agreed under cross-examination that the terms “sawmill” and “shut down” each can have different meanings within the industry. The term sawmill can be used as either referring to the entire mill or the sawmill part of the operation. As well, the term “shut down” has been used in the industry to refer to either the initial curtailment or layoff or to the date of the permanent closure of an operation. He also agreed that these words can be ambiguous and it is possible that the parties were “ships passing in the night” when using these terms during bargaining. Mr. Smith also agreed with Union Counsel that the Company never expressly stated the new language would not apply to a permanent partial closure at Nanaimo and he agreed that the entire discussion around the Nanaimo mill was in the context of a total closure of the site.

Mr. Mercer also testified with respect to the exchange recorded at paragraphs 16 – 29 of the Company notes. He stated that what the Company agreed to was that if the principal part of the Nanaimo operation (i.e. the sawmill) remained closed as of December 15, 2010, severance pay would be paid to all employees at the mill as per the Pletz Amendment under the terms of the old Agreement. The notes also refer to the fact that the clock had started ticking on December 15, 2008. He also testified that it was clear that if the mill was restarted, then the three components language in the new Agreement would apply. Mr. Mercer testified that he was “convinced Bob Matters, at least, got it because of the questions he asked”. Mr. Mercer also testified he did not feel there was any confusion about the intended effect of the retroactivity clause. He testified the Union never took the position that, if any operation had been down prior to ratification but the 24 months had not yet expired, severance pay would be payable.

As of late June there was still disagreement between the parties concerning the amount of severance pay to which an employee would be entitled, including whether there would be a cap on the amount to be paid. That topic continued to be discussed in meetings on June 30, July 13, July 14 and July 15. On July 15, the Company tabled what would be close to the agreed upon language, with the particular exception of paragraph (d) dealing with the amount of severance:

Permanent Partial Closure

Amend as follows:

- a. A permanent partial closure occurs when a major operating component of a manufacturing facility is declared closed by the Company or has not operated for a period of 24 months. The major operating components of a manufacturing facility are defined as a sawmill, planer mill or dry kiln.
- b. A permanent partial closure in logging occurs when a logging operation as referenced in SCHEDULE "A" has not operated for a period of 24 months.
- c. In the event a permanent partial closure is declared by the Company, or the facility has not operated for a period of 24 months, the employees who were employees of record at the commencement of the closure are entitled to severance pay. Severance pay is calculated on the basis of the employee's seniority at the date of the layoff, not the date of the permanent partial closure.
- d. Employees who are terminated by the Company because of a permanent partial closure shall be entitled to severance pay equal to seven (7) days to a maximum of 30 weeks for each year of continuous service with the Company. Where alternate shifts are in effect (e.g. 10 hour or 12 hour shifts) under Article V, Section 2 and Supplement No. 8, the severance pay available shall not exceed the maximum severance pay based on an eight-hour shift equivalent.
- e. Severance pay is not payable where a part of a plant or logging operation is relocated and the employees involved are not required to relocate their place of residence and are not terminated by the Company.
- f. The application of this Article becomes effective upon ratification of the 2010 Collective Agreement. There is no retroactivity of application of this Article affecting events occurring prior to ratification.

Mr. Wong testified there was no discussion between the parties at the time about the last sentence in paragraph (c).

On July 19, the Union made a final offer of settlement which included addressing the amount of severance as well as the link between severance pay and the right to preferential hiring and those discussions continued in meetings on July 22 and 23.

Mr. Wong testified that on July 23, there was a side-bar discussion where he and Mr. Matters met with the Employer committee in the Employer's caucus room. Mr. Wong testified (and he made a written note of this later) that he was told that the Duke Point, Nanaimo and Andy Bay employees would be given severance pay based on the new permanent partial closure language. Mr. Wong testified he felt he had received assurance there that if the Nanaimo mill did not resume operations, then the terms of the new Agreement would apply and that there would be no 5 year eligibility requirement. Mr. Wong testified that everyone was in a good mood at the time and there had been a number of one on one discussions ongoing and "everyone was talking at the same time". Mr. Wong testified that when the formal meeting resumed he did not confirm his understanding of what he felt had been agreed to nor did he ever discuss his understanding with Mr. Matters.

Mr. Smith testified that there had been only a very short exchange with Mr. Wong in the caucus room and at the time he had "wondered what all that was about". Mr. Smith was adamant he made no commitment of any kind during that discussion. Under cross-examination, Mr. Smith did agree he also never asked for any clarification from Mr. Wong when the parties resumed formal discussions a little while later. Mr. Mercer testified that on this occasion in the caucus room "we chatted" and he does not even remember what was discussed and no notes were taken about what was said.

On that day, the final form of the Collective Agreement was agreed to by the committees and referred to the Union membership for ratification. Mr. Wong sent out an email that evening to the elected staff and business agents reporting on the conclusion of negotiations. The Company was not sent a copy of this material and the evidence of the Employer witnesses is that they did not see it prior to preparing for this hearing. That email stated in part:

... The pref hire changes do not impact any of our current members at Nanaimo or Duke Point it is for future closures with respect to once you have been paid severance pay you will not be able to continue your seniority at a new operation for Vacation pay or Statutory holidays.

Both Nanaimo and Andy's Bay will be provided with severance under the permanent partial closure language in the event that they do not return to work within 24 months from the date of shut down. The landing Bucker rate has been changed going forward and the incumbents keep the higher rate as well as fallers who need to get out of falling.

...

Duke Point is also covered but it is a clear case of permanent partial closure so there was no dispute with the company on that.

I have spoken to Tony Sutra and he tells me that he does expect that Nanaimo will open in the fall as there working on order file right now however he did not provide a date. He also told me that he believes that the Duke Point sawmill will reopen this fall and he is of the opinion that it has the better long term future than Nanaimo because of its location. He acknowledged that the mill needs some serious money to be reinvested in Duke Point but he is confident that they will get there.

The evidence with respect to the Andy's Bay closure was that this log sorting operation in Howe Sound had closed in late 2008 and the employees were advised in January, 2009 that the closure was "indefinite". Mr. Mercer testified he knew the facility was to be closed permanently and his view was the employees should be paid severance and "let the group get on with their lives". Mr. Mercer testified he felt this was the compassionate thing to do and, although the Union never argued for it under the Agreement, the Company followed his suggestion. Mr. Smith was asked about this arrangement in his cross-examination and he stated that the agreement to pay severance at Andy's Bay was based on the permanent closure language and the Company declared in September 2010 that the operation was permanently closed. Mr. Smith did agree that he had told the Union in bargaining that severance pay would be paid after 24 months but in his view that payment was pursuant to the Pletz Agreement, although he did not think he ever stated that expressly to the Union.

Prior to the ratification vote the Union also sent out a pamphlet to its membership to provide further information. With respect to the partial plant closure language, the bulletin stated:

PERMANENT PARTIAL CLOSURES

- Members no longer need 5 years seniority to qualify for severance pay.
- Members qualify for severance when a defined component of a mill does not operate for 24 months.
- Members working in logging operations qualify for severance if operation does not run for 24 months.

- Nanaimo Sawmills and Duke Point will qualify for severance if operation does not operate for 24 months.

On July 29, Mr. Wong sent that document together with the following email to Mr. Mercer and Mr. Smith:

The attached has been sent to our members and to the me-too employers on the coast.

I told our members based on your commitments to me that Andy's Bay would be getting there (sic) severance pay based on the new language as will Nanaimo under the new 24 month rule and no 5 year provision and Duke Point was going to be provided with the new language as well. We also agreed they would not lose any of their current pref hire rights.

This is what we agreed to and I cannot support this agreement if you have now changed your minds.

Mr. Mercer and Mr. Smith testified the second paragraph of this bulletin caused them serious concern as they felt there had never been any agreement to apply the "new" 24 month rule to Nanaimo. As a result, they arranged a meeting with Mr. Wong and Gary Kobayashi of the Union staff to be held in Courtenay on July 30. Mr. Wong testified that at that meeting the Nanaimo operation was discussed and it was agreed that if it went back into operations then it would fall under the "new language". He also stated that the Company agreed to not apply the five year eligibility which would have been required under the "old Agreement". Under cross-examination, he stated it was agreed that "eligible employees would get the severance under the 2007-10 agreement but that the five year requirement would be waived". He also stated that "we expected Nanaimo to all open or not".

Following that meeting, Mr. Smith sent an email, containing a letter to Mr. Wong setting out the Company's understanding of the outcome of the meeting. That letter stated, in part:

Re: Collective Bargaining Clarification Meeting – July 30, 2010

On the above noted date Harold Mercer and I met with you and Gary Kobayashi to discuss a number of points flowing out of our recently concluded collective bargain with the USW. This letter serves as the official record of our discussion on the items listed below.

1. Nanaimo Sawmill – As you know the Nanaimo Sawmill has been curtailed since December 15, 2008. As discussed, in the event that the Nanaimo Sawmill does not restart production between now and December 15, 2010, eligible employees (including those with less than 5 yrs service) will be entitled to receive their contractual

severance. In the event that the Nanaimo Sawmill restarts between now and December 15, 2010, employees will be subject to the terms of the new "Permanent Partial Closure" language recently negotiated as part of the 2010 – 2014 collective agreement.

2. Duke Point Sawmill – Currently the Duke Point Sawmill is operating on a restricted basis, with only the Planer Mill operating. As the Sawmill portion of the operation last ran on October 14, 2009 and the mills current operating status occurred during the term of the 2007 – 2010 collective agreement, the operation is subject to the 2007 – 2010 Permanent Partial Closure language. In the event that the sawmill restarts, employees will be subject to the Permanent Partial Closure language found in the 2010 – 2014 collective agreement.
3. Andy's Bay Log Sort – The Andy's Bay Log Sort has been curtailed since January 15, 2009. In the event that the Sort does not restart between now and January 15, 2011, eligible employees will be entitled to receive their contractual severance.

In the event that the Sort restarts between now and January 15, 2011, employees will be subject to the terms of the new "Permanent Partial Closure" language recently negotiated as part of the 2010 – 2014 collective agreement.

...

If you are in agreement with the above, please confirm in writing. This letter will form a part of the Company's notes from the 2010 collective bargain.

Mr. Smith testified that this letter clearly indicated that Nanaimo "went down under the old language" and if the entire operation remained closed for 24 months employees would receive severance pay (the Pletz Amendment). It also indicated that the Company had agreed to "waive" the 5 year eligibility requirement which existed under the old contract. Further, the letter goes on to state that should the mill reopen then the terms of the new 2010 – 14 Collective Agreement would apply.

In cross-examination, Mr. Smith agreed he never used the term "waive" with respect to employees with the less than five years' seniority at Nanaimo but simply stated they would be "included". Mr. Smith also agreed there was nothing in the paragraph about the Nanaimo mill referring to the old 2007 – 2010 Agreement as there was in the paragraph dealing with Duke Point.

Mr. Wong testified that when he received this letter he took the second bullet under the Nanaimo heading to refer to the "Pletz Amendment" and understood the third bullet to be indicating that if the mill restarted, then the "new" agreement would apply.

Under cross-examination, he agreed that Mr. Smith was referring for the most part to the “old” language in the 2007 – 2010 Agreement.

On August 3, Mr. Kobayashi sent a letter raising further issues with Mr. Wong who, on August 5, passed it along to Mr. Smith. On August 5 at 3:58 p.m., Mr. Smith emailed Mr. Wong with his responses to the questions raised in Mr. Kobayashi’s letter and stated “I have responded to Gary’s questions on the understanding that the Sawmill (principal processing or production part ...) has restarted or not, which is consistent with the current Permanent Partial Closing language (2007 – 2010 CA)”. The email then set out the questions which had been raised by Mr. Kobayashi with Mr. Smith’s responses to each set out in italics:

NANAIMO SAWMILL

- Has been curtailed since December 15, 2008. *Yes.*
- In the event that the sawmill does not restart by December 15, 2010, all employees who were employees of record at the commencement of the closure are entitled to severance pay including those with less than 5 years. *If the current operating status of the Sawmill (the principal processing and production part) does not change by December 15, 2010, then yes severance is payable to employees of record, including those with less than 5 yrs seniority.*
- In the event that the sawmill does restart by December 15, 2010, the Permanent Partial Closure provisions of the 2010 – 2014 collective agreement will apply. *If the Sawmill restarts then yes the employees are subject to the new (2010 – 2014 CA) Permanent Partial Closure language.*
- In the event that the mill does not restart by December 15, 2010, employees who filed a preferential hiring application and renewed the application in a timely manner, will be covered by the preferential hiring provisions of the 2007 – 2010 Coast Master Agreement. *Yes, and to reinforce your point, employees must have met the current PH (2007 – 2010 CA) application requirements (ie. Section 7(f)).*
- In the event that the mill does restart by December 15, 2010, employees will be covered by the preferential hiring provisions of the 2010 – 2014 Collective Agreement. *Yes, the switch to the 2010 – 2014 PH rules occurs only if the Sawmill restarts, if it doesn’t restart then the current PH rules apply.*

DUKE POINT

- The Sawmill has been curtailed since October 14, 2009. *Yes.*
- The Planer Mill has continued to operate. *Yes.*

- In the event that the Sawmill does not restart by October 14, 2011, employees attached to the sawmill including those with less than 5 years seniority will be covered by the Permanent Partial Closure provisions of the 2007 – 2010 Coast Master Agreement. *If the Sawmill doesn't restart, the employees are subject to the current Permanent Partial Closure rules. The Company agrees to waive the 5 yrs seniority language found in the 2007 – 2010 CA for affected employees.*
- In the event that the Sawmill does restart by October 14, 2011, employees will be covered by the Permanent Partial Closure provisions of the 2010 – 2014 Collective Agreement. *Yes, if the Sawmill were to restart the current Permanent Partial Closure language dies and the employees are subject to the new Permanent Partial Closure language.*
- In the event that the Sawmill does not restart by October 14, 2011, employees who filed a preferential hiring application and renewed the application in a timely manner, will be covered by the preferential hiring provisions of the 2007 – 2010 Coast Master Agreement. *Yes, the employees are subject to the current Article XX.*
- In the event that the Sawmill does restart by October 14, 2011, employees will be covered by the preferential hiring provisions of the 2010 – 2014 Collective Agreement. *Yes, if the Sawmill restarts the employees are subject to the new PH language.*

Mr. Smith testified that his responses to Mr. Kobayashi indicated that the Company intended to waive the five year requirement for the Duke Point employees under the “old” Agreement as had already been done for the Nanaimo employees. As a result, at 4:19 p.m. that day Mr. Smith issued a “clarification letter” amending his letter of August 3 to take into account his later comments about Duke Point. The paragraph in question was now revised to state:

Duke Point Sawmill – Currently the Duke Point Sawmill is operating on a restricted basis, with only the Planer Mill operating. As the Sawmill portion of the operation last ran on October 14, 2009 and the mills current operating status occurred during the term of the 2007 – 2010 collective agreement, the operation is subject to the 2007 – 2010 “Permanent Partial Closure” language. In the event the operating status of the mill does not change by October 14, 2011, severance would be payable to eligible employees (including those with less than 5 yrs service) under the provisions of the aforementioned language. In the event that the sawmill restarts, employees will be subject to the “Permanent Partial Closure” language found in the 2010 – 2014 collective agreement.

Under cross-examination, Mr. Wong agreed this paragraph was revised by Mr. Smith because it was the “old Collective Agreement” that was being applied and he conceded that was what Mr. Smith was indicating in point 2 of the letter. He also agreed

that the understanding was that for both Nanaimo and Duke Point the new Collective Agreement would apply if there was a new closure. He also agreed the Union never responded to this position which had been set out by the Employer.

Mr. Wong testified that, in his view, the employees at Andy's Bay and Duke Point had been paid severance pay under the new Collective Agreement as employees with less than five years' seniority received monies that would not have been due under the 2007 – 2010 Agreement. He also indicated that he would not have recommended ratification of the agreement if he had been of the view that there would be no severance to Nanaimo employees if only part of the mill was reopened.

Mr. Smith testified that at no point prior to ratification vote did the Union ever indicate to the Company that the planer mill at Nanaimo would attract severance pay if it did not reopen. The sole discussion related to the situation where the entire mill at Nanaimo stayed down for 24 months in which case severance pay would have been paid to all employees.

As indicated above, in October 2010, the Company announced that it would reopen the sawmill portion (on a limited basis) of the Nanaimo operation in late November and, therefore, the Company took the position that a permanent plant closure had not occurred under the terms of the 2007 – 2010 Collective Agreement. Further, no severance was payable for the planer closure under the 2010 – 2014 Agreement as those terms were not retroactive.

On February 4, 2011, the Union filed by letter the policy grievance which is the subject matter of this decision. The grievance stated:

Re: Policy Grievance – WFP Nanaimo Division

Please be advised that the Union is hereby filing a policy grievance over the Company's violation of the Permanent Partial Closure language provisions of the Collective Agreement and any other Collective Agreement provision that may apply, as well as any other agreed document between the parties or law that may apply.

As this is a policy grievance please note that this grievance will commence at Step 3 of the grievance procedure. Considering the fact that the Union has already met with you and discussed this issue in detail and you have already advised the Union of your position on the matter, please advise me if you are agreeable to waive Step 3 and proceed directly to arbitration.

There was also evidence presented related to the knowledge of the parties about the *Carrier Lumber* decision of Arbitrator McConchie which had been issued in January 7, 2010. In that decision, it was concluded that in those particular circumstances, for the purposes of severance pay entitlement, a permanent total “closure” of the mill was deemed to have occurred at the time of the original curtailment of operations. Mr. Wong testified he was aware of the decision but had “not read it for a long time”. Mr. Smith agreed under cross-examination that *Carrier Lumber* is one of a number of cases in the industry that establishes that a “closure” in this industry is a question of fact.

DECISION:

The present case involves the interpretation of the provisions of Article XXVIII – Permanent Plant Closure of the 2010 – 2014 Collective Agreement between these parties. Once again, that provision states:

ARTICLE XXVIII – PERMANENT PARTIAL CLOSURES

- (a) A permanent partial closure occurs when a major operating component of a manufacturing facility is declared closed by the Company or has not operated for a period of 24 months. The major operating components of a manufacturing facility are defined as a sawmill, planer mill and dry kiln.
- (b) A permanent partial closure in logging occurs when a logging operation as referenced in SCHEDULE “A” has not operated for a period of 24 months.
- (c) In the event of a permanent partial closure is declared by the Company, or the facility has not operated for a period of 24 months the employees who were employees of record at the commencement of the closure are entitled to severance pay. Severance pay is calculated on the basis of the employee’s seniority at the date of the layoff, not the date of the permanent partial closure.
- (d) Employees who are terminated by the Company because of a permanent partial closure shall be entitled to severance pay equal to ten (10) days for each year of continuous service and thereafter in increments of completed months of service with the Company. A day’s pay shall continue to include daily overtime or other premiums or add-ons as in the past, as applicable. However, where alternate shifts are in effect (e.g., 10-hour or 12-hour shifts) under Article V, Section 2 and Supplement No. 8, the severance pay available shall not exceed the maximum severance pay based on an eight-hour shift equivalent.
- (e) Severance pay is not payable where a part of a manufacturing facility or logging operation is relocated and the employees involved are not required to relocate their place of residence and are not terminated by the Company.

- (f) Severance pay is not payable if an employee affected by a permanent partial closure is offered a position within the same operation of the Company.
- (g) The application of this Article becomes effective upon ratification of the 2010 Collective Agreement. There is no retroactivity of application of this Article affecting events occurring prior to ratification.

There is an abundance of arbitral authorities dealing with the general principles of interpretation to be applied to collective agreements. The parties provided the following case authorities setting out the critical considerations for an arbitration board in fulfilling that task: *Central Coast School District No. 49*, [2000] B.C.C.A.A.A. No. 70 (Foley); *Pacific Press*, [1995] B.C.C.A.A.A. No. 637 (Bird); *Corporation of District of Maple Ridge*, 23 L.A.C. (2d) (Hickling); *MDS Nordion Inc.*, [1998] B.C.C.A.A.A. No. 594 (Coleman); *British Columbia Hydro & Power Authority*, [1987] B.C.C.A.A.A. No. 4 (Hope); Brown and Beatty, *Canadian Labour Arbitration*, Fourth Edition, Canada Law Book, para 4:2120; *Canada Post Corporation*, [1993] C.L.A.D. No. 1139 (Bird); *Health Employers Association of British Columbia*, [1996] B.C.C.A.A.A. No. 646 (Morrison); *Cardinal Transportation British Columbia Inc.*, [1997] B.C.C.A.A.A. No. 83 (Devine); *Columbia Hydro Constructors Ltd.*, [2011] B.C.C.A.A.A. No. 76 (Germaine).

In *Pacific Press*, *supra*, Arbitrator Bird discussed a number of the guiding principles. He identified the following:

1. The object of interpretation is to discover the mutual intention of the parties.
2. The primary resource for an interpretation is the collective agreement.
3. Extrinsic evidence (evidence outside the official record of agreement, being the written collective agreement itself) is only helpful when it reveals the mutual intention.
4. Extrinsic evidence may clarify but not contradict a collective agreement.
5. A very important promise is likely to be clearly and unequivocally expressed.
6. In construing two provisions a harmonious interpretation is preferred rather than one which places them in conflict.
7. All clauses and words in a collective agreement should be given meaning, if possible.
8. Where an agreement uses different words, one presumes that the parties intended different meanings.
9. Ordinarily words in a collective agreement should be given their plain meaning.
10. Parties are presumed to know about relevant jurisprudence.

There are also additional rules that have been recognized in the jurisprudence. In applying all these propositions to the situation at hand, a number of them are more significant than others and some of them have general applicability while others relate

more directly to the specific provisions in Article XXVIII. Therefore, it will be useful to discuss the general propositions first and then address the remainder within the specific analysis of the key provisions of this Agreement.

The first general principle is that the primary resource for the interpretation of provisions in a collective agreement is the words the parties chose to express what their mutual intention was in arriving at the bargain that they struck. It is the language of the agreement which must be given the most significant attention.

A second principle is that when provisions are established that are particularly onerous on either party (e.g. monetary benefits, infringement on the seniority of employees), the parties must express those limitations in very clear and unequivocal contractual language: *British Columbia Hydro & Power Authority, supra*; *Brown and Beatty, supra*; *Canada Post Corporation, supra*; *Health Employers Association of British Columbia, supra*; *Cardinal Transportation British Columbia Inc, supra*; *Health Employers Association of British Columbia*, [2004] B.C.C.A.A.A. No. 36 (Gordon); *Simon Fraser Health Region*, 94 L.A.C. (4th) 115 (McPhillips); *Vancouver Hospital*, 54 L.A.C. (4th) 35 (Morrison); *Board of School Trustees of School District No. 39 (Vancouver)*, 53 L.A.C. (4th) 33 (Hope); *Canada Post Corporation*, 39 L.A.C. (4th) 6 (Bird). In this case, the Union's claim for severance pay is significant so this principle has application on the facts here.

A third principle, which is not one of the ones identified by Arbitrator Bird, deals with the doctrine of mistake. A "common" or "mutual" mistake occurs where both parties are honestly mistaken about the intention of the other and, thus, there is no actual consensus. At common law, such agreements can be found to be void. However, it is accepted that it is very difficult to apply in any practical way that approach in the context of the interpretation of collective agreements. Arbitration boards do not have the luxury of declaring there is no meaning at all which can be attributed to the intention of the parts, and simply concluding that the collective agreements, or parts thereof, are thereby void. In *Northern Drywall and Building Supplies Ltd., supra*, the British Columbia Labour Relations Board observed, at paras. 17 – 19:

17 What makes the doctrine of mutual mistake so deceptively attractive in the case under review is that circumstances disclosing the parties' subjective intent arise in a timely fashion proximate to the conclusion of negotiations. Bearing in mind the cautions expressed by the Board here and in Ontario as to the

undermining of the labour relations scheme by successful pleas of mistake, such a result arising so close to the conclusion of negotiations at first blush would seem no more disruptive than a failed ratification. The deception becomes apparent when one realizes that the issue could have just as easily arisen six months later had the Union not noticed the additional employees and had the Employer said nothing on the day it was apparently prepared to sign the collective agreement. Surely the application of the doctrine of mutual mistake from one case to another cannot depend solely on an arbitrary criterion of how close in time it arises to the completion of negotiations. If any features of the common-law doctrine of mutual mistake are to be useful in resolving issues dealing with, in the words of Adams, the “precise meaning or legal ramification of a particular clause or component” (which according to the Act are questions of interpretation and application to be resolved by arbitration in any event), they must be capable of application throughout the term of the collective agreement without the risk of voiding an otherwise valid collective agreement.

18 In referring to principles of the common law, we must be careful not to encumber the statutory scheme of labour relations with concepts it was not designed to bear. We must also be cautious not to encourage parties, who want to get out of what they perceive to be bad deals, to raise inappropriate common-law concepts to defeat a collective agreement. We therefore conclude that the common-law doctrine of mutual mistake should not be wholly imported into the law of the collective agreement. However, understanding certain features of that doctrine is useful in dealing with a case such as the one at hand.

19 To begin with, the parties’ conflicting positions on whether the collective agreement applies to only three people, surely fit the definition of a mutual mistake. Moreover, the part of the common-law approach in dealing with mutual mistake which requires a third party standing in the shoes of a reasonable man to determine the sense of the promise, also coincides with the labour relations policy objectives of maintaining the collective agreement. To that limited extent those features of mutual mistake may be “borrowed” to resolve problems which arise in collective bargaining. By thus limiting the concept of mutual mistake, we preclude the possibility of voiding an otherwise valid collective agreement. Such an approach recognizes that an objective interpretation may result in finding that a firm deal had been made notwithstanding the after-the-fact reservations of a party, and serves to discourage attempts at last-minute renegeing on deals, a policy objective to be fostered.

However, if only one party is mistaken about what it thought was the meaning of the agreement, then that constitutes a “unilateral” mistake and, in that situation, unless the error was induced into that error by actions the other side which constituted “sharp practices”, it has been held that the mistaken party must live with its error: *Northern Drywall and Building Supplies Ltd.*, [1990] B.C.L.R.B.D. No. 242; *Teck Cominco Metals Ltd.*, 154 L.A.C. (4th) 161 (Taylor); *Zellers Inc.*, 95 L.A.C. (4th) 21 (Thompson); *White Spot Ltd.*, [1976] 1 C.L.R.B.R. 145 (B.C.L.R.B.); *School District No. 39 (Vancouver)*, B.C.L.R.B. No. 538/95; *B.C. Packers Ltd.*, 9 C.L.A.S. 17 (McPhillips); *Community Social Services Employers’ Association*, [2005] B.C.C.A.A.A. No. 158 (Gordon).

With those general principles in mind, it is now appropriate to turn attention to the particular provisions of Article XXVIII of the 2010 – 2014 Collective Agreement. Specifically, the significant subsections that have been identified are subsections (a), (c), (f) and (g) and each of these needs to be discussed in considerable detail.

Once again, subsection (a) reads as follows:

- (a) A permanent partial closure occurs when a major operating component of a manufacturing facility is declared closed by the Company or has not operated for a period of 24 months. The major operating components of a manufacturing facility are defined as a sawmill, planer mill and dry kiln.

The second sentence of this provision is not in dispute and both parties agree that under the new language in the 2010 – 14 Agreement, the closure of a planer mill would involve a “major operating component” of the facility. The disagreement is over the effect of the first sentence, specifically as to when there was a “closure” in Nanaimo. In that regard, the parties referred to a number of authorities dealing with the meaning of “closure” in the forest industry: *Island Shake and Shingle Co. Ltd.*, December 31, 1982 (McKee); *Downie Street Sawmills Limited*, November 28, 2988 (Munroe); *FIR and IWA*, May 31, 1989 (Mr. Justice Lysyk); *Stave Lake Cedar Mills Inc.*, September 29, 1988 (McKee); *Hayes Forest Services Ltd.*, [2006] B.C.C.A.A.A. No. 115 (Hope); *Carrier Lumber Ltd.*, [2010] B.C.C.A.A.A. No. 10 (McConchie); *West Fraser Mills Ltd.*, 199 L.A.C. (4th) 344 (Burke); *Eurocan Pulp and Paper Company*, [2010] B.C.C.A.A.A. No. 158 (Munroe).

These authorities all deal with complete plant closures where there was no specific time limitation in place in the collective agreements. These involved situations where employers were claiming that these were “temporary closures for indefinite periods” and thus, according to the unions, avoiding the obligation to pay severance pay. The disputes in those cases were factual ones regarding the point at which the company actually determined the mill would not be re-opened and, therefore, was permanently closed. The inquiries in those cases focused on the “intent” of the employer in each case as well as whether there was objective evidence to support the company’s position. Thus, the status of “permanent” closure was determined on the basis of the objective facts and not solely on the intention (real or claimed) of the employer. In other words, in these types of cases the decision must be based on a “mix of objective and subjective

considerations”. That sentiment was summarized by Industry Arbitrator Mr. Justice Lysyk in *FIR and IWA, supra*, who observed, at p. 9:

If such a date has not been fixed, Article XXXII in its present form requires an arbitrator to decide in light of all the relevant circumstances whether or not the closure is permanent. A conclusion concerning the permanence of a particular plant closure will turn on the facts of the particular case and the issue cannot be resolved in the abstract by this interpretation.

It is also clear from these decisions that the conclusion about when a closure occurs is not defined by the period of time during which the retention of seniority rights of employees continues under the applicable agreement. Put another way, the loss of seniority retention rights does not automatically convert a temporary closure into a permanent one. *Downie Street Sawmills Limited, supra; FIR and IWA, supra; Hayes Forest Products, supra; Carrier Lumber Ltd., supra.*

Unfortunately for present purposes, these authorities do not particularly aid in the task at hand as the language in Article XXVIII dealing with partial closure is far more specific. In my view, the plain and ordinary meaning of the language in subsection (a) is that permanent partial closure occurs whenever one of two things occurs – either a company declares that a principal component of the operation is closed or there is a passage of 24 months from the date that part of the operation was initially curtailed. While far more will be said about extrinsic evidence below, it should be noted that the Employer’s own bargaining proposals on May 5 refer to severance pay being payable in the case of permanent partial closures on the basis of the employee’s seniority “at the date of the layoff, not the permanent plant closure”. That constitutes further support for the proposition that a permanent partial closure occurs either at the time of a declaration by the Company or the passage of the 24 months from the initial curtailment.

We turn our attention next to subsection (c) of Article XXVIII:

- (c) In the event of a permanent partial closure is declared by the Company, or the facility has not operated for a period of 24 months the employees who were employees of record at the commencement of the closure are entitled to severance pay. Severance pay is calculated on the basis of the employee’s seniority at the date of the layoff, not the date of the permanent partial closure.

On its face this provision does not directly address the issue in dispute as it deals with an employee’s entitlement once it has been established which employees are entitled to collect the severance pay. However, it is apparent that the parties are using

contradictory terms in this provision. The last sentence indicates that severance pay is calculated on the basis of seniority at the date of the layoff (or curtailment) and “not the date of the permanent plant closure”. That usage seems to line up directly with the language of subsection (a) by indicating that the closure occurs when there is a declaration by the Company or 24 months have elapsed from the date of the layoff. However, the first sentence of subsection (c) introduces ambiguity into the situation. It refers to individuals who were “employees of record at the commencement of the closure”. (It should be noted that in its bargaining proposal in the June 28 meeting, the Company used similar language in referring to the initial curtailment as “the commencement of the closure”). Therefore, the parties in subsection (c) did not use the terms layoff or curtailment to indicate the initial shutdown but rather referred to that occurrence as the “commencement of that closure”. The inference to be drawn from this is that the use of “closure” in this provision was intended to have a broader meaning than simply the date of the declaration or the passage of 24 months and that “closure” may involve the initial curtailment as well as the declaration or passage of 24 months.

The next subsection of relevance in Article XXVIII is (f):

- (f) Severance pay is not payable if an employee affected by a permanent partial closure is offered a position within the same operation of the Company.

The Employer correctly asserts that this provision also seems to indicate that the time of the layoff or initial curtailment is part of the closure process. If not, this provision would have to be read as meaning that an employee who is offered a position in the same operation soon after he has been laid off would still be entitled to severance pay but if the position was only offered once the “permanent partial closure” occurred after 24 months then that employee would not get severance pay. In my view that would be an absurd and impractical result and, thus, this provision adds further confusion as to usage of these terms.

Finally, and most importantly, we turn to subsection (g)

- (g) The application of this Article becomes effective upon ratification of the 2010 Collective Agreement. There is no retroactivity of application of this Article affecting events occurring prior to ratification.

The critical issue here is the meaning to be given to the term “retroactivity” as it was used by these parties. Both Counsel provided authorities dealing with the legal

concepts of “retroactivity” and “retrospectivity”: *North Shore Taxi (1966) Ltd.*, [1993] B.C.L.R.B.D. No. 31; *Government of British Columbia*, No A201/03, October 15, 2003 (Hall); *International Forest Products Ltd.*, [2005] B.C.C.A.A.A. No. 52 (Steeves); *Grand Forks District Savings Credit Union*, B.C.L.R.B.D. No. B275; *MacMillan Bloedel Industries*, B.C.L.R.B. No. 46/74; *Canadian Cannery Ltd.*, 4 L.A.C. (2d) 59 (Schiff); *Central Canada Potash Ltd.*, 10 L.A.C. (2d) 29 (Norman); *Bell Canada*, 15 L.A.C. (3d) 27 (M. Picher); *Stelco Parkdale Works*, [1993] O.L.A.A. No. 928 (Rayner); *Air Canada*, [1999] C.L.A.D. No. 113 (Frumkin).

In *North Shore Taxi*, *supra*, the British Columbia Labour Relations Board was dealing with amendments to the *Labour Relations Code* with respect to the use of replacement workers (Section 68). The Labour Relations Board quoted extensively from an article by Professor Driedger “Statutes: Retroactive Retrospective Reflections, *Canadian Bar Review*, (1978) Vol LV1 264, as to the meaning of the retrospective and retroactive and their effect on the interpretation of a statute.

In essence, the law dictates there is a presumption against retroactivity and in favour of prospectivity and that approach has been widely applied in the arbitral authorities that were cited above. However, in this case, these parties have expressly addressed the issue in subsection (g) of Article XXVIII and recorded their agreement as to the intended effect of the provision. It is to those specific terms that effect must be given in these circumstances.

The first sentence of subsection (g) mandates that the terms of Article XXVIII become effective on the date of ratification of the Agreement, which as it turned out was August 23, 2010 and there is no dispute between the parties on that point. The second sentence of the provision, however, is the source of considerable disagreement between the parties. At issue are the meaning and effect to be applied to the terms “events” and “retroactivity”.

The Employer asserts that the meaning that must be given to the term ‘event’ is that of a “thing that happens or takes place” (Concise Oxford Dictionary, 10th ed); *Marcoccia (Litigation Guardian of)*, [1995] OJ No. 1894. It submits, first, that the ‘event’ is the closure of the planer mill and that occurred in December 2008. It maintains that a declaration of permanent partial closure is a declaration about the ‘status’ of an

event that has previously occurred. The Employer argues that the 'event' cannot be the passage of 24 months because that time period only has relevance with respect to an 'event', in this case one which had occurred in December, 2008.

In the alternative, it is submitted by the Company that subsection (g) uses the term "events" in the plural and, thus, it is clear that the parties intended all "events" to have occurred after the ratification. Here there were two "events", the initial curtailment in December 2008 and then the passage of the 24 months and both of these had to have occurred after the ratification of this Agreement.

The Union's view is that the 'event' contemplated in subsection (g) is either the declaration of the closure by the Company or the passage of 24 months at which point the permanent partial closure occurs. Until one of those occurs, there has been no permanent partial closure and all that had happened (in this case in December 2008) was that there was a curtailment or layoff from which the employees could be recalled. In this case, the status of the permanent partial closure of the planer mill was not attained until the passage of the 24 months from the date of the layoffs and that is the "event" for the purposes of subsection (g).

In my opinion, the arguments about the meaning of the term 'event' are not determinative. If the parties had truly intended that the "closure" was to be the single event (i.e. either a declaration or the passage of 24 months) then the parties could also have used the term "closure" in subsection (g) so as to clearly line up with subsection (a). Alternatively, although slightly less clear, would have been the use of the singular term 'event' which would have given some support to the Union's position. However, that is not the situation. The parties have used the plural term "events" in subsection (g) so it must be concluded that they were intending to refer to more than a single event. That usage of the plural term must be given effect in this interpretation exercise.

At this point, it is also worth revisiting the wording in subsection (c) of Article XXVIII. As noted above, in that subsection the parties seemed to be treating "closure" as involving both the original curtailment (the "commencement of the closure") and the ultimate decision to close a part of the operations. Thus, it appears they certainly recognized there was more than one event occurring. This reference in subsection (c) lends support to the notion that the parties in subsection (g) were intending to refer to

both of these occurrences and that is why they chose to employ the plural term “events” as opposed to a singular term such as “event” or “closure”.

As a result, it appears, on an objective reading of subsection (g), that the parties contemplated more than one event, that is, both the shutdown/curtailment/layoff as well as the “closure” itself (the declaration or the passage of 24 months) having to occur after the date of ratification in order for the provisions of the 2010 – 2014 Collective Agreement to have application.

It is with respect to the interpretation of subsection (g) that the extrinsic evidence becomes potentially helpful. As indicated in points three and four of Arbitrator Bird’s list of interpretive guidelines, an arbitration board may have recourse to extrinsic evidence, specifically past practice or bargaining history, to aid in the interpretation of disputed provisions: *UBC and CUPE*, B.C.L.R.B.D. No. 42/76, [1977] 1 Can L.R.B.R. 13; *Nanaimo Times Ltd.*, [1996] B.C.L.R.B.D. No. 40, February 12, 1996; *Board of School Trustees, Prince George School District*, B.C.L.R.B. No. 41/76; *Health Employers’ Association of British Columbia*, 77 L.A.C. (4th) 237 (Sanderson); *Cowichan School District No. 65*, [1992] B.C.C.A.A.A. No. 146 (Kinzie); *John Bertram and Sons Co. Ltd.*, 18 L.A.C. 362 (Weiler); *Board of School Trustees of School District No. 62 (Sooke)*, [1995] B.C.C.A.A.A. No. 27 (McPhillips); *Corporation of the District of Maple Ridge, supra*; *MDS Nordion Inc., supra*; *Strait Crossing Joint Venture*, 64 L.A.C. (4th) 229 (Christie); *British Columbia Hydro and Power Authority*, [1987] B.C.C.A.A.A. No. 4 (Hope); *Gulf Concrete Products, a Division of DeMilo Developments Ltd.*, [1982] B.C.L.R.B.D. No. 42.

This jurisprudence makes it very clear, however, that extrinsic evidence must be used to establish the mutual intention of the parties and that evidence of the unilateral intent of one of the parties is not particularly helpful. As Arbitrator Munroe observed in *Eurocan Pulp and Paper Company*, November 10, 1992, at p. 10, there are “potential dangers of using one side or the other’s bargaining objectives or positions as a key interpretive pivot – especially where, as here, one is dealing with contract language which is both highly charged and a tough compromise”. Similarly, in *Strait Crossing Joint Venture, supra*, Arbitrator Christie noted, at para. 238, that “evidence of what people thought, even when corroborated by evidence of their actions, does not easily

meet that requirement”. As well, the extrinsic evidence cannot be used to override or avoid a clear term of the collective agreement as it is critical that the “reasonable expectations of the parties not be defeated”: *Corporation of District of Maple Ridge, supra*, at p. 88. These principles have been articulated on many occasions by the Labour Relations Board, most prominently in *UBC and CUPE, supra*, and *Nanaimo Times, supra*.

In the context of the present case it bears repeating that the evidence of every one of the witnesses in this hearing was that a permanent partial closure at Nanaimo was never discussed by the parties at bargaining. As a result, there is absolutely no evidence of any clear and unequivocal statement by either side that this language would or would not apply if that eventuality developed. However, that is not the end of the matter.

With respect to some of the evidence, there is uncertainty as there were many remarks that could be interpreted in support of either party. For example, the Union’s notes of the May 29 session state the following in the “conclusions” section, at point 4:

4. Western Forest Products responds to the union’s clarifying questions on a permanent partial plant closure and how it might effect the existing operations that are permanently or partially closed by stating with regard to the Nanaimo sawmill that under the terms of the last agreement, as of December 15th 2010, if Western Forest Products hasn’t started that mill, it is permanently closed and the employees will be eligible for severance. With regard to the Somass mill that in February of 2010 Western Forest Products restarted the sawmill portion of the mill and not the planer and took the position at that time that it would not be eligible for severance under permanent partial closure because the planer is not the principle processing or production part of the plant under the existing language. With regard to the Duke Point sawmill, Western Forest Products is running the planer mill and as a result, the planer employees will not be eligible for severance.

The essence of the statement is that Company was referring to the total closure of the Nanaimo mill only but the overall response was made in the context of both a permanent or partial closure.

Another example relates to the numerous occasions on which the parties referred to the new Agreement being applied on a “go-forward basis”. It often appears most likely that the parties were referring to all events that had yet to have occurred but it is conceivable that the “go-forward” basis could have been interpreted to apply only to any final closures (either the declaration or passage of 24 months) which had not yet occurred.

There was also evidently some confusion with respect to the application of the Pletz Amendment at various stages of the negotiations. However, the Pletz Amendment would not resolve the dispute about the application of subsection (g) in any event as it applied to both the 2007 – 2010 Agreement and would continue to apply as to the 2010 – 2014 Agreement. Those discussions involved a commitment from the Company that in the case of a total plant closure, severance pay would be payable after 24 months. It places a time limit (similar to the language for partial plant closures) on how long a plant could remain closed with the employer claiming it might reopen, thus avoiding arguments about whether a plant was permanently closed or whether there was a legitimate intention to re-open it. When the Company agreed that if there was a total closure then the 24 month criteria would be applied, the type of dispute arising in Carrier Lumber was avoided. It was on that basis that the Company agreed that in the case of a total closure at Nanaimo (the 24 months would expire in December 2010) severance pay would be payable.

It is also apparent that there were some instances during the negotiations when it was not at all clear whether the new or old Collective Agreement was being discussed. This same observation applies with equal force to the discussions involving whether there was a “waiver” of the five year eligibility under the “old” Agreement or that it would not be applied due to the adoption of the new language in the 2010 - 2014 Agreement. There was also confusion added throughout the negotiations by the fact that Duke Point, Nanaimo and Andy’s Bay were being discussed at the same time, although each involved significantly different fact patterns. Indeed, Mr. Smith conceded during his cross-examination that there may have been times when the parties were “ships passing in the night”.

I agree with the Union that these examples are far too equivocal to be used in any way as an aid to interpretation. However, there are other areas of the extrinsic evidence that provide a clearer window into the apparent intention of the parties.

The first area in that regard relates to the meaning to be attached to the usage of the term “shut down” by the parties during these negotiations. It is worth noting that in the arbitral decisions relating to closures in the forest industry, which were discussed above, the term “shut down” is more often used to refer to the initial curtailment or

cessation of operations: see, for example, *Downie Street Sawmills Limited, supra*. Indeed, Mr. Wong in his direct evidence concerning the June 29 meeting testified that this meant “the clock started ticking at the date of the shut down” although he then clarified his response indicating that the term might also refer to either the ultimate decision to close the mill or the passage of the 24 months.

There were times, however, where the meaning that these parties were applying to “shut down” appears to be very clear. Most critically, that observation applies to the discussions in the negotiation session on June 29. In that regard, the Union’s notes indicate the following exchange occurred between Mr. Mercer and Mr. Matters:

46. Bob Matters wonders what will happen with Nanaimo if it doesn’t restart with regard to the employees receiving severance pay – the question that the union is kicking around is which language will cover the situation and further they wonder if the retro-active would apply; and if the company accepts the union proposal, would the 20 days be in effect or the 10 days be in effect. He also asks when the 24 month clock starts ticking – would that be from the day of the last shut-down or the time of the announced permanent closure.
47. Harold Mercer says that you have the answer and it starts ticking on the day of the shut-down and you have it in the minutes ...

...

50. Harold Mercer says the severance formula that applies will be the permanent partial plant closure language that is in effect on the day that it is shut-down.
51. Bob Matters says he understands that the existing severance language would be followed for those who have been shut-down during the term of the existing collective agreement and that those who have been shut-down after the new agreement was ratified, they would be under the terms of the new agreement.

In my opinion, those comments clearly indicate both Mr. Matters (who was actually the first to use the term “shut down” in this exchange at para. 46) and Mr. Mercer were clearly using the term “shut down” to refer to the time of the curtailment or original layoff. When one reads those passages in an objective manner, it is undisputable that “shut down” was being used by the parties in that sense. The comments by Mr. Matters in paragraph 46 clearly distinguish between the “shut down” and the permanent plant closure announcement (or the passage of 24 months). Again, in paragraph 51, he appears to make it very clear that for the “new” language to apply the “shut down” or

initial curtailment had to occur after ratification in order for the terms of the new Agreement to apply.

This is further reinforced by a different comment of Mr. Matters during those discussions on June 29 (Company notes – para. 28) where he stated “if we were successful in negotiations today, 20 days (the severance pay at that time) would apply to any operation that is operating when we ratify and subsequently shuts down”. That remark also indicates that the Union was of the view that for the new language to apply the operation had to be actually operating after the time of the ratification and then be shut down at a later date. This conclusion is further supported by the comment made by Mr. Matters which is recorded at paragraph 24 of the Company notes. Mr. Matters states with respect to Duke Point that “the planer is still there. So theoretically you would start the planer next week and the new language kicks in”. Mr. Mercer then responds affirmatively to that statement.

The clear implication of all these exchanges is that a mill which was already shut down but the 24 months had not yet elapsed would not be covered by the new language in the 2010 – 2014 Collective Agreement and chief negotiators for the two parties expressly agreed on that point.

That there was such an understanding in bargaining is also supported by discussions subsequent to the Agreement being drawn up. I refer specifically to the meeting on July 30 between Mr. Smith, Mr. Mercer, Mr. Wong and Mr. Kobayashi as well as to Mr. Smith’s responses to Mr. Kobayashi’s subsequent email.

During his evidence, Mr. Wong agreed that in that July 30 meeting it was clear that the Company agreed to take out the five year eligibility requirement which was required under the “old” Agreement and that severance pay would be paid, if Nanaimo remained in total closure, under the terms of the 2007 – 2010 Agreement. Mr. Wong conceded in his evidence that the Company agreed the five year condition would not apply to Nanaimo and that had to be a concession “made under the “old” Agreement as if the “new” Agreement was in effect such a concession would have been unnecessary. In my view, that is unequivocal evidence that parties were operating on the understanding that the Nanaimo situation was governed by the 2007 – 2010 Agreement. If that was the

case, then the shut down of only the planer mill would not attract severance pay for the same reasons it had not in the Somass situation.

That understanding was confirmed in the subsequent email from Mr. Smith indicating that “in the event that the Nanaimo Sawmill restarts between now and December 15, 2010, employees will be subject to the terms of the new “Permanent Partial Closure” language recently negotiated as part of the 2010 – 2014 collective agreement”. That is another indication that the parties were *ad idem* that for the new language to apply the mill had to be restarted after ratification and then subsequently shut down. The corollary, of course, is that if the mill did not restart, then the “old” language remained in effect or to put it, as Mr. Smith testified, “Nanaimo went down under the old language”.

Moreover, Mr. Smith’s responses to Mr. Kobayashi’s questions seem to be equally clear that the 2007 – 2010 Agreement applied to the Nanaimo situation. In his preamble, Mr. Smith stated that “I have responded to Gary’s question on the understanding that the sawmill (principal processing or production part) has restarted or not, which is consistent with the current Permanent Partial Closing language (2007 – 2010 Collective Agreement)”. Mr. Smith then indicated the following with respect to the Nanaimo operation:

- Has been curtailed since December 15, 2008. *Yes.*
- In the event that the sawmill does not restart by December 15, 2010, all employees who were employees of record at the commencement of the closure are entitled to severance pay including those with less than 5 years. *If the current operating status of the Sawmill (the principal processing and production part) does not change by December 15, 2010, then yes severance is payable to employees of record, including those with less than 5 yrs seniority.*
- In the event that the sawmill does restart by December 15, 2010, the Permanent Partial Closure provisions of the 2010 – 2014 collective agreement will apply. *If the Sawmill restarts then yes the employees are subject to the new (2010 – 2014 CA) Permanent Partial Closure language.*
- In the event that the mill does not restart by December 15, 2010, employees who filed a preferential hiring application and renewed the application in a timely manner, will be covered by the preferential hiring provisions of the 2007 – 2010 Coast Master Agreement. *Yes, and to reinforce your point, employees must have met the current PH (2007 – 2010 CA) application requirements (ie. Section 7(f)).*
- In the event that the mill does restart by December 15, 2010, employees will be covered by the preferential hiring provisions of the 2010 – 2014

Collective Agreement. *Yes, the switch to the 2010 – 2014 PH rules occurs only if the Sawmill restarts, if it doesn't restart then the current PH rules apply.*

The second bullet reiterates that the “new” Agreement will apply only if the mill is restarted. The third and fourth bullets go on to indicate that if the mill is not restarted, then it is the terms of the “old” Agreement which would also apply to preferential hiring rights.

It is also important to note that the “revised” paragraph with respect to Duke Point makes it even clearer what was intended. It stated:

Duke Point Sawmill – Currently the Duke Point Sawmill is operating on a restricted basis, with only the Planer Mill operating. As the Sawmill portion of the operation last ran on October 14, 2009 and the mill's current operating status occurred during the term of the 2007 – 2010 collective agreement, the operation is subject to the 2007 – 2010 Permanent Partial Closure language. In the event that the sawmill restarts, employees will be subject to the Permanent Partial Closure language found in the 2010 – 2014 collective agreement.

Mr. Wong agreed in his testimony that it was his understanding at the time that Mr. Smith was making it very clear here that it was the “old” Agreement that was being applied and that the “new” Agreement would apply to Nanaimo and Duke Point only if there was a “restart” and a “subsequent” closure. He also agreed with Employer Counsel that the Union never responded to the Company indicating that a different understanding existed on the part of the Union.

In summary then, while the extrinsic evidence related to the 2010 negotiations, while not absolutely unequivocal in some places, supports the Employer's view of what was agreed to by the parties.

Divining the mutual intention of the parties is an objective exercise and does not involve determining the unilateral intentions of each of the parties. As indicated above, if either of them is incorrect about the meaning of what was agreed to, that does not void the agreement. In *Teck Cominco, supra*, Arbitrator Taylor thoroughly addressed the matter of a unilateral mistake in his Award at paragraphs 57 - 60:

57 [56] The Union argues that here, each party came away with a different view of the substance of their agreement. That argument may be sufficient in cases where the alleged agreement is nothing more than an exchange of misunderstood promises. However, in circumstances where there is a documented agreement, and it matches one party's view, the mere fact that the

other party's view differs does not establish mutual mistake. In this case, the signed agreement incorporating Appendix 1.2 is precisely what the Employer intended to achieve, and agreed to. There was no mutual mistake. The Union's mistake was unilateral.

58 [57] The Union also argues the Employer's mistake was that it thought its proposal had been communicated and accepted. I do not find this establishes mutual mistake as to the term agreed. The Employer did believe its proposal had been earlier communicated to the Union by the Mediator; however, that is not a belief that would establish mutual mistake affecting the validity of the term itself. (And Appendix 1.2 was present when the MOS was signed.) The Employer's belief that Appendix 1.2 was accepted by the Union was not a mistake; the Union accepted it when it signed the MOS expressly incorporating it.

59 [58] Accordingly, the Union's mistake was unilateral, and the doctrine of mutual mistake does not apply.

60 [59] At first glance, the law of mistake may seem unduly harsh in its general refusal to relieve a party from a unilateral mistake. However, its reluctance can be better understood when it is appreciated that, in the context of a concluded agreement, what must be addressed is not the rights of a single party, but the balance that is struck between two parties. In circumstances such as the present case, removing part of the bargain on the grounds of one party's unilateral mistake would be adjusting the bargain in favour of that party, to the detriment of the party who was not mistaken. Fairness, then – as seen from the perspective of both contracting parties – is one of the rationales for the law of mistake.

Applying that principle here, it certainly appears that Mr. Wong was personally of the view that the new permanent partial closure language would apply to the Nanaimo situation as can be seen from the email he sent to the Union bargaining agents on July 23 but which, it must be noted, was not copied to the Employer. I readily accept the evidence of Mr. Wong concerning his view of what had been agreed to during these negotiations in 2010, but I find that the objective evidence indicates that he was mistaken in his understanding. That conclusion applies as well with respect to the very short "side-bar" meeting he and Mr. Matters had with the Employer committee on July 23 during which Mr. Wong felt that certain commitments had been made.

As noted above, in cases such as this where the claim is for significant amount of money, it must be established that the parties clearly and unequivocally intended a particular result. This is not to say that the Union bears the onus in a legal sense of proving its interpretation is correct: *CN/CP Telecommunications*, 18 L.A.C. (3d) 78 (Picher); *BC Hydro*, January 5, 1987 (Hope). However, in these situations, the language

of the collective agreement must be construed by an arbitration board with strictness and there should be a reluctance to infer or imply intentions to the parties that may not have been present. That requirement has been expressed in a number of ways. For example, Arbitrator Morrison (as she then was) observed in *Vancouver Hospital, supra*, at para. 45, that “arbitration boards must be careful not to confer any additional monetary benefits to a collective agreement, unless the intention of both parties is clear and unambiguous”. Similarly, Arbitrator Hope in *BC Hydro, supra*, observed at p. 31, that there must be “evidence in which the intention to confer the benefit arises expressly or necessary implication”. Finally, Arbitrator Kelleher (as he then was) stated in *Highmont Operating Corporation*, October 31, 1985, that “the more grave the consequences to the parties concerned, the more inherently unlikely it is that their bargain in that regard would be expressed in anything other than appropriately precise language”. That is the legal test which must be applied and in these circumstances there is an absence of clear and cogent evidence to establish that it was the mutual intention of the parties to confer severance pay on employees at Nanaimo if only the planer mill were to remain closed.

In summary, it has been concluded that the more reasonable interpretation of the wording of the provisions in Article XXVIII is that which has been suggested by the Employer. Further, when the extrinsic evidence is analysed on an objective basis it adds support to that conclusion. As a result, the Union’s grievance in the present case must fail.

AWARD:

For all of the above reasons, the Union’s grievance is denied.

Dated this 17th day of February, 2012.



David C. McPhillips
Arbitrator