BCLRB No. B158/93

BRITISH COLUMBIA LABOUR RELATIONS BOARD

WALDUN FOREST PRODUCTS LTD.

(the "Employer")

-and-

IWA-CANADA, CLC, LOCAL UNION NUMBER 1-3567

(the "Union")

PANEL: Maria Giardini, Vice-Chair

COUNSEL: Peter Parsons, for the Employer
Sandra Banister, for the Union
Peter Sheen, for Certain Employees

CASE NO: 14620

DATE(S) OF HEARING: April 15, 16, 17 and May 6, 7, 1993

DATE OF DECISION: May 26, 1993

DECISION OF THE BOARD

I. NATURE OF APPLICATION

On April 1, 1993, the Union applied to be certified for a unit of all employees except management, sales, office and supervisory staff of Waldun Forest Products Ltd.

The certification application was shortly followed by an unfair labour practice complaint against the Employer. A vote was held on April 8, 1993, and the ballot box sealed pending disposition of a number of disputed issues.

After discussion with counsel for the Union, Employer, and Certain Employees, it was agreed that the issue of inclusion/exclusion of certain individuals should be dealt with first. At the present time there are 89 employees in the bargaining unit. This decision addresses that issue.

II. UNION'S REQUEST FOR EXCLUSIONS

The Union takes the position that certain individuals should be excluded for the reasons set out below:

Cherlyne Colling

She has been receiving WCB benefits on and off for 6 years and has a problem with her arm which makes it highly unlikely that she will return to work.

Grant Daum

He regularly works as acting foreman and other workers in the unit view him as their supervisor and as a company representative. He associates with management, works long flexible hours and sets his own overtime. He hired an individual on at least one occasion and

spends a considerable amount of time in the main office and the millwright's office. Daum organizes crews and gives direction on the graveyard shift, when it is worked. As well, he replaced Dennis Clarke, the afternoon foreman for a lengthy period of time in 1992. The other workers view Daum as the right-hand man of the majority owner, Wynn Walker, who relies on Daum heavily.

Richard Delloca

He was hired on March 30, 1993, the day before the Union applied for certification. He was hired to replace Sean McCormick. By this time, the Employer had full knowledge of the Union organizing campaign and hired Delloca to "stack" the list.

Craig Finch

He has been receiving WCB benefits for an extended period of time. He has a back problem and there is little prospect that he will return to work for the Employer.

Aaron Greenhalgh

He is a casual employee who works weekends on clean up. Because he is not a full-time employee he has little, if any, community of interest with other employees.

Barkpal Grewal

He has only worked eight hours in 1993 and therefore, at best, has only marginal ties to the Employer.

Sean Kennedy

He is a fourteen year old high school student who works weekends on clean-up. He is a child who works only on a casual basis and his community of interest is different from the adult workers. Moreover, the *Employment Standards Act* provides that a person under 15 years of age cannot be employed without permission of the Director. The Union also questions whether,

given the provisions of the *Infants Act*, Kennedy has the capacity to enter into a contract and become a Union member.

Garnet McBride

Initially the Union said McBride worked for another company owned by Wynn Walker and not for the Employer. However, it later amended its position and now argues that he should be excluded because he is part of the management team. McBride works part-time for the Employer and part-time at another mill. He has acted as on-shift supervisor and associates with Daum and Povlsen and others who form the core management team of the Employer. McBride may not be as central to the management team as Daum or Povlsen but his community of interest lies with the management team and not with other employees.

Tim McBride

He is a student who quit to return to school and therefore has no community of interest with the other employees.

Sean McCormick

He has essentially quit working for the Employer and is working for a moving company. He is a casual employee who has worked few hours for the Employer in 1993 and who has no obligation to report to work and few, if any, ties to the Employer.

Glendon MacDonald

The Union believes he works for another company and is not employed with the Employer.

Geert Povlsen

He is the head millwright. He supervises and directs other workers. While he may not normally hire, fire or discipline, he is a member of the management team. He is close to management and in the past, supervised contractors and employees on another project for Wynn

Walker. He is a department head who can't be bumped. He assigns work to the other millwrights, authorizes overtime for himself and others and participates in interviews of maintenance personnel if required. Additionally, he works independently and is part of a key group relied on by management.

Steve Roberts

He is off work and receiving WCB benefits for a broken finger. He has been off work since November 1992.

Clayton Walker, Colin Walker and Curtis Walker

They are sons of the majority owner, Wynn Walker, and should be excluded because of the potential conflict their family ties could cause. Additionally, Colin and Curtis only work part-time and are casual employees who share no community of interest with other employees in the bargaining unit.

III. UNION'S REQUEST FOR INCLUSIONS

The Union argues that the following employees should be included in the bargaining unit:

Pargat Athwal

He is a shingle sawyer whose name did not appear on the voter's list prepared by the Industrial Relations Officer. He worked in 1992 and in 1993 and expects to be recalled.

Haramrit Dhaliwal

He is a cuberman who worked full-time in 1992 and was laid off during the slow winter period. The Union argues that he is an employee who has not quit, who has only worked a few hours in 1993, but is expected to be recalled.

IV. AGREEMENT BETWEEN THE PARTIES

During the course of the hearing the parties agreed that Colling and Finch should be excluded. Further, the parties agreed that MacDonald and Clayton Walker should be included and the Union conceded that Roberts should be included.

V. UNION'S POSITION IN GENERAL

The Union asserts that the challenged employees fall into three categories; namely, family members, casuals and management. It argues that there are sound labour relation reasons for excluding individuals in each of these groups from the unit.

In regard to family members, the Union argues that the presence of Curtis and Colin Walker in the bargaining unit will cause conflict because they are close to their father. Their loyalties are with their father and not with other members of the bargaining unit. Moreover, the two Walker brothers will be a conduit of information to their father. Therefore, their presence in the bargaining unit will have a negative effect on the ability of other employees in the bargaining unit to pursue their collective bargaining objectives.

The Union argues that Daum, Povlsen and McBride should be excluded because they are part of the management team. Therefore, there is a clear conflict between their interests and the interests of the employees in the bargaining unit. The Union argues that *Vancouver General Hospital*, BCLRB No. B81/93 (Reconsideration of IRC No. C179/91), in spite of what it seems to say, continues to endorse exclusions based on the management team concept. This is because individuals whose interests are incompatible with other employees in the bargaining unit should be excluded as their inclusion will be destructive of the collective bargaining process.

The Union argues that the remaining contested employees are part-time casual employees who have no community of interest with the regular full-time employees. The Union argues that the casual employees perform work different from that performed by full-time employees.

Moreover, their terms and conditions of employment are different in that they do not appear on the seniority list maintained for full-time employees, they do not gain seniority and they do not receive benefits.

VI. THE EMPLOYER'S POSITION

It is the Employer's position that all employees challenged by the Union should be included in the bargaining unit.

With respect to the two Walker brothers, the Employer argues that the fact that they are sons of the majority owner, Wynn Walker, is not in itself a sufficient reason for exclusion. The Employer argues that the two Walker brothers do not receive any preferential treatment, they are working their way through the traditional entry level jobs as all other employees have done. There is no evidence to show that they so identify with the interests of the Employer that conflict would arise from including them in the bargaining unit. The Employer also argues that there is no evidence to show that the two Walker brothers will be a conduit of information to their father about the events taking place with bargaining unit employees. Given the nature of the workforce and the size of the operation any news travels quickly. The Employer says that the fact that Colin and Curtis Walker still live at home should not be a major consideration in determining their status. The Employer notes that both Colin and Curtis demonstrated that they hold their own opinions and will not necessarily be swayed by their father's point of view.

With respect to Daum, Povlsen and McBride, the Employer argues that they were not management nor are they part of the management team. The Employer argues that irrespective of what may have been decided by *Vancouver General Hospital*, *supra*, regarding the status of the management team concept, the three individuals in question cannot by any stretch of the imagination be called members of management. The Employer argues that these three individuals perform exactly the same kind of work that chargehands perform. Chargehands are generally in the bargaining unit. The Employer argues that neither Daum, Povlsen or McBride hire, fire, or discipline. This, the Employer points out, is virtually conceded by the Union. The Employer argues that the other supervisory duties performed by these individuals are not sufficient to render them management exclusions.

With respect to the casual employees, the Employer argues that these employees work sufficient hours and have a history of employment with the Employer such that they cannot be classified as sporadic or irregular workers. The Employer argues that it is impossible to draw a line around the group of casual employees and exclude them from the bargaining unit.

VII. POSITION OF CERTAIN EMPLOYEES

Certain Employees argue that it is important to consider the fundamental proposition set out in Section 4(1) of the Code. That section provides that every employee is free to be a member of a trade union. Certain Employees assert that *prima facie* everyone who is an employee should be included in the unit.

With respect to the family relationship Certain Employees argue that the question to be answered is whether there is a conflict between the two Walker brothers and the rest of the unit. Certain Employees suggest that there is no conflict. They say that the Walker brothers have a community of interest with other employees in the unit in that they work the same hours, perform the same duties and possess the same skills. They are not treated preferentially and accordingly should be included in the unit.

With respect to the Union's management team argument regarding Daum, Povlsen, and McBride, Certain Employees argue that the management team concept has been severely curtailed if not totally eliminated by the decision in *Vancouver General Hospital, supra*. Moreover, if that is not so and the management team concept is still alive and well, then the three employees in this case do not meet the test set out in *Kootenay Savings Credit Union*, BCLRB No. 94/76, [1978] 1 Can LRBR 36. Certain Employees argue that none of the three have the authority to hire, fire or discipline. None of the three set policy. None of the three has administrative responsibilities. Daum and Povlsen may have supervisory powers; however, the fact that they exercise such powers on occasion is not sufficient to exclude them from the unit.

With respect to the casual employees, Certain Employees argue that the test is whether there is a sufficient and continuing interest in the bargaining unit. Certain Employees cite *Glen*

River Industries (Delta) Ltd., BCLRB No. 70/77, [1978] 1 Can LRBR 168, for the proposition that the test is "tangible and felt relationship." In applying that test, Certain Employees argue that I should consider what is expected of the employees, how long the employees have been with the Employer, and whether the employees make themselves available for work. In this case, Certain Employees argue that the casual employees expect to get work. By and large, they have all been working for the Employer for some period of time and they telephone in and otherwise check in regarding the availability of work. Certain Employees argue that the casual employees are entitled to vote because they do have a tangible and felt relationship with the Employer.

VIII. ANALYSIS AND DECISION

Familial Relationship

The fact that a familial relationship exists between an employee and an employer is not sufficient in and of itself to exclude that employee from the bargaining unit: *Bruce Clarke Ltd.*, BCLRB No. 56/78, [1979] 1 Can LRBR 149. The rationale for excluding employees on the basis of a familial relationship is that such employees lack a community of interest with the remaining employees in the bargaining unit and/or that the inclusion of such employees in the bargaining unit might give rise to conflict within the unit: *Diversey (Canada) Limited*, BCLRB No. 50/79.

Both Curtis Walker and Colin Walker testified. Curtis Walker is 21 years old. He worked full-time in 1992. However, in 1993 he reverted to working part-time because he returned to Douglas College to complete studies he had begun several years ago. In January 1993 he returned to college and in February 1993 he moved back home and is currently living with his father. Curtis Walker said that he views himself as an employee, he does not receive any special privileges, he does not get dividends from the Employer nor does he own shares in the Employer. His father does pay his college tuition but he pays for everything else himself. Curtis Walker said that he is rarely home and when he is he doesn't talk about work. In particular, he said he and his father have not discussed the Union or the organizing drive.

Colin Walker is 18 years old, he lives at home and attends grade 12 at the local high

school. He started working at the mill when he was in grade 7. In 1992 he worked approximately 824 hours and in 1993 has worked approximately 224 hours. His father tells him what work needs to be done and he goes in to the mill to do it.

Colin Walker learned about the organizing drive approximately one month ago at about the same time as his father. His father has talked to him and told him what a trade union is about. Colin Walker said he has listened to his father, and has listened to people in the lunchroom at work. He feels there are both good and bad points to a union and will make up his own mind.

Both Walker brothers gave their evidence in a forthright manner and I find them to be sincere young men. There is no doubt that they are employees in the bargaining unit. However, the question which must be addressed is whether they should be excluded from the bargaining unit because they are sons of the majority owner. In answering that question I must consider where their community of interest truly lies, and whether including them in the bargaining unit would cause conflict of the kind discussed in *Feed-Rite Ltd.*, [1979] 1 Can LRBR 296. In that case, the Canada Board examined the status of a 14 year old student who was the son of the vice-president of the employer. It held that given the age of the employee and the nature of his employment, taken in the context of his familial relationship, including him in the unit would present an obvious conflict of loyalties.

In analyzing the issue, the Canada Board compared familial relationships to managerial and confidential exclusions. Such relationships raise obvious concerns regarding potential conflict of interest between loyalties to the employer and the union. In reaching the decision to exclude the son of the vice-president, the Canada Board noted:

> While there is no presumption in favour of the exclusion of familial employees as such, the Board must be taken to be aware of the normal human responses arising out of close familial relations such as between the spouse and dependent children of an employer. (p. 304)

In the case before me there is no doubt that both Curtis and Colin Walker are still dependent children. They both live at home and, to some extent, receive financial assistance

from their father. There is daily interaction between them and their father, albeit at times it may be fleeting. While I accept that they are capable of making up their own minds on the issue of union representation, I am equally convinced that their loyalties lie with their father and consequently with the Employer.

Moreover, in reaching a decision on whether they should be included or excluded I must consider how their inclusion affects other employees in the bargaining unit. In *Diversey (Canada) Limited*, *supra*, the panel commented on this point as follows:

> What is important for us to extract from these familial relationship cases is that these employees were excluded, not because of their familial relationship with the employer, but rather because they lacked a community of interest with their fellow bargaining unit members and because their presence in the bargaining unit might give rise to conflict within the unit. As was said in *Alpine Land Development Ltd.,* case, at page 5:
>
> > Exclusion by virtue of a family relationship is not contemplated by either legislation or this Board.
>
> The existence of a familial relationship between employer and employee is important only to the extent that it signals a source of possible conflict in the proposed bargaining unit. It is only because familial relationship between employee and employer so often results in loss of community of interest with fellow workers and conflict in the bargaining unit that it serves as an important indicator to the parties that a person may not be appropriate for inclusion in a bargaining unit. (p. 10)

Neither Curtis nor Colin Walker admitted to identifying with management or to a possible conflict of interest; however, I am satisfied based on all the evidence that the inclusion of the two Walker brothers in the unit could give rise to possible conflict within the unit. Accordingly, while Curtis and Colin Walker are employees, they nevertheless should be excluded from the unit.

Management Team

The latest decision to address the viability of the management team concept is *Vancouver General Hospital*, *supra*. In that case the Board made it crystal clear that while the management team concept continues to exist, its application will be severely curtailed. In that decision the Board said the following:

> What then are the parameters of the management team concept? The Board sees it as a very narrow exclusionary ground. It would be a relatively rare occurrence when an individual is excluded under the concept of management team. This is in keeping with past jurisprudence. (p. 60)
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> * * *
>
> The management team concept will be "a relatively rare" ground for exclusion. It must be remembered that these individuals are employees, and, therefore, entitled to collective bargaining. However, in working as a senior confidential secretary, because of personal or familial relationships, in a professional capacity as a confidential advisor to management, or because of ownership or partial ownership of the business, a conclusion is reached that their community of interest lies with management, and not the union. The rationale for exclusion is community of interest. (This may in fact be no more than the opposite side of the conflict of interest coin). This is a policy construction, but one consistent with the overall scheme of the Code - the need in collective bargaining for an arm's length relationship. (p. 62)

I have concluded that the management team concept should not be applied to Daum, Povlsen and McBride. These individuals do not meet the management exclusion in Section 1(1) of the Code. The Union, therefore, attempted to have them excluded under the management team concept. If I acceded to the Union's argument I would be doing what was expressly rejected by the *Vancouver General Hospital* case:

> Therefore, individuals who do not meet the test of managers but indeed may amount to "near managers", do not become excluded under the management team concept. In this analysis, the management team concept would simply eat up the first level of supervision. If an individual is found not to be a manager, she

> remains in the bargaining unit in accordance with the scheme of the Act. Therefore, on the facts of this case one does not take a class of employees such as the 69 head nurses, find them not to be managers, but find that they perform significant administrative or management duties, and thereby exclude them under the concept of management team. Thus, the *Kootenay Savings Credit Union* criteria of significant administrative or management duties will not be employed to deliberately read down the statutory provisions in Section 1(1) (managerial exclusions). (p. 59)

Applying the analysis set out in *Vancouver General Hospital, supra*, I conclude that Daum, Povlsen and McBride are employees. They are not managers and they do not fall under the "relatively rare" ground for exclusion covered by the management team concept. On the basis of the evidence before me, I cannot conclude that there is a potential for conflict of interest. The majority of their time is spent performing bargaining unit work. Accordingly, it cannot be said that they do not share a community of interest with the other employees in the unit.

Casuals

Jurisprudence of the former Board, the Industrial Relations Council and the current Board clearly establishes that casual or and part-time workers are employees: *Edoco Healey Technical Products Ltd.*, BCLRB No. 81/79, [1980] 1 Can LRBR 570; *Emergency Health Services Commission*, IRC No. C35/89, (1990) 6 CLRBR (2d) 111, (Reconsideration of IRC No. C237/88); and *Custom Gaskets Ltd.*, BCLRB No. B83/93. However, a determination must be made on the facts of each case to determine whether casual or part-time employees share a sufficient community of interest that they should be included in the bargaining unit and thereby have a say in whether the unit should be certified: *Edoco Healey*.

There is no simple rule which determines the status of a part-time or casual employee. However, over the years the Board and the Council have enunciated a test; namely, do the challenged employees have a "sufficient, continuing interest" in the issue of union representation such that they are entitled to be included in calculating union support, see *Superior Contracting Ltd.,* IRC No. C313/88; *Custom Gaskets Ltd.; and Emergency Health Services Commission.*

In deciding whether that test has been met the Board will consider a variety of factors, some of which were set out in *Edoco Healey* and *Superior Contracting*:

- permanence of employment
- proportion of casual/temporary employees in the total work force
- nature and organization of the employer's business
- each individual's particular employment circumstances

If layoff is a factor, as it was in *Superior Contracting*, the Board will look at the character and definition of layoff rights, duration of layoff, seniority, and whether an employee has returned to school or found other employment.

I have applied the "sufficient, continuing interest test" and have considered the various factors listed above in reaching my decision in this case. My conclusion with respect to each of the remaining employees (i.e. Delloca, Greenhalgh, Grewal, Kennedy, McBride, McCormick) follows.

<u>Delloca</u>

Delloca was hired on March 30, 1993, and since that time he has worked approximately 31 hours. The Union objects to his inclusion because it feels that the Employer is trying to "stack" the voter's list. There is no evidence before me that this is the case. There is evidence that this year to date has been an extremely slow year but that as work picks up employees will be called back. The Employer intends to continue to employ Delloca. He should be included in the unit.

<u>Greenhalgh</u>

Greenhalgh was first hired on September 21, 1991, and worked approximately 677 hours in 1992 and 136 hours in 1993. There is no question that he has a sufficient continuing interest in the bargaining unit as well as a community of interest with the other employees. He should be included in the unit.

Grewal

Grewal commenced his employment on May 28, 1992. In 1992 he worked approximately 342 hours but has only worked 8 hours in 1993. Ross Holmes, who is a foreman/supervisor and a minority owner, testified that Grewal calls him on a regular basis. He knows Grewal's name is on a list with another company but said that it is not surprising that Grewal is trying to obtain other part-time work. He said that it is anticipated that there will be an increase in work and that Grewal will get an opportunity to be called in to work. However, on cross-examination Holmes said that Grewal is a last resort because he is a very slow packer and if someone off the street were available, who was a good packer, Holmes would hire that person.

Walker, however, said that no decision has been made regarding Grewal and as far as he is concerned Grewal is still an employee. He said that Grewal is a slow packer and he has been spoken to on several occasions. However, the Employer is prepared to give him another chance to prove himself. It may be his final chance but the Employer has not yet reached that stage.

Other part-time employees have worked significantly more hours than Grewal. Even Delloca, a recent hire, has worked 31 hours. The Employer's explanation that Grewal will be given another chance is somewhat self-serving in the circumstances.

Given that Grewal has only worked 8 hours and that the Employer acknowledges work performance problems I find that his relationship to the Employer is so tenuous that he does not have a sufficient, continuing interest in the bargaining unit and should therefore be excluded.

Kennedy

Kennedy is a 14 year old student who began work at the mill on November 7, 1991. He worked approximately 347 hours in 1992 and approximately 47 hours in 1993. The Union objects to his inclusion on the basis that he is a child and a casual worker and that his community of interest is different from the adult members of the bargaining unit. The Union also argues that under the *Employment Standards Act* the Employer needs a permit from the Director in order to employ Kennedy. This point was first raised by the Union in argument and neither the Union nor the Employer called evidence on the question of the legitimacy of Kennedy's employment

status. The issue addressed by the Union raises some important policy questions. I am not prepared to make a ruling on this point when it was not fully explored in the evidence and argument and where, as here, Kennedy's inclusion or exclusion may not make any difference to the eventual outcome of the case.

McBride

McBride was first hired on August 5, 1991, and worked approximately 201 hours in 1992. He only worked 8 hours in 1993. He is a full-time student. Holmes said that McBride is an on-call employee and part of the spare pool. Holmes received a list of times when McBride is available. Holmes said that he hoped that he would be able to provide McBride more hours over the summer.

Walker said that he anticipated McBride would be back to work during the summer either on a steady or on an on-call basis. Except for Grewal, all other casual employees have worked substantially more hours than McBride. Even Delloca who was only hired March 30 worked 31 hours. It is clear that there is work for casuals, yet no satisfactory explanation was given as to why McBride has only worked 8 hours. Like Grewal I find that his relationship to the Employer is so tenuous that he does not have a sufficient, continuing interest in the bargaining unit and should therefore be excluded.

McCormick

McCormick was first employed on January 13, 1990. In 1992 he worked 558 hours and in 1993 he worked approximately 67 hours. The Union says he is working for a moving company and is no longer working at the mill. However, Holmes says that McCormick is on-call and it is expected that his hours will increase as the need arises. McCormick apparently has musical aspirations and he works around his musical commitments.

Walker said that McCormick is called as required and as available. Walker said he still

considers McCormick an employee and McCormick told him that as soon as he is called he will come in to work. Walker explained that this has been an extremely slow year and that hours normally available for the part-time employees have been severely reduced.

Given McCormick's history of employment with the Employer and the fact that he worked 67 hours in 1993 and will be given work as the business improves, I find he does have a sufficient continuing interest in the bargaining unit and should be included.

Union Inclusions

The Union asked that Haramrit Dhaliwal and Pargat Athwal be included in the unit. Both of these individuals worked in 1992. Dhaliwal started in 1988 and Athwal in May 1992. Both have worked under 40 hours in 1993. The Employer was not prepared to concede that these individuals should be included in the bargaining unit. However, Wynn Walker's testimony regarding their current status was a concession by any other name. I therefore conclude that these two individuals are employees and should be included in the bargaining unit.

IX. CONCLUSION

1. Curtis Walker and Colin Walker are excluded from the proposed bargaining unit because, as sons of the majority owner, their inclusion in the bargaining unit could cause potential conflict.

2. Grant Daum, Geert Povlsen and Garnet McBride are included in the proposed bargaining unit. They are employees and do not fall under the narrow exclusionary ground of the management team concept.

3. Richard Delloca, Aaron Greenhalgh and Sean McCormick should be included. They are casual employees who have a sufficient, continuing interest in the bargaining unit.

4. Barkpal Grewal and Tim McBride are excluded. They are casual employees whose

relationship is so tenuous that they do not have a sufficient, continuing interest in the bargaining unit.

5. I make no finding regarding the status of Sean Kennedy at this time. His inclusion or exclusion may make no difference to the eventual outcome of this matter. Moreover, he did not cast a ballot.

The conclusions I have reached in this case do not unequivocally determine the issue of membership support for the Union. The parties will therefore need to address the issue of the revocations filed by several employees.

LABOUR RELATIONS BOARD

MARIA GIARDINI
VICE-CHAIR