Conifer
Arbitration
Report

AR No. 3/89

RE: DOWNIE STREET SAWMILLS LIMITED
AND
IWA-CANADA, LOCAL 1-417

PERMANENT CLOSURE VS CESSATION OF OPERATIONS - Severance Pay

The issue was whether the suspension of operations of the Company's sawmill in January 1986, constituted a "planned permanent closure" within the meaning of the collective agreement provision.

The Union, through a nominal grievor, claimed severance pay under the terms of the collective agreement dealing with "permanent closure." The Union claimed that the cessation of operations extended to the point that all employees had lost their "seniority retention," and were thus "...terminated... because of a planned permanent closure...."

The Arbitrator's remarks, indicated on Pages 12 and 13 of the award, state there is not "...an inevitable or automatic link between the "seniority retention" provision and the "permanent closure" provision of the agreement."

The grievance was dismissed.

R. A. Rogers,
Manager, Employee Relations

RAR/JLD

Enclosure

Jan. 9/89

IN THE MATTER OF AN ARBITRATION

BETWEEN

DOWNIE STREET SAWMILLS LIMITED

(the company)

AND

INTERNATIONAL WOODWORKERS OF AMERICA
LOCAL 1-417

(the trade union)

(Grievance of Aubrey Salon et al --
Severance Pay)

Arbitrator	:	Donald R. Munroe, Q.C.
For the company	:	Gary Catherwood
For the trade union	:	David Pidgeon
Dates and place of hearing	:	October 20 and November 9, 1988 Vancouver, B.C.

The parties agreed that I was properly constituted as an arbitration board under their collective agreement with jurisdiction to resolve the issues in dispute.

At the material times, the company and the trade union were covered by the Southern Interior Master Agreement which is a collective agreement binding on various forest industry employers and three locals of the International Woodworkers of Canada. This grievance alleges a breach by the company of Article XXIX(a) of the Master Agreement which states:

> Employees terminated by the Employer because of planned permanent closure of a manufacturing plant shall be entitled to severance pay equal to one week's pay for each year of continuous service and thereafter for partial years in increments of completed months of service with the Company.

See: CONIFERS' AGREEMENT ART XVI Sec 6

The issue at hand is whether the suspension of operations of the company's sawmill at Revelstoke, B.C., in January, 1986, constituted a "planned permanent closure" within the meaning of that provision.

The facts are as follows. In the early and mid-1980's, the forest industry in British Columbia suffered severe economic setbacks. A few mills closed and were not re-opened; reduced operations and layoffs were commonplace; and there was a general rationalization of productive facilities.

The company's mill at Revelstoke did not escape the economic malaise. Its first sustained closure due to market conditions was from October, 1981 to May, 1983. For most of that period, there was a complete cessation of operations. Apart from watchmen, the whole of the bargaining unit was laid off. Most (not all) of the employees lost their "seniority retention". In that connection, Article X(10) of the Master Agreement provides that:

> Seniority during layoffs shall be retained on the following basis:
>
> (a) Employees with less than one (1) year's service shall retain their seniority for a period of eight (8) months.
>
> (b) Employees with one (1) year's service shall retain their seniority for one (1) year, plus one (1) additional month for each year's service, up to an additional six (6) months....

Throughout the shutdown, steps were taken by the company to preserve the assets, and to ensure the readiness of the mill for resumed operations when conditions warranted. As examples, certain of the equipment was greased and oiled in the ordinary way; the mobile equipment was periodically started; drive belts were loosened to maintain them in working condition and to preserve bearing life; some of the heavy components were occasionally turned to ensure the integrity of the moving parts; snow removal was done normally to prevent the collapse of any building

structures, and to allow ingress and egress; the sprinkler system was properly maintained for fire protection purposes; the office equipment and records were kept in good order.

As I have indicated, the 1981-83 shutdown was approximately 18 months in duration -- with the result that many but not all of the employees lost their "seniority retention". There was no claim or demand for severance pay. Presumably, the trade union was of the view that the shutdown was not a "planned permanent closure" within the meaning of Article XXIX of the Master Agreement.

The mill was re-opened in May, 1983. The reason for the resumption of operations was an improved market climate such that the company would sustain a lesser loss by operating than by remaining closed.

About two years later, in mid-1985, the company put together its projections for the 1986 cutting year. Without exploring this in detail, the projections were that drastic losses would be sustained by continued operations. In an effort to alter those projections, the company prepared a cost reduction package for consideration by public agencies and the trade union. The two public agencies that the company approached were the Ministry of Forests (seeking new operating areas) and the Critical Industries Commissioner (seeking a reduction of municipal taxes and Hydro rates).

The approach to the trade union was directed towards obtaining wage or benefit concessions.

Those efforts did not succeed. In the result, a cessation of operations was initiated in December, 1985. The last of the bargaining unit employees was laid off in January, 1986. In a press release issued in December, the company characterized the cessation as being "...a temporary closure for an indefinite period".

The company took the same steps as during the 1981-83 closure to preserve the assets, and to keep the mill ready for resumed operations. To flesh that out somewhat, there was further evidence that the mill supplies and spare parts were retained on site, and that insurance premiums and taxes were kept current.

When the mill was shut down, the company came under pressure from the Ministry of Forests either to find a way to operate or to sell the mill to someone who could bring a different set of economics to bear on it. The leverage which the Ministry brought to those discussions was the threat of cancellation of forest licences. To hold the Ministry at bay, the company agreed that it would not remove any logging inventory from the site without prior notification; that it would re-examine the economics of the

operation; and that it would simultaneously offer the mill for sale.

But in September, 1986, the Ministry cancelled the company's forest licences. Pursuant to the Forest Act, the company appealed the cancellation to the Regional Manager. Its appeal was not successful. It then appealed to the Chief Forester. Again, it was unsuccessful. As permitted by the statute, the company appealed to an independent tribunal. Once again, it did not succeed. Undaunted, the company petitioned the Supreme Court of B.C. pursuant to the Judicial Review Procedures Act. The petition for judicial review was dismissed. An appeal was launched to the Court of Appeal. For reasons which will shortly be explained, the appeal did not proceed to a hearing.

During this period, the company was actively attempting to sell the mill. It prepared and circulated a detailed information package in which the mill -- its fixed and operating assets -- were advertised as a going concern. There was no attempt to sell any of the assets individually or for salvage.

All of this was being coordinated by Federated Co-operatives Limited, of which the company was a wholly owned subsidiary. There were a number of serious inquiries by prospective purchasers. Finally, in early May, 1988, a sale

was completed. The purchaser was described in evidence as Stardust Ventures Ltd. The transaction was by way of sale and purchase of shares -- i.e., Federated Co-operatives Limited sold all the shares of the company to Stardust Ventures Ltd. The company continued in existence as the operating entity.

I said above that the appeal to the Court of Appeal in connection with the cancellation of timber licences was not heard. That is because when the sale of the company's shares was completed, new timber licences were issued and the appeal was abandoned.

Later in May, 1988, the mill was re-opened. It continues to operate to this date. Of course, by the time the mill was re-opened (some 28-29 months after the cessation of operations), all the employees in the bargaining unit had lost their "seniority retention" (that loss having occurred for the most senior employees in or about June, 1987). Nevertheless, as best I can gather from the evidence, all were offered the opportunity to return. Some accepted the offer; some did not. An example of someone in the latter category is Aubrey Salon who is the nominal grievor in this group grievance. Mr. Salon had obtained alternative employment, and decided that his future was more secure by staying where he was.

As the last of the "seniority retention" rights were expiring, the trade union made a claim for severance pay. When the claim was turned down, the trade union lodged a grievance in the following terms:

> On behalf of Aubrey Salon...and all other employees who lost or will lose their seniority rights, this letter will serve as the first step of the grievance procedure regarding Article XXIX of the collective agreement.

The case for the trade union can be simply stated: severance pay is due and owing under the terms of Article XXIX of the Master Agreement where a suspension of operations has extended to the point that all employees have lost their "seniority retention". Here, that occurred in early June, 1987, at which time the mill was still for sale and there was no word from the company as to a possible resumption of operations. Hence, says the trade union, I must find that at that point, the employees were "...terminated...because of [a] planned permanent closure" of the mill.

Reliance was placed by the trade union on the award in Council of Marine Carriers (1983) 10 L.A.C. (3d) 375 (Munroe). There, the collective agreement provided that "Employees...who were displaced...due to...permanent reduction in the...number of employees..." would be entitled to severance pay. The bare facts of the case were set out at pp.376-77:

> The underlying cause of this dispute is the current economic recession, especially as it has affected the British Columbia forest industry. By nature, the tow-boat industry is dependent on the fortunes of other industries. The coastal forest companies, as a group, are the biggest single customer of tow-boat services. Over the years, the tow-boat industry has been as cyclical as its major users. As the forest companies have experienced ebbs and flows, so have many of the tow-boat companies. In any given year, there are lay-offs. But in recent memory, these have been of fairly short duration: rarely more than a few months. What is now being experienced is uncommonly enduring. As the current economic malaise took hold, lay-offs were implemented. And some of the employees of some of the member companies have been out of work for more than a year. Some employee complements have been severely cut. The reason, quite simply, is lack of work. On the evidence, a credible prediction about recalls is impossible.
>
> As some of the Guild's members passed the one-year mark, it took the position that the severance pay provisions of art. 1.33 were now applicable. The Guild's view is that there has been a "reduction in the number of employees"; further, that such reduction must now be characterized as "permanent" for those whose lay-offs have exceeded one year.

These passages appear at pp.379 and 382-83 of the award:

> The next analytical issue has to do with the word "permanent". It is only job loss due to permanent reduction in the number of employees which triggers the payment of severance benefits...
>
> ...Where a lay-off is of indefinite duration, and where the situation is both enduring and without a foreseeably marked alteration, it is natural to think that a condition of permanency may have been attained.
>
> But a final interpretive judgment should not be reached in the abstract. It must take account of the industrial context in which the agreement was

negotiated. As was observed at p.379 of the earlier-cited decision in Consolidated Aviation:

> In the area of collective bargaining temporary may have different connotations in different plants within an industry. Thus, a temporary lay-off for retooling in the automobile industry has a different meaning from temporary in the canning or building industry.
>
> Dictionary definitions are not of great assistance. The definitions contained in the Oxford Dictionary...do not supply the needed answer of "how many days is temporary in this context" or "what period of time" was considered by the parties to be temporary.

Here, as I earlier noted, the tow-boat industry is cyclical in normal times. The parties are not strangers to lay-offs lasting a few weeks or even a few months. Clearly, by the use of the word "permanent", they did not intend that severance benefits would be payable for "a reduction in the...number of employees..." that was part of the usual cyclical pattern, even where there is a lapse of some months with no date of recall being fixed.

However, the present situation is decidedly abnormal. As I said near the outset, the employee complements of at least some of the member companies have been reduced for more than a year. Some employees have been off the job for more than 15 months. I was told that a few recalls have taken place, but it was not suggested by anyone that that represents a marked alteration to the over-all situation which everyone acknowledges to be without a predictable end in sight.

There is another provision of the collective agreement which is material. It is art. 1.13(f) which states:

> An officer who has been laid off will retain his seniority and the right to be recalled for a period of twelve (12) months...

No mention was made of art. 1.13(f) during the negotiations which surrounded art. 1.33. However, that does not mean that art. 1.13(f) is utterly irrelevant. It is part of the over-all structure of the agreement. It helps to show the industrial context. It demonstrates a mutual view that in

> the circumstances of the tow-boat industry, a lay-off of greater than 12 months should be treated as the equivalent or tantamount to dismissal. It is a complete severance of the relationship.
>
> Article 1.13(f) may not be individually pivotal. But it is a legitimate factor to be considered. The guidance it gives is consistent with a common sense view of things, and serves to make the judgment about the meaning of the word "permanent" less arbitrary.
>
> I hold that the condition of permanency is reached, within the meaning of art. 1.33, where the reduction in the number of employees has endured for 12 months with no date of recall having been fixed.

Slightly closer to home is the award in Island Shake and Shingle Company, October 9, 1981 (McKee). It is closer to home because it arose in the forest industry under a collective agreement which is nearly identical. The collective agreement under which that case arose is the Coast Master Agreement. Interestingly, the severance pay provision of the Coast Master Agreement speaks simply of "permanent closure"; not "planned permanent closure". In my view, the former is a softer formulation than the latter. In his closing submission, counsel for the trade union made an argument which presumed that "planned" modified only "closure". While I agree that for many circumstances, "planned" would not add a great deal of meaning to the word "closure" standing alone, I cannot agree that that is the only word being modified. The qualifier "planned" also applies to the condition of permanency.

As does CONIFERS' ART XVI Sec. 6.

The facts of Island Shake and Shingle were as follows. In December, 1979, the entire bargaining unit was laid off due to poor market conditions. As the arbitrator remarked at p.2, "...no one has worked at the mill since that day." The award was published in October, 1981. That being so, the arbitrator was confronted with a closure spanning some 22-23 months which was still ongoing.

Some five months after the cessation of operations, the mill was destroyed by fire. At the time, the company was in receivership. It struggled to "regain control of its existence and its books"; about one year later, in June, 1981, it was released from the receivership. A principal of the company testified before the arbitrator that "...given suitable financing, leasing and market conditions, it will rebuild"; further, that the company would undertake to make the severance payments if the mill was not rebuilt by October 1, 1982 (another year hence).

At p.7 of the award, the arbitrator concluded as follows:

> After consideration of all the circumstances, evidence and argument in regard to this case, I find as follows:
>
> 1. The Company mill, while burned to the ground, is not in a state of permanent closure as foreseen in Article XXX.
>
> 2. The Company is intent on rebuilding and re-opening the mill subject to suitable financing, lease arrangements, and market

> conditions. I consider that such an endeavour of the Company to continue its operation and provide employment in an industry presently suffering from poor market conditions and high unemployment should be encouraged.
>
> 3. If the Company cannot fulfill its intent to re-open, it is then clear that the situation will quickly move from an intent to rebuild to a permanent closure and the employees will be entitled to receive severance pay in accordance with Article XXX.
>
> I shall retain jurisdiction in this matter to ensure not only the Company's progress in re-activating this operation but also in the event a dispute arises over the calculation or apportionment of severance pay if such payment becomes necessary.
>
> I accept the Company's declaration of payment by October 1, 1982, if it has not rebuilt the mill. Such is a reasonable position to take and for the Union to accept....

Thus, in the circumstances being examined, the arbitrator was unwilling to declare the existence of a "permanent closure" until after the passage of some 34 months. The fact that the employees' "seniority retention" would long since have expired did not attract attention.

The central point to be drawn from Island Shake and Shingle is this: whether a cessation of operations is a "permanent closure" is a question of fact which is to be determined in every case according to the circumstances proven in evidence. In some cases, it would be proper to make such a finding at the first moment of the cessation. In other cases, a very prolonged closure and an evolution of

circumstances will be required for the declaration to be warranted. Thus, the decision as to whether a "permanent closure" has occurred may be a mix of objective and subjective considerations. It is not a decision which is automatically made upon the arrival of the date on which "seniority retention" will be lost. Neither on the face of the collective agreement, nor as a matter of logical necessity, is there an inevitable or automatic link between the "seniority retention" provision and the "permanent closure" provision of the Master Agreement.

I have no difficulty reconciling the awards in Council of Marine Carriers and Island Shake and Shingle. Very simply, the reconciliation lies in the differing language of the two collective agreements. In the former, the focus of the language was on the employees: "...due to...permanent reduction in the...number of employees...." In the latter, as in the instant case, the focus of the language was on the physical plant: "...because of planned permanent closure of a manufacturing plant...." Where the issue of "permanency" relates to the employee complement, it is reasonable and natural to use "seniority retention" as a reference point. But where the issue of "permanency" is cast in terms of the future of the physical plant itself, a different analysis is required. As I said above, it is a question of fact in each case whether a manufacturing plant has been permanently

closed; more especially, whether there has been a "planned" permanent closure.

Of course, unless one is governed by an automatic criterion like "seniority retention", the conclusion is inescapable that the company's mill was not permanently closed. The plain fact is that it re-opened in May, 1988, with many of the same employees working at their former jobs, using the same machinery and equipment, for essentially the same manufacturing purpose. The only real difference was that the shares of the company had been sold to someone new. However, Article XXIX of the Master Agreement is not concerned with new ownership. It is concerned solely with whether the plant has been permanently closed.

I appreciate that if the hearing of this grievance had been conducted in, say, January, 1988, instead of November, 1988, the immediately preceding paragraph could not have been written (recall that the company was not sold, and the mill was not re-opened, until May, 1988). But the facts as we now know them cannot be denied or ignored. In any event, an earlier hearing likely would have produced a decision no more favourable, from the trade union's perspective, than the award in Island Shake and Shingle. The company's witnesses testified that the intention was never one of permanent closure; that it was always the intention that the

mill would be re-opened, either by the company itself when market conditions permitted, or by a new owner if a sale could be consummated. No doubt, such unilateral statements of intention, whether of future intention as in Island Shake and Shingle or of past intention as in this case, must be examined with care. But here, the objective facts do appear to be consistent with the more subjective testimony.

The conclusion I have reached is that there was not a "planned permanent closure" of the company's sawmill within the meaning of Article XXIX of the Master Agreement. Accordingly, the grievance is dismissed.

DATED AT VANCOUVER, B.C., THIS 28th DAY OF NOVEMBER, 1988

Donald R. Munroe, Q.C.
Arbitrator