IN THE MATTER OF AN ARBITRATION

BETWEEN:

HOUSTON FOREST PRODUCTS
A DIVISION OF WEST FRASER MILLS LTD.

("Employer")

AND:

UNITED STEELWORRKS OF AMERICA,
LOCAL 1-424

("Union")

RE:

HARGURMEET PARMAR

("Grievor")

COUNSEL:

FOR THE UNION: Ms. Marjorie Brown

FOR THE EMPLOYER: Mr. Donald J. Jordan, QC

DATE OF HEARING: April 14, 2005
Houston, BC

COLIN TAYLOR, Q.C.
Arbitrator

File: CT2616

I

This arbitration arises out of a grievance whereby the Union alleges that the Grievor's probationary period was wrongfully terminated.

New employees are hired into the Spare Board and undertake a 30-day probationary period of training in entry-level positions.

The Grievor satisfactorily completed 25 days of the probationary period. The Employer's position is that he proved unsuitable with respect to the last and most demanding segment of the period. The Union grieves this decision.

The provisions of the collective agreement which bear on this matter are as follows:

ARTICLE VIII - SENIORITY

Section 1:

a) *Notwithstanding anything to the contrary contained in this Agreement, it shall be mutually agreed that all employees are hired on probation, the probationary period to continue until thirty (30) days have been worked, during which time they are to be considered temporary workers only, and during this same period no seniority rights shall be recognized.*

> b) *Upon completion of thirty (30) days worked, they shall be regarded as regular employees, and shall then be entitled to seniority dating from the day on which they entered the Company's employ, provided however, that the probationary period of thirty (30) days worked shall only be cumulative within the three (3) calendar months following the date of entering employment.*

The parties disagree on the standard of review for dismissal of probationary employees under this collective agreement. The Employer's position is that the standard of review has been long-established in the forest industry and is one of suitability. The Union argues that since the collective agreement does not expressly address the standard to be applied to a probationary employee, the standard must be the same as that applied to seniority-rated employees, namely just cause.

In Canadian Forest Products Ltd., Chetwynd Division and Industrial Wood and Allied Workers of Canada, Local 1-424, [1998] B.C.C.A.A.A. No. 528, Arbitrator Kelleher, as he then was, had occasion to review the arbitral jurisprudence in this area.

Beginning at p.1 (QL), he wrote:

> *¶2 It is common ground that the dismissal of probationary employees can be justified on a different standard from the usual approach in the case of seniority-rated employees. The*

basic principles are, in my view, two. The first was stated by Arbitrator McKee in Pacific Logging Company Limited (Ladysmith Div.) -and- IWA, Local 1-80:

> Absent any evidence of a charge of discrimination, prejudice, union affiliation, and so forth by the company, I accept the basic premise that an arbitrator should not interfere with an employer's conclusion in an area of judgment based on many intangible and subjective factors unless evidence can substantiate that the employer acted vindictively or capriciously. (at 8)

The second was articulated by the same arbitrator in Meeker Cedar Products (1967) Ltd. -and- IWA, Local 1-367, unreported, July 18, 1980 (McKee):

> ... common sense dictates that a probationary employee be dealt with in a fair and even-handed manner; that he is told what job he is to perform and to what standards; that he is told so that he is fully aware of the intent of the communication that his performance is not up to the standards set for him and not just to "pull up his socks" or "get on with it"; that he be given a chance to change his work and behaviour pattern on the job for which the final assessment will be made and not just on some isolated incident of job performance totally removed from his day to day and primary assignment. (at 37)

¶3 Thus, an employer has a broad latitude to make judgments about the suitability of an employee during the probationary period. But a probationary employee is entitled to be told what the standard is, and more importantly, to be told that her or his

performance is below that standard so the employee has an opportunity to change his or her behaviour.

¶4 The two principles were summarized in one sentence by Arbitrator Vickers in Gregory Manufacturing Limited, Specialty Products Division, -and- IWA, Local 1-357, unreported, January 29, 1985:

> *Recognizing the company's right to an almost unrestricted assessment, she is nevertheless entitled, for her part, to expect that the assessment will be fair.*

The earlier award of Arbitrator Vickers, as he then was, in Gregory Manufacturing Ltd., Specialty Products Division and International Woodworkers of America, Local 1-357, (1985), 18 L.A.C. (3d) 71, considered the decision of Sloan, C.J., sitting as an industry interpreter, as well as those of Mr. McKee in Pacific Logging Company (Ladysmith Div.) and IWA, Local 1-80, (1979), unreported and Meeker Cedar Products (1967) Ltd. and IWA, Local 1-367, (1980), unreported.

Pacific Logging was appealed to the Labour Relations Board and dismissed: L94/79.

The issue in Meeker Cedar Products was whether, in the discharge of a probationary employee, an employer must establish just cause. While acknowledging that the approach with respect to the dismissal of probationary employees had changed over the years, Arbitrator McKee did not accept "that the Coast Master agreement has to

be read by a panel arbitrator as changed." He concluded that the Sloan decision remained a correct interpretation of the Coast Master agreement for these reasons:

1. The subject of probationary employees had not been addressed in negotiations following Pacific Logging.

2. An appeal of the Pacific Logging decision was dismissed by the Labour Relations Board.

3. Since the amendments to the Labour Code in 1975, the parties had ample opportunity to negotiate a different provision.

4. The absence of any change signaled that the parties accepted the Sloan interpretation of the probationary employee language.

(Gregory Manufacturing, pp.3-4)

Arbitrator McKee did, however, go on to enunciate the two principles adopted by Arbitrator Kelleher in Canadian Forest Products, supra.

Arbitrator Vickers accepted the test of suitability as enunciated by Mr. McKee.

The Sloan decision was reviewed by Arbitrator Munroe in Doman Forest Products Ltd. and IWA, Local 1-80, (1984), unreported. He said:

> *... I have little choice but to accept the Sloan award as having continuing authoritative value, as analyzed and explained in the Pacific Logging and Meeker awards. It is entirely possible that I would have reached a different conclusion had I been the arbitrator in Pacific Logging. However, subsequent to the publication of both the Pacific Logging and Meeker awards, and prior to the dismissal of the grievor in the fall of 1983, there was yet another round of collective bargaining between the parties to the Coast Master agreement, without any changes being made to the language concerning probationary employees. At some stage, the point must be taken as representing an ongoing mutual intent. In this case, the union accepts the state of the jurisprudence and agrees that the Sloan award, as explained by the three subsequent awards, remains in force. (Gregory Manufacturing, p.5)*

That line of authority was adopted in Northwood Pulp & Timber Ltd. v. Industrial Wood and Allied Workers Union of Canada, Local 1-424 (Perry Grievance), [1995] B.C.C.A.A.A. No. 41 (Suhr) and, as previously discussed, by Mr. Kelleher in Canadian Forest Products, *supra*. Since the parties have not seen fit to change it, the standard of review established by that line of authority must be seen to be a reflection of the mutual intent of the parties.

II

Victor Kelly is the "B" Shift Sawmill Supervisor. He oversees the training of employees.

In September 2004, the Employer hired 15 new employees for the introduction of a third shift in the planer mill. The training period is identical for all employees.

The Grievor began his probationary period on September 10, 2004. On October 18, 2004, he commenced training in the sawmill under the supervision of Mr. Kelly.

The supervisor's uncontroverted evidence was that "the best indicator of success [of a new employee] is strip pushing because it is labour intensive."

The probationer is trained for four days on strips, the J-bar and clean-up. He is expected to work on his own by the fifth day.

Mr. Kelly testified that on the Grievor's first day in the sawmill, he was provided orientation which included written material on standard operating procedures and safety including the proper technique for pushing strips.

A mentor, a member of the bargaining unit, was assigned to the Grievor. The practice of Mr. Kelly is to "check back with the mentor and do my own checks."

Mr. Kelly said that strip pushing is the most demanding of the probationary period duties and that not all probationers succeed. While the mentoring period is 4 days, with the employee expected to work alone on the fifth day, Mr. Kelly testified that he could "judge before the 4 days is up" whether a trainee would succeed.

The Grievor was told about the demanding nature of strip pushing and what was expected of him.

On the Grievor's second day, Mr. Kelly observed that the strip magazine was low and told the Grievor he must increase the pace. The supervisor conferred with the mentor who said he was not confident in giving the Grievor "the green light", meaning the Grievor was not capable of working on his own.

On the third day, the Grievor was summoned to the office of Mr. Kelly who told him he was not "comfortable with him working on his own." In cross-examination, Mr. Kelly could not recall whether or not he told the Grievor he was not comfortable with his performance:

I said I was not comfortable with allowing him to work on his own and he would be evaluated by another supervisor.

Mr. Kelly spoke to the mentor who advised that the Grievor needed more training and he next reported to Superintendent Fred Wood that he was not "comfortable giving [the Grievor] the green light and he needed to be evaluated again."

At this point, the Grievor had been training on strips and the J-bar for three days and, said Mr. Kelly, "I can make my judgement within that time."

Mr. Kelly cited the case of another probationary employee who was deemed unsuitable at strip pushing and his probationary period was terminated on the third day.

Superintendent Fred Wood testified that he spoke with Mr. Kelly on the third day and was told there were "concerns" about the Grievor's performance "on the strips as well as the sorter." In his evidence, Mr. Kelly did not speak of any problems on the J-bar.

On the fourth day, Mr. Wood conferred with the mentor who told him that the Grievor "had problems keeping up on the strips and on the J-bar - keeping the lumber straight."

After discussions with Human Resources, Mr. Wood terminated the Grievor for "failing to keep up pushing strips, and failing to keep lumber straight in the sorter."

In cross-examination, Mr. Wood was asked if the Grievor was told of the Employer's dissatisfaction with his performance on the J-bar:

A: Don't believe it was.

III

The test to be applied in the discharge of a probationary employee under this collective agreement is suitability.

It is generally agreed that arbitrators should not interfere with an employer's assessment of the suitability for future employment of a probationary employee. The principles which apply are found in the decision of Arbitrator Kelleher in Canadian Forest Products, *supra*, in which he adopted the reasoning of Arbitrator McKee in Pacific Logging and Meeker Cedar Products, *supra*, concluding at p.2 (QL):

> *Thus an employer has a broad latitude to make judgements about the suitability of an employee during the probationary period. But a probationary employee is entitled to be*

> *told what the standard is, and more importantly, to be told that her or his performance is below that standard so the employee has an opportunity to change his or her behaviour.*

The difficulty with the Employer's decision in this case is two-fold. First, Mr. Kelly's evidence was that the Grievor fell short in only one area - the speed at which he was pushing strips. In all other respects, the supervisor took no issue with the Grievor's performance. It was the pace at which the Grievor was working and, given the requirement to maintain the flow of production, this was a legitimate concern and one which the Grievor was required to meet.

Superintendent Wood, on the other hand, dismissed the Grievor for failing to meet the standards required on the strips and on the J-bar. The Grievor was not told that his work on the J-bar was below standard. It must be assumed from Mr. Kelly's evidence that the Grievor was not deficient in this area.

With respect to the strips, the Employer's approach in this case was, to borrow the expressions used by Arbitrator McKee, a "pull up your socks" or "get on with it" stance rather than clearly bringing to the Grievor's notice that his performance was unsuitable and defining the standards to be met. I also observe that if the only deficiency was speed, then more time on the job might well have led to improved efficiencies and greater production. He didn't have the

benefit of the fourth day. Indeed, the evidence suggests that the Grievor spent no more than 8 hours in total on the strips.

It is my conclusion that the Grievor did not have a fair opportunity to meet the Employer's standards. He was not told that his performance on the J-bar was unsatisfactory and since speed was the only deficiency on the strips, he should have been given the fourth day to increase the speed.

The appropriate remedy is for the Grievor to be given the opportunity to prove his suitability with respect to the 5 days training in the sawmill.

DATED at Vancouver, British Columbia, this 9 day of May, 2005.

Colin Taylor, Q.C.