

BRITISH COLUMBIA LABOUR RELATIONS BOARD

WEYERHAEUSER CANADA LTD.

(the "Employer")

-and-

INDUSTRIAL WOOD AND ALLIED WORKERS OF
CANADA (I.W.A. CANADA), CLC, LOCAL UNION NUMBER
1-417

(the "Union")

PANEL:	Richard S. Longpre, Vice-Chair Joan Gordon, Vice-Chair Laura Parkinson, Vice-Chair
COUNSEL:	R. Patrick Saul, for the Employer J. Miriam Gropper, for the Union
CASE NO.:	22945
DATE OF HEARING:	November 22, 1995
DATE OF DECISION:	February 27, 1996
DATE OF REASONS:	April 22, 1996

REASONS OF THE BOARD

I. INTRODUCTION

1 This matter involves the reconsideration of BCLRB No. B237/95 (the “original
decision”): leave for reconsideration was granted on August 22, 1995. The original
decision granted an application to vary the Union’s existing certification at
Weyerhaeuser to include: “dependent contractor truck owners whose trucks are
employed to haul timber on behalf of Weyerhaeuser Canada Ltd. (Vavenby Division)”.

2 Weyerhaeuser’s reconsideration application raises several issues. Its
reconsideration application reads:

...Weyerhaeuser submits that the Panel made fundamental errors
in four main areas: first, the Panel erred in its consideration of the
economic dependence test; second, the Panel made numerous
errors in its consideration of the employment relationship test; third,
the Panel placed undue importance on historical events which were
alleged to have taken place 6 or 7 years before this Section 28
application; and fourth, the Panel incorrectly included a hauler in
the bargaining unit.

Weyerhaeuser focuses on the original panel’s interpretation of economic dependence
and the obligation to perform duties that distinguish employees from contractors.

3 The Union disputes Weyerhaeuser’s application.

4 On November 22, 1995 the Panel heard oral arguments from the parties. On
February 22, 1996 we issued a brief decision, with reasons to follow, dismissing the
Employer’s application for reconsideration. Our reasons follow.

II. BACKGROUND

5 The original panel reviewed the evidence at some length. We will attempt to
briefly summarize the facts found by the original panel.

6 The Union’s application sought inclusion of log haulers at the Employer’s
Vavenby mill operations. These log haulers are employed primarily by six log
contractors regularly hired by Weyerhaeuser to transport harvested logs to the Vavenby
mill and other sites designated by Weyerhaeuser.

7 Prior to 1989, Weyerhaeuser contracted directly with the log haulers for the
transportation of logs. The logs were loaded on the log hauler’s truck, the truck and
logs were then weighed at the Weyerhaeuser scale and transported to the mill. The
logs were unloaded and the empty truck was then weighed. Payment was based on
the difference in weight; Weyerhaeuser unilaterally set the rate of payment.

8 In 1989, the log haulers along with other truckers, joined the Teamsters and sought to bargain collectively with Weyerhaeuser and two other companies. Initially, Weyerhaeuser refused to bargain and the log haulers withdrew their services. After two weeks Weyerhaeuser agreed to an increase in haul rates and certain other terms of employment. Soon after, however, Weyerhaeuser implemented a stump to dump program with the log haulers. The original decision reads:

To prevent the truckers from collectively negotiating improvements and withdrawing services in the future, Weyerhaeuser imposed a stump to dump program. This program effectively placed the log contractors between Weyerhaeuser and the haulers. Although there were no substantive changes to the manner in which the haulers carried out their work, the stump to dump program meant the log contractors would contract directly with the haulers and the haulers would look to the log contractors for payment. (pp. 6-7)

9 The original panel reviewed at some length the log haulers' relationship with Weyerhaeuser and the log contractors following the stump to dump program's institution in 1989. Log haulers remained with the same contractor. Previously, the Wood Service Agreement between Weyerhaeuser and the contractors had dealt with the harvesting of logs. That agreement now included the hauling of logs. Haul rates continued to be specified by Weyerhaeuser. Weyerhaeuser now pays the contractor in a form that sets out the payment owed to each log hauler. The contractor pays the log hauler accordingly. Weyerhaeuser continues to pay the premiums for the log hauler's medical, dental and pension plans. A contractor must now sponsor a newly employed log hauler, but once on the medical and pension plans, the log hauler can work for any of the contractors that service Weyerhaeuser and maintain entitlement on these plans.

10 Government regulations concerning safety in the forest industry have escalated in recent years. The Workers' Compensation Board's substantial safety program governs all persons working in the industry. Weyerhaeuser is responsible to ensure that each log contractor within the Vavenby operation has a safety program. Weyerhaeuser regularly inspects each contractor to ensure compliance. Weyerhaeuser updates each contractor's wood safety program and each log hauler must sign a copy of the updated program each year. Weyerhaeuser must also ensure each log hauler has complied with the program.

11 The log contractors also have a safety program which log haulers must follow. Weyerhaeuser is involved in its enforcement. The log contractor must hold a monthly "tail gate" meeting with log haulers. A Weyerhaeuser employee attends these meetings whenever possible. The original decision reads:

During the tail gate meetings the log contractor may bring to a hauler's attention a safety violation passed on to him by a Weyerhaeuser supervisor or issue a warning to the hauler in accordance with the non-compliance procedures. Copies of the safety inspection checklist and the tail gate minutes must be

provided to Weyerhaeuser. While the log contractor may investigate and record minor accidents or near misses, all serious accidents and fatalities are investigated by Weyerhaeuser. In addition, it is Weyerhaeuser who forms the primary contact in the event of an emergency through use of its radio frequencies and by contact with the Weyerhaeuser bush foreman, Weyerhaeuser's office, and weigh scale. (p. 9)

12 Log haulers must comply with the WCB and Ministry of Transportation and Highway Regulations in their use of private roads. The WCB inspects Weyerhaeuser's work sites once or twice a year. The infrequency of WCB inspection leaves the primary responsibility of checking log haulers with Weyerhaeuser and the contractors; however, log haulers are largely unsupervised on the roads (p. 10).

13 With respect to discipline, Weyerhaeuser terminated three log haulers prior to 1989. Since then, Weyerhaeuser and the contractors have issued only oral warnings. In one case, the contractor followed an oral warning by Weyerhaeuser with a written warning.

14 The original panel notes Weyerhaeuser's purchase of private timber. The purchase price may or may not include the cost to haul the logs. The log hauler is affected as follows:

What remains in controversy is the amount received by truckers for hauling wood purchased by Weyerhaeuser from private sources. When Weyerhaeuser purchases private timber, it either arranges for the hauling itself, or buys the logs with the haul price included. Often Weyerhaeuser will engage a hauler directly to pick up and deliver the wood to the Vavenby mill. Where the vendor is responsible for delivery, Weyerhaeuser will advise the haulers about available wood through its radio frequency or the scale office. While the vendor is free to negotiate a different haul rate than that paid to it by Weyerhaeuser, this does not often occur. Further, Weyerhaeuser's accounting department separates the log price and the haul rate on the supplier's invoice because it is common for the supplier to ask Weyerhaeuser to deduct the haul rate and pay it to the trucker directly. (p. 11)

15 Many of the log haulers at issue in this case are registered to work for other companies, however, only a small amount of their work is obtained from these companies. To work for Weyerhaeuser, a log hauler must register the truck with Weyerhaeuser's scale office. Therefore, a contractor cannot sub-contract work without Weyerhaeuser's consent. There is no evidence Weyerhaeuser had exercised its right and refused its consent.

16 The original panel concluded that log haulers were a necessary and integral part of Vavenby's operation during the logging season. Weyerhaeuser sets competitive log hauler rates. Weyerhaeuser was also noted to have recently assisted a hauler in

continuing to operate. A \$21,000 air control system was needed: "Weyerhaeuser paid \$15,000, the hauler \$3,500, and the log contractor \$2,500" (p. 12).

17 Following its review of the party's arguments, the original panel's analysis addressed three issues: Are log haulers dependent contractors? Is Weyerhaeuser the employer of these log haulers? Is the proposed unit appropriate with their inclusion in the unit?

18 The original panel reviewed *West Fraser Mills Ltd.*, BCLRB No. B97/93, (Reconsideration dismissed BCLRB No. B442/93) and the underlying policy of the dependent contractor provisions of the Code: the extension of collective bargaining rights to persons otherwise excluded by the definition of employee under the Code. Adopting the test in *Aspen Planers Ltd.*, BCLRB No. 250/83, the original panel addressed the distinction between dependent and independent contractors:

...the test of dependency, particularly in an industry characterized by a web of shared controls, is whether the employer exercises the ultimate and most dominant control over the work and continued employment of the log haulers: p. 16. (p. 19)

19 The original panel concluded its analysis with a comment from the legislative debates concerning Bill 84 that the Code was intended to expand the scope of collective bargaining to contractors in general.

20 In determining the first issue, whether the haulers were dependent contractors as defined in Section 1(1), the original panel considered two questions: whether the log haulers were economically dependent on Weyerhaeuser and whether they performed services for Weyerhaeuser under conditions more closely resembling an employee than an independent contractor (p. 20).

21 Turning to economic dependency, the original panel concluded that a log hauler's substantial source of income was from Weyerhaeuser. Weyerhaeuser compensates log haulers through the contractor who invariably passes the same amount directly on to the log hauler. Weyerhaeuser pays, or effectively pays, the log hauler directly for private wood hauled to the Vavenby mill. Where a supplier of logs is responsible for the delivery of wood purchased by Weyerhaeuser, Weyerhaeuser notifies the log hauler of the purchase. The log hauler then seeks to perform the delivery work. The original panel specifically addressed Weyerhaeuser's argument concerning work performed by log haulers for private sources of logs:

...I am satisfied, however, that these private hauls will normally constitute work or income derived from Weyerhaeuser's relationship with the log haulers. While suppliers have paid lower haul rates, they usually pay Weyerhaeuser's rates. In addition, because it is most common for Weyerhaeuser to deduct and pay the haul rate for private wood, the occasions when a supplier will pay the contractor directly are in the minority. Lastly, it is usually a work opportunity the haulers receive notice of through a

Weyerhaeuser employee and there is no evidence the haulers are regularly refused these work opportunities by the supplier. (p. 21)

22 The original panel then turned to Weyerhaeuser's degree of control over a log hauler's work. Weyerhaeuser controls the radio frequency from which work is made known, it controls the weigh scale office, it requires log trucks to be registered and, prior to 1989, Weyerhaeuser terminated log hauling privileges. Contractors cannot sub-contract work to a log hauler without Weyerhaeuser's consent.

23 The second criteria for economic dependency was the obligation on log haulers to perform the work. The original panel found that the log haulers did not exercise entrepreneurial initiative that suggests they are independent contractors. Weyerhaeuser set the rates of pay without notice to or consultation with the log haulers. Weyerhaeuser unilaterally imposed the stump to dump program as a direct consequence of log haulers' refusal to perform work in 1989. Weyerhaeuser sets the routes, vehicle speeds, and cycle time.

24 Most log haulers work the maximum number of hours possible. The scale dictates the size of a log hauler's load. At best, log haulers can increase their income by \$200 a day, however, only few log haulers can increase their load size sufficiently. Further, the difference in income between log haulers is based primarily on an informal seniority system recognized by Weyerhaeuser. The more senior log haulers receive the more work. There has been a core group of log haulers with a long-term relationship with Weyerhaeuser since before 1989. Weyerhaeuser expects these log haulers to perform Weyerhaeuser work and to make themselves available. From all of these findings of fact, the original panel concluded the log haulers are obligated to perform work for Weyerhaeuser.

25 The original panel noted that a log hauler's work is heavily regulated by government authority. It noted also the role of the contractor and Weyerhaeuser in supervising log haulers:

...the log contractor and Weyerhaeuser exercise a shared authority to supervise the haulers' work. The log contractors supervise the haulers at the landings, Weyerhaeuser employees supervise the haulers at the Vavenby yard, and the Weyerhaeuser scale office directs the haulers while performing this function. While enroute, the haulers operate with a high degree of independence; however, the Weyerhaeuser safety program requires them to observe strict radio usage regulations. Repeated violations of these regulations may cause the loss of hauling privileges. In addition, the haulers are expected to observe the safe practices outlined in Weyerhaeuser's Woods Services Program whether in the yard, at the landings, or enroute. In regard to haulers, these regulations include the use of protective equipment and clothing, accident reporting and investigation, use of seat belts, and emergency procedures. (p. 25)

26 The original panel further noted Weyerhaeuser's disciplinary responsibility. While seldom exercised with the log haulers, it clearly exists in certain circumstances.

27 The original panel found that there were definite aspects of the log haulers' situation in which they operate as independent contractors. A significant investment in their vehicles, the risk of profit and loss, the freedom to sell their vehicles, and minimal supervision by Weyerhaeuser are all such aspects among others. The original panel, however, concluded:

I am satisfied the preponderance of the evidence shows the haulers' services are subject to regular and ongoing control by the log contractors and Weyerhaeuser. Weyerhaeuser and the log contractors also exercise a shared control and regulation over the discipline of haulers and the assignment of work. The log haulers are undoubtedly a continuing and integral part of Weyerhaeuser's operation and there is a mutual expectation that the log haulers will be available for work each day during scale hours and within the logging season. (p. 28)

28 The original panel went on to address the other two issues: whether Weyerhaeuser is the employer and whether the proposed unit was appropriate. On the first issue, the original panel did find that Weyerhaeuser was the employer. Relying on the evidentiary review from the first question, the original panel concluded the haulers have a close employment relationship with Weyerhaeuser. The original panel also found that the unit was appropriate:

While the unit proposed by the Union may not be the most appropriate one, I am satisfied that it is an appropriate unit. The requirement that haulers operate their own vehicles ensures they are not effectively in business for themselves. While haulers who own two trucks and provide a driver for one may well come within the definition of dependent contractor, their exclusion does not necessarily make the Union's proposed bargaining unit inappropriate. It is also relevant that the Union does not seek a stand alone unit of dependent contractors such that the Board would be concerned about a proliferation of bargaining units by the exclusion of some categories of dependent contractors. Rather, the Union seeks to vary its existing certification with Weyerhaeuser to include the log haulers. ... (p. 30)

29 The original decision provided the formula to gauge dependent from independent contractors. Accurate financial information, necessary to determine which haulers were dependent contractors, was not made available to the original panel at the hearing. The certification was issued but the question of which log haulers are covered by the certification has not yet been determined. An IRO will soon meet with the parties to commence the investigation.

III. EMPLOYER'S ARGUMENT

30 Weyerhaeuser argues that the original decision expands the definition of dependent contractor under the Code and, in doing so, makes a significant departure from the Board's jurisprudence. Several arguments were advanced; we will briefly review each of these arguments.

31 At the outset, Weyerhaeuser raises two preliminary arguments. It argues the extent of the evidence before the original panel when it made its decision and the specific evidence permitted by the original panel was insufficient. Weyerhaeuser's submission reads:

By proceeding without sufficient evidence and allowing unreliable evidence, the original panel put itself in the position of having to "fill in the gaps" with assumptions and arguments which are not substantiated by the evidence.

By giving a priority to a quick, short hearing, the original panel left itself with insufficient reliable evidence upon which to construct a sustainable decision.

32 Weyerhaeuser also quarrels with the fact that the original panel permitted the Union to lead evidence of events that occurred prior to 1989 when problems occurred between log haulers and Weyerhaeuser. Weyerhaeuser objects to this evidence being permitted as it "coloured" the existing relationship: the relationship that the original panel was required to review. Weyerhaeuser argues that the original decision clearly relied upon this evidence:

In our respectful submission, by permitting this evidence to be led, the original panel allowed itself to be influenced by arguments that the contractors wanted collective bargaining rights and on that basis, decided that they should have them, writing the decision not as an objective analysis of the facts on the basis of principles set out in the Code, but as a rationalization for that initial sympathetic decision.

33 Weyerhaeuser then notes the comparative analysis inherent in the definition of dependent contractor: the comparison between an employee on the one hand and an independent contractor on the other. Locating a specific individual along this "spectrum" requires accurate and adequate evidence. Further, relying on *Aspen Planers Limited, supra*, and the general jurisprudence of the Board, Weyerhaeuser argues that an individual cannot choose to be a dependent contractor. Weyerhaeuser summarizes its argument as follows:

...an independent contractor cannot convert himself into an employee simply by choosing to work regularly for a single employer. As the cases referred to above indicate, a deeper inquiry must be made to determine not simply whether the individual is economically dependent or regularly working for a single employer but to determine whether the individual is doing so

in a manner which more closely resembles an employee than an independent contractor.

34 Weyerhaeuser also submits that the Board must distinguish between the purpose of the dependent contractor provisions of the Code and the test to be applied. Recent decisions of the Board have failed to make this distinction. The purpose of Section 28 is to extend collective bargaining rights to further groups of dependent contractors. The definition of individuals who have this expanded right of certification has not changed. While the test reflects the purpose in the Code, the test remains economic dependence and whether the individual in the performance of duties resembles an employee or an independent contractor. In its written argument, Weyerhaeuser argues:

The test of economic dependence therefore requires a finding not only of actual economic dependence but of economic dependence of a kind which more closely resembles the relationship of an employee than of an independent contractor.

35 With respect to the degree of economic dependency, Weyerhaeuser refers to the Board's jurisprudence and the significant extent of dependency that is necessary. Noting the discretion exercised by previous panels, Weyerhaeuser argues that one principle is clear: "The higher the amount from any one source, the more likely is a finding of economic dependence" (see *Ridge Gravel & Paving Ltd.*, IRC No. C163/88, p. 5). In reviewing the evidence, Weyerhaeuser argues that none of the nine proposed dependent contractors met this test. The original panel accepted that the Union bore the onus to prove that a significant portion of a dependent contractor's income was earned from Weyerhaeuser. Only two contractors were examined. Weyerhaeuser argues that these figures demonstrated that none of the contractors earned more than 70 percent of their income from Weyerhaeuser.

36 Weyerhaeuser's main focus in its argument on reconsideration, however, is the necessity to examine the "character" of economic dependence:

...The issue which must be examined is whether the particular contractor has legitimate opportunities which he could exercise with respect to economic dependence. It is the existence of such opportunities, not the actual choice made by the contractor which should determine whether he is truly dependent. This approach is entirely consistent with the purpose of the dependent contractor provisions, i.e. to provide collective bargaining rights to persons like employees. Where an individual has extensive freedom of choice with respect to his economic dependence, he is not like an employee and not in need of collective bargaining rights.

37 The opportunities for choices available to a contractor can be examined under three general areas: "Comparison with Others; Comparison Over Time and Explaining the Fluctuating: Entrepreneurial Opportunities".

38 Weyerhaeuser submits that the Board must compare the income of the contractors to the income of employees and some similarity must be present in order to make a finding of dependent contractor status. Comparisons with other contracts should be distinct. There must be substantial differences between dependent contractors and independent contractors. Income earned from a single employer may fluctuate over time. Where the fluctuation is significant over time, the contractor is independent. Where income earned gradually increases, the contractor may resemble an employee. In any event, the Board must factor in changes in the employer's operations. Finally, a contractor who freely chooses to work for a single employer is not dependent. Economic dependence does not arise where the contractor has a choice.

39 The second test in determining a contractor's economic dependence on the employer focuses on the duties performed: assignment of tasks, direction and supervision, payment of wages, performance review and promotion, and discipline and discharge. Weyerhaeuser argues that it is fundamental to this stage of the inquiry that the Board must recognize that an employer also exercises control over an independent contractor:

Accordingly, the "Duties Performed" or "Employer Control" test, like the economic dependence test must be broken down into two enquiries. Firstly, there must be a determination that the individual in question is subject to a degree of control by the employer. Secondly, the character of that control must be evaluated to determine whether it is more typical of the relationship of an employee than that of an independent contractor.

40 At this point, Weyerhaeuser's argument turns to an analysis of the original decision. Weyerhaeuser's argument extensively reviews the evidence before the original panel. Without addressing all of these arguments in detail, we set out a summary of the salient points raised by Weyerhaeuser.

41 Weyerhaeuser argues that private wood hauling should not have been found to be work performed by the log hauler for Weyerhaeuser. Private wood contracts involve the sale of wood to Weyerhaeuser. Payment for the work is made by the third party to the log hauler. The rate and the time of the haul are negotiated between the log hauler and the private wood contractor. The work is learned of through the haulers' truck radio and the log contractor is not directed or ordered by Weyerhaeuser to do the work. Private wood hauling is an opportunity to work; it is not an order by Weyerhaeuser. It is work the contractor chooses to perform. Payment for the work does not come from Weyerhaeuser, nor is it controlled by Weyerhaeuser.

42 The original panel concluded that the income differential between log haulers largely results from an "informal seniority system operated first by Weyerhaeuser and now by the log contractors" (para. 65). Weyerhaeuser argues that since 1989, seniority has not been a factor in the amount of work performed: the evidence demonstrated that fact. Seniority also fails to explain yearly fluctuations in income amongst log haulers. Weyerhaeuser's submission reviews the evidence regarding the opportunity for an additional \$200 in daily earning capacity and the advertising by log haulers.

Weyerhaeuser argues the original panel expanded the degree of economic dependency previously accepted by the Board and ignored the character of that dependency.

43 Weyerhaeuser then turns to the duties performed by the log haulers reviewing all of the factors normally associated with this criteria. To a large extent, Weyerhaeuser re-argues its case that it presented before the original panel. Weyerhaeuser argues it was "simply impossible" to conclude the log haulers' work was under the control and direction of Weyerhaeuser. Since 1989, there has been no discipline by Weyerhaeuser. Weyerhaeuser exercises authority arising from regulations imposed by legislation, notably the *Industrial Health and Safety Regulations*. Further, the authority is directed at breaches of statutory infractions and not job performance (see *West Fraser Mills Ltd., supra*, (p. 20) and *Aspen Planers Ltd., supra*, (p. 15)). Weyerhaeuser went on to review the evidence concerning vacations, truck regulations and numbers, weigh scale hours and several other factors considered by the original panel. Again, Weyerhaeuser sought different conclusions to be drawn by this Panel from that evidence.

44 Finally, Weyerhaeuser addresses the proposed unit of log haulers to be varied into the existing Weyerhaeuser bargaining unit. Nine truckers were sought to be included by the application. These nine excluded log haulers who did not own a vehicle, who owned but did not operate a vehicle, or who owned two or more vehicles. These restrictions exclude two of the nine proposed log haulers. One excluded log hauler fell within these proposed parameters. Weyerhaeuser argues that the original panel disregarded evidence that one individual, Harrison, owned two trucks at the time of the certification. Despite that evidence, the original panel erroneously included Harrison in a bargaining unit which includes only owners of one truck. Weyerhaeuser also says that the original panel found another log hauler, Hansen, to be within the bargaining unit despite the fact that his dependency had never been factually established in the absence of any documented financial evidence for the year 1994.

IV. UNION'S ARGUMENT

45 The Union argues that Weyerhaeuser's reconsideration application is in large measure an attempt to quarrel with the weight given to the evidence by the original panel. The Union points to the extensive evidence before the original panel on the control exercised by Weyerhaeuser in various ways, such as the control over the weigh scale hours, the use of the log haulers of the roads and the use of its radio frequencies. While some matters such as discipline may be a shared responsibility between Weyerhaeuser and the log contractors, Weyerhaeuser has the ultimate and controlling authority in the areas of the safety program, the use of the radio frequency, and its ability to withhold its consent for sub-contracting. As for the source of some of the rules from external bodies, the Union argues that whether or not a safety rule emanates from a regulatory body, the fact is that Weyerhaeuser is in a position to affect the continued employment of the log haulers.

46 The Union refutes Weyerhaeuser's claim that the original panel improperly relied on irrelevant facts. The Union says that the original panel properly included earnings from "private wood" in its assessment of dependency. The facts found by the original panel support its conclusion that these work opportunities were derived from the log haulers' relationship with Weyerhaeuser. The Union argues that it is not for a reconsideration panel to interfere with that type of finding by an original panel.

47 In reply to Weyerhaeuser's arguments advanced in relation to the exercise of choice by the log haulers, the Union responds that the evidence establishes that the opportunity to exercise entrepreneurial judgment is severely limited by the terms and conditions established by Weyerhaeuser. Any flexibility the log haulers may have in terms of scheduling trips to maximize the number of hauls made each day is circumscribed by Weyerhaeuser dictating the scale hours, vehicle routes and speeds, loading and unloading times and the destination for the logs. The additional earning capacity due to investment in equipment has little significance because it fails to account for added expense, increased driving skill, loading and unloading times, and the lack of available wood. The Union submits that the existence of entrepreneurial initiative was properly considered by the original panel, but not considered decisive as that opportunity was only available within limited parameters.

48 As for the alleged error in considering evidence of pre-1989 events, the Union says the original panel did not rely incorrectly on that history of the relations between the log haulers and Weyerhaeuser. Contrary to Weyerhaeuser's submission, the original panel was not "punishing" Weyerhaeuser; it merely found that placing an intermediary between itself and the log haulers was not sufficient to avoid being found to be the employer. The original panel also expressly found that little had changed since 1989, despite the intervention of the logging contractor.

49 In relation to the IRO investigation, the Union argues that the original panel has not abrogated its role in determining dependence by delegating that function to the IRO. It has expressly retained jurisdiction to deal with any dispute with the IRO

recommendations made as a result of the investigation. The Union also submits that it would be unnecessary and impractical to require the original panel to review the financial records of each proposed member of the bargaining unit in the context of a formal hearing. It is sufficient for the panel to establish criteria which governs the IRO investigation.

50 On the issue of the scope of the bargaining unit and the alleged error committed by the original panel in including two individuals within the bargaining unit, the Union says its position was that the bargaining unit extended to owners of not more than two trucks who operate one of those two trucks. To the extent the original panel's decision reflects that the unit consists of only owner operators of one truck, the decision is in error.

III. ANALYSIS AND DECISION

51 Weyerhaeuser's application for reconsideration addresses the principles of Section 28 of the Code and the evidentiary basis of the original decision. We will deal first with the principles to be applied in Section 28 applications.

Factors Used In Determining Dependent Contractor Status

52 The definition of dependent contractor reads:

dependent contractor" means a person, whether or not employed by a contract of employment or furnishing his or her own tools, vehicles, equipment, machinery, material or any other thing, who performs work or services for another person for compensation or reward on such terms and conditions that he or she is in relation to that person in a position of economic dependence on, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor;

53 Section 28(1) of the Code:

28. (1) If an application for certification is made for a unit consisting of, or including, dependent contractors, and the application meets the requirements of section 23 or section 24 and 25, the board shall

- (a) if there is no other certified unit of employees of the same employer, determine whether the unit applied for is appropriate for collective bargaining and, if so, certify that unit, or
- (b) if there is a certified unit of employees of the same employer, determine whether inclusion of the dependent contractors in the existing unit

would be more appropriate for collective bargaining and, if so, require that an application be made to vary the certification.

In *Slocan Forest Products, Vavenby Division*, BCLRB No. B146/94 (Leave for Reconsideration of BCLRB No. B193/93), the Board notes that an application to certify dependent contractors under Section 28 is a two step process. In its summary, the *Slocan* panel states:

In summary, the inquiry begins with ensuring both a varied unit and a stand-alone unit are appropriate. If so, and there are no actual impediments to access to collective bargaining in a variance application, the Board will consider how the six factors of the community of interest test affects industrial stability. The examination begins with the presumption that industrial stability is adversely affected by two or more units. The applicant union bears the onus to demonstrate that the presumption does not apply in the case and/or, the presumption is outweighed by a conflict between the interests of the existing unit and the dependent contractors. Finally, the Board will consider any other relevant factors addressing the issue of appropriateness, specifically, the nature of the industry at issue. (p. 19)

54 There is no issue in this case as to the appropriateness of a stand-alone unit nor the appropriateness of inclusion of dependent contractors into the Union's existing bargaining unit. The sole issue is whether these log haulers are dependent; if so, they would be varied into the existing bargaining unit.

55 Further, applications made under Section 28 of the Code must be adjudicated consistent with *Island Medical Laboratories Ltd.*, BCLRB No. B308/93 (Leave for Reconsideration of IRC No. C217/92 and BCLRB No. B49/93), (1993), 19 CLRBR (2d) 161. Access to collective bargaining and industrial stability continue to be the principles that largely affect the determination of appropriateness under Section 28. These two principles impact on the facilitation of organizing dependent contractors in a particular way: dependent contractors are a group with low density certification. In its summary, *IML* specifically addresses the certification of such groups:

With these rules of appropriateness we hope to accomplish several things: first, to bring the Board's policy in line with its practice; second, to integrate the policy approach to appropriateness beginning with the statutory emphasis on the facilitation of collective bargaining on initial applications for certification, and "build" towards the establishment of all-employee units in furtherance of the statutory purpose of achieving industrial stability in collective bargaining; third, to set out more clearly the evidentiary requirements and the principles to be applied in making determinations of appropriateness. (p. 38)

56 Finally, it is useful to review the ten factors used in determining dependent contractor status developed in *West Fraser Mills Ltd.*, BCLRB No. B97/93, and upheld on appeal in BCLRB No. B442/93. These factors were gleaned from the previous jurisprudence and set out a broad based perspective on the question of dependency:

The Panel's review of the decisions of the former Board and Council regarding dependent contractors reveal the consideration of a variety of factors when determining whether particular individuals are dependent contractors, including:

1. the way the industry operates;
2. the type of work involved and its source;
3. the nature of the applicant's operations;
4. the organization of the employer's operations and the degree to which the contractors are a continuing part of it (does the employer generally expect the contractors to work on a daily basis and are the contractors generally available for work during working hours; is a long term, stable relationship between the parties evident?);
5. any contractual arrangements between the parties and others;
6. the type and extent of control and direction exercised by the employer with respect to such matters as hiring, firing, discipline, work assignment, hours of work, and so forth;
7. the nature and manner of compensation and how it is determined;
8. the percentage of income which the contractor derives from the employer (generally, the lion's share of the contractor's income must derive from the relationship with the employer);
9. the opportunity for the contractor to make a profit through the exercise of independent entrepreneurial judgment;
10. the contractor's opportunity for economic mobility and whether the contractor

advertises or solicits customers elsewhere.
(pp. 18-19)

Evans Forest Products, supra, notes the purposive use of these factors:

The factors are used to assist the Board to determine whether the relationship more closely resembles an employment relationship than that which would exist between two independent businesses. “The statutory definition forces the Board to engage in a comparative exercise; to determine on which side of the mid point of an imaginary line between independent contractor and employee the disputed persons fall”: see *Canada Crushed Stone* [1980] 3 Can LRBR 66 (O.L.R.B.), at p. 73 (quoted with approval in *West Fraser Mills Ltd.*, BCLRB No. B442/93, at p. 15; and in *Aspen Planers Ltd.* at p. 8).

It is important to emphasize that no single factor is determinative. The significance of any particular factor must be considered in the circumstances of the case as a whole. Each case requires the Board to consider the particular facts before it and to make a judgment as to which side of the line the persons in question fall. (p. 28)

We adopt the *Evans* panel’s reasoning that reliance on certain factors will vary depending on the circumstances of each case. Further, certain factors in *West Fraser Mills* address the framework of the industry in which the contractors work. Some factors (factors 4 and 8) examine the integration of the contractors into a specific employer’s operation in that industry and other factors (factors 9 and 10) examine a contractor’s entrepreneurial initiative. However, two principle factors will remain the focal point of the Board’s examination: the economic dependence of the person on the employer and the obligation on the person to perform duties for that employer more closely resembling the relationship of an employee than an independent contractor. The application of these two factors, within the framework of the industry, determines whether the contractor more closely resembles an employee and is therefore entitled to certification.

Attempted Review of Evidentiary Findings

57 Weyerhaeuser acknowledges that its argument challenges findings of fact, and the failure to address evidence relied upon by the original panel in reaching its conclusion. There is limited scope for reconsideration of the evidence before the original panel. For example, the original panel’s reliance on “private wood” hauling in determining a contractor’s degree of dependency is beyond our scope of review. The fact this work “normally” constitutes Weyerhaeuser work is an assessment of all the evidence before the original panel. The Panel reviewed virtually all of the remaining issues raised by Weyerhaeuser under the “duties performed” criteria. Again, most of these arguments seek a review of the evidence that exceeds the scope of review in an application for reconsideration. Regardless, we do not see any reviewable errors as suggested by Weyerhaeuser. Finally, Weyerhaeuser challenged the evidence and

facts relied upon by the original panel in reaching conclusions with respect to Messrs. Hansen and Harrison. The original panel's findings of fact were derived from all of the evidence generated in the hearing. The reconsideration panel can not now be asked to review specific evidence nor to reach other findings from the evidence. The application of this evidence to individual contractors will follow the IRO's report. That practice is not unusual: see *Evans Forest Products Ltd.*, BCLRB No. B412/95.

Determination of Criteria To Govern IRO Investigation

58 One aspect of the original decision remains outstanding: who precisely is covered by the order to vary dependent contractors into the Union's existing bargaining unit. The original decision reads:

These findings do not, however, address the identity of those persons included within the appropriate bargaining unit. While I found Hansen and Harrison to be within the unit, the status of the other haulers remains in issue. Without more complete financial information concerning these truckers, as well as evidence in regard to their ownership and operation of vehicles, I am unable to determine this issue. Accordingly, I am appointing an Industrial Relations Officer to confer with the parties, and conduct an investigation in accordance with the criteria established in this decision, to determine the identity of those persons included within the appropriate bargaining unit. If the parties are unable to accept the IRO's recommendations, in whole or in part, I retain jurisdiction to finally resolve the issue. (p. 30)

This step of the hearing was recently commenced; we endorse the assistance of the IRO in this manner. In a variety of circumstances, the Board has set out the legal framework of its final decision in an "interim" decision (see *B.C. Rail Ltd.*, BCLRB No. B427/95). That is what the original panel has done here. The parties are sophisticated labour relations practitioners and, with the IRO's assistance, will be able to apply the facts of the remaining contractors to the criteria set out in the original decision. We note that the original panel found that "economic dependence is established provided 70 percent of the trucker's hauling income is derived from his relationship with Weyerhaeuser" (p. 22). If any dispute arises between the parties as to the application of that criterion to a particular individual, the original panel remains seized of the issue as well as any other issue that cannot be resolved by the parties.

Alleged Confusion Between The Purpose and The Test For Dependent Contractors

59 Weyerhaeuser argues that the original panel erred in confusing the distinction between the purpose of and the test for Section 28. We agree with Weyerhaeuser that legislative reforms to the Code have extended the right of certification to dependent contractors into stand-alone bargaining units, but the question of who meets the definition of dependent contractor remains as it was. However, the original panel, after

reviewing the purpose of Section 28, correctly noted that the test for determining a dependent contractor has not changed. The original decision reads:

There are two questions involved in this determination. First, whether the log haulers are economically dependent; and, second, whether the log haulers perform services under conditions more closely resembling an employee than an independent contractor. An independent contractor has been defined as a person who functions on a detached and independent basis: Pacific Press, BCLRB No. 4/77, [1977] 1 Can LRBR, p. 352. (p. 20)

We find no confusion in the original decision between the purposes and test as alleged by the Employer.

Economic Dependence Test

60 Weyerhaeuser argues that neither the degree nor the character of the log hauler's economic dependency can be by the choice of that log hauler. The original panel addressed this issue. It concluded Weyerhaeuser was the "ultimate source of the log haulers' work and income" and later noted that the log hauler's obligation to perform duties was a factor:

As noted by the Board in *Aspen Planers, supra*, however, economic dependence, standing alone, is insufficient. The log haulers must also be under an "obligation to perform duties for that person more closely resembling the relationship of an employee than that of an independent contractor". Applying the analysis sanctioned by the Board in such cases as *Pacific Press, supra*, and *West Fraser Mills Ltd., supra*, I find the log haulers also meet the second aspect of the test for dependent contractor status. (p. 22)

61 Weyerhaeuser's control of the log haulers was reviewed: rates paid, cycle time for rates, ton per hour rates, haul rates and alteration to rates made by Weyerhaeuser. The original panel then reviewed entrepreneurial opportunities. Acknowledging certain opportunities exist, the original panel concluded those opportunities are overshadowed by the obligation on the log hauler to perform work for Weyerhaeuser. Again, the weighing of evidence by an original panel is not subject to review by a reconsideration panel.

62 Weyerhaeuser argues certain factors assist in determining economic dependency: comparison with others, comparison over time, and an explanation of the fluctuations. In all of these factors, Weyerhaeuser argues the focus is the choice of the log hauler to work for other employers.

63 We agree with Weyerhaeuser that a determination of dependency must be viewed over a period of time. The period of time cannot be lengthy, nor can it be unduly speculative. However, we disagree with Weyerhaeuser's focus on choice. We note that the original panel determined that the contractor's dependency on

Weyerhaeuser was not, in fact, by choice. The original panel properly examined whether, on the evidence, Weyerhaeuser and the log haulers had developed a stable relationship more resembling that of an employee than that of independent contractor. The dependent contractor's ability to choose other work is not a deciding variable.

64 The second test for dependency is a contractor's obligation to perform work for the employer. It is well recognized that an obligation exists on both employees and on independent contractors. It arises upon being hired and upon being retained. Direction, review of work performed, and discipline or termination of contract are similar conditions experienced by employees and by independent contractors. Weyerhaeuser adopts the well recognized principle that in determining the existence of that obligation, the degree of control exercised by the employer must be examined. That is, the degree of obligation on a contractor to perform the work as directed. Once the degree of control is determined, it must be determined whether that control resembles more closely the relationship between employer and employee or the relationship between an employer and an independent contractor.

65 We turn now to entrepreneurial initiative. Weyerhaeuser concedes that an examination of a contractor's degree of obligation, or alternatively, the contractor's choice, would be difficult to assess. Certainly, a focus on this issue would adversely affect the recognized need for the Board to produce expedited and consistent decisions under Section 28. Normally, a portion of a dependent contractor's total income will be earned from another employer. Such income reflects some entrepreneurial initiative. An examination of potential opportunity and possible choices, however, would be entirely speculative. Further, in making this argument, Weyerhaeuser relies upon quotes from the *Woods Task Force on Canadian Industrial Relations*, (1968) and the Cohen report on *Labour Legislation in Newfoundland* (1972) cited in *Fownes Construction Co. Ltd.*, BCLRB No. 8274, [1974] 1 Can LRBR 453. Yet neither of these quotes nor the *Fownes'* decision itself suggests that choice determines the dependent status of the contractor. The dependent contractor must perform work or services, must be in the labour market not the product market, and must work for compensation. These criteria are examined by the Board to determine a contractor's relationship with the employer. The extent and continuity of the work performed by the contractor, and the terms under which the work is performed will, in all the circumstances, determine the relationship between the contractor and the employer. The opportunity for the exercise of entrepreneurial initiative is simply one factor which must be weighed with all of the other factors in determining where on the spectrum a particular relationship falls. The original panel certainly made those examinations and reached its conclusion on the evidence before it.

Alleged Improper Reliance on Statutory Responsibilities

66 Weyerhaeuser argues that a distinction must be made between its supervisory role as an employer and its role under the *Industrial Health and Safety Regulations*. Weyerhaeuser says its authority over log haulers arises only from its statutory obligation to oversee compliance with the Regulations. The original panel found Weyerhaeuser supervised log haulers in the Vavenby yard and at the weigh scale. Log

haulers were obligated to observe Weyerhaeuser's Wood Services Program at all times:

...Pursuant to the requirements of Weyerhaeuser's own Woods Safety Program, all log contractors must conduct a monthly safety inspection according to a prescribed safety check-list and hold monthly tail gate meetings to cover areas of safety concerns. Normally Weyerhaeuser sends an employee to these meetings and receives copies of the minutes. In the minutes, the log contractor will record oral and written reprimands given to haulers for safety infractions pursuant to the terms of the safety program. (p. 26)

Considering all of the evidence, the original panel found that log haulers were obliged to follow Weyerhaeuser's Wood Safety Program. This program may have included statutory obligations. The fundamental issue is the original panel's conclusion that Weyerhaeuser retained "primary authority" over the log haulers' performance. While Weyerhaeuser disagrees with that assessment of the evidence, we see no basis for review.

Alleged Misapplication of Evidence

Weyerhaeuser argues that certain evidence was misconstrued by the original panel. The original panel concluded that Weyerhaeuser set the routes and the speeds and, therefore, the performance of each log hauler. Weyerhaeuser argues that its setting of routes and speeds determined only the price paid to log haulers. Determination of the price paid by an employer is indicative of a dependent contractor. The original panel specifically noted the limited flexibility within which the log hauler operated:

...Log haulers are entitled to schedule their trips so as to maximize the number of hauls made each day. This flexibility, however, is circumscribed by Weyerhaeuser in three important ways. First, the scale hours effectively limit the length of any work day. Second, the vehicle routes and speeds, as well as loading and unloading times, are fixed by Weyerhaeuser in the cycles. Third, Weyerhaeuser dictates the destination for the logs. It is only within these fixed parameters that the haulers are entitled to arrange their schedules. (p. 27)

67 Weyerhaeuser argues that it is not Weyerhaeuser's fixing of the rate a log hauler receives that determines economic dependency. It is the log haulers' response to Weyerhaeuser's rate that is relevant. However, the original panel found there was an identifiable group of haulers that were economically dependent on Weyerhaeuser. Further, the original panel accepts that at least 70 percent of a log haulers' income must be derived from Weyerhaeuser. That assessment remains outstanding and will be addressed in the IRO's report.

Historical Events

68 Weyerhaeuser argued, with some vehemence, that the original panel improperly relied on past events. Specifically, the events that led up to Weyerhaeuser's introduction of the existing stump to dump program. With respect, the original panel's review of past events cannot be criticized. It was evidence before it; it was evidence the original panel had an obligation to assess. Further, the original panel reviewed these facts in the context of economic dependency. Referring to the rates paid by Weyerhaeuser, the original decision notes events that led up to the stump to dump program:

...Weyerhaeuser kept a record of the trip times and eventually notified the hauler that the cycle would be altered. There was no negotiations over the extent of the change. The haulers' lack of bargaining strength was clearly illustrated by the events of 1989. After repeated efforts to persuade Weyerhaeuser to meet with the haulers collectively, they withdrew services in an attempt to compel Weyerhaeuser to bargain rates and other conditions of work. Although Weyerhaeuser initially agreed to certain terms, it unilaterally reneged on the agreement. In a further statement of its authority over the haulers, and for that matter, the log contractors, Weyerhaeuser imposed a stump to dump program as a direct consequence of the haulers' strike. (p. 23)

While not determinative, these facts assist in an examination of economic dependency.

Scope of the Bargaining Unit

69 The original decision reads:

The Union proposes to include in the bargaining unit the log haulers who own and operate one vehicle within the Vavenby operation. Those haulers who do not own a vehicle or who own but do not operate are excluded from the proposed unit. (p. 29)

70 The bargaining unit description sought by the Union in its original application was to vary its existing bargaining unit to include "dependent contractor truck owners whose trucks are employed to haul lumber on behalf of Weyerhaeuser's Vavenby Division".

71 Weyerhaeuser quarrels with the inclusion of Harrison within the unit as the evidence before the original panel was that at the time of the certification application he owned two trucks. However, the Union disputes this characterization of the scope of the unit as excluding those who own two trucks. It says it was seeking a bargaining unit which included those truck owners who own not more than two trucks and who operate one truck. The Union says that Harrison is thus properly within the bargaining unit.

72 In argument before us, Weyerhaeuser acknowledged in response to questions posed by the Panel that the Union at the original hearing intended to include Harrison in

the bargaining unit. Weyerhaeuser also acknowledged that when the Union discovered in the course of the evidence adduced at the hearing that Harrison owned two trucks, it did not resile from his inclusion in the bargaining unit during argument.

73 As the express wording of the bargaining unit description would not exclude Harrison, and in light of that acknowledgment by Weyerhaeuser of the Union's position, we have determined that it is appropriate to refer this issue back to the original panel as there appears to have been some misunderstanding as to the precise scope of the bargaining unit sought by the Union.

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