

BRITISH COLUMBIA LABOUR RELATIONS BOARD

WAYNE MACDONALD

(the "Complainant")

-and-

IWA-CANADA, CLC, LOCAL UNION NO. 1-424

(the "Union")

-and-

QUESNEL FOREST PRODUCTS

(the "Employer")

PANEL: Kate Young, Vice-Chair

COUNSEL: Bruce Kaun, for the Complainant

E. Casey McCabe, for the Union

Frances R. Watters, for the Employer

CASE NO.: 12121

DATES OF HEARING: September 8, 29, October 22, 1993
March 7 and 18, 1994

DATE OF DECISION: April 21, 1994

DECISION OF THE BOARD

I. THE APPLICATION

Macdonald was discharged for insubordination by Slocan Forest Products Ltd. Macdonald alleges that Jack Higgins, the Union's business agent, acted arbitrarily and in bad faith, contrary to Section 7 of the *Industrial Relations Act*, by failing to advise him prior to the discharge to agree to take direction from the utility man as required by the Employer. The Union grieved Macdonald's discharge, processed it through the grievance procedure, set the matter down for arbitration, and retained a lawyer to act on its behalf at the arbitration. The day before the arbitration Macdonald agreed to a settlement of his grievance. Macdonald alleges that this agreement was obtained as a result of misrepresentations by the Union's lawyer, is unfair, and should be set aside.

II. TRANSITIONAL

Macdonald filed his complaint on June 26 and July 28, 1992. The hearing commenced September 28, 1993 before the Industrial Relations Council. On January 18, 1993 almost all provisions of the *Labour Relations Code* came into force. Proceedings commenced under the *Industrial Relations Act* continue substantively pursuant to the Act, while adopting where possible the procedural requirements of the Code: *Speed-Erect Foundations and Framing Ltd.*, BCLRB No. B1/93 (Reconsideration of IRC No. C132/92). As the applicable provisions of the Act and the Code are in all material respects identical, no submission on the impact of the introduction of the Code was sought from the parties.

III. THE FACTS

On March 18, 1991 Macdonald was piling lumber on the green chain. The green chains became plugged and Dick Lalande, the utility man, came over to assist on one of the green chains. Utility men are members of the bargaining unit and are entitled to direct the work force in the absence of a foreman. Lalande looked up as Macdonald was momentarily inactive,

exchanging a few words with a co-worker, Gary Edwards, while he waited for Edwards to lay down some logs. Lalande shouted across the green chains telling Macdonald to shut up and pile lumber. Macdonald laughed in response. Lalande yelled again and approached Macdonald. Macdonald "gave Lalande the finger" and likely told him to "fuck off". Macdonald told Lalande that he had no authority to order him around. Lalande became very angry and the two yelled and swore at each other.

This was not the first occasion Macdonald had confronted a utility man. On March 5, 1991 Macdonald refused to carry out the direction of Bill Adamson, another utility man. Adamson directed Macdonald to throw away some wood as scrap. Macdonald concluded that the wood was good and should not be thrown away. He refused to follow the direction saying he would only do so with management authorization.

It is these two events which led Terry LaLonde, the superintendent of operations, to call Macdonald to a meeting with John Manuluk, the head of personnel, and Bob Veitch, a foreman, on March 19. Macdonald attended the meeting with a shop steward, Ted Alexander. When asked what happened on March 18, Macdonald admitted that he had "given the finger" to the utility man and told Lalande that he didn't have to listen to him. Lalande asked Macdonald if he would agree with the following:

It is the company's policy that in the absence of the foreman the utility men always have been and will continue to be in charge of the shift. He has the full backing of management and is in control of the shift. We need your undertaking to follow that policy. You must take direction from the utility man without argument or disruption.

Alexander said Macdonald would not give an answer until he got direction from the Union. The meeting ended with Macdonald being told that he would not be allowed to work until he agreed to take direction from utility men.

There is a history to these events. Utility men are selected by the Employer from the ranks of the bargaining unit. The selection and role of utility men has been the subject of some discussion and debate among members of the Union. The Employer maintains it has the right to

select utility men. The Union has formally objected to this selection process and says that the positions should be posted and bid for.

The collective agreement excludes supervisory officials, and no foremen or supervisors are in the bargaining unit. The direction of employees is vested exclusively in management. Macdonald had been told by others, including members of the Union executive, that utility men do not have the authority to direct members of the bargaining unit. Macdonald shares this view.

The next morning, Macdonald went to see Jack Higgins, the Union vice-president and business agent, and told Higgins what had occurred on March 19. Macdonald was aware that Higgins was of the view that utility men were entitled to give direction in the absence of a foreman. Macdonald told Higgins that he had been asked to sign a letter or undertaking. Macdonald asked Higgins "Do I have to take this?". Macdonald testified that Higgins responded "They can't do that, file a grievance."

Higgins denied telling Macdonald that the Employer could not require Macdonald to sign the undertaking, but Higgins acknowledged he wasn't sure the Employer could require Macdonald to do so. Higgins testified he told Macdonald just to sign acknowledging receipt of the undertaking. Higgins testified he told Macdonald that if he didn't sign, the Union would grieve, and if he did sign, the Union would grieve saying that the utility man had over-stepped his authority on March 18. Macdonald denies Higgins ever suggested he sign and grieve later.

While Macdonald was at the Union office, Manuluk, the head of Personnel, called and asked Macdonald to come in to see him. Macdonald asked Higgins to accompany him to the meeting. Higgins declined, and when asked why said he had to look after the office.

Macdonald went to the meeting accompanied by Alexander. Macdonald was again asked to agree that he would take direction from the utility man. Macdonald said he wanted to take a copy of the document he understood he was to sign to the Union. LaLonde concluded that Macdonald had been given enough time to talk to the Union and said he would be discharged if he did not agree to take directions as required. LaLonde read to Macdonald a letter he had already prepared which read:

There have been two situations in 1991 March 5 and 18 in which you have failed to take instruction from a utility man. As you well know, it has been a policy of this company that utility men are in charge of the shift in the absence of the foreman and have the authority to give work direction.

Last night you were asked for your undertaking to obey the instruction of the utility man. You refused and were sent home without pay.

We have requested an undertaking from you because we can not and will not tolerate further insubordination and interference with the orderly operation of the mill. Unless you are prepared to give us this undertaking we will terminate your employment based on your failure to give an undertaking which recognizes the authority of utility men, the incidents of March 5 and 18 1991, and your overall work record.

Macdonald said he would not give the undertaking and LaLonde handed the letter to him.

Following the discharge Alexander and Macdonald again spoke to Higgins who recommended that Macdonald immediately proceed with a grievance.

Macdonald's work record was a factor in the Employer's decision to proceed to discharge. Macdonald had been employed for six years and had a record of several verbal and written warnings, plus short suspensions. Some matters had been removed from Mr. Macdonald's work record as a result of grievances by the Union.

At the conclusion of the March 20 meeting Alexander told the Employer that the Union wished to proceed to the second step in the grievance procedure as soon as possible. The second step occurred on March 26, 1991. At the conclusion of this second stage the discharge was confirmed.

The Union interviewed those individuals involved in the events of March 5, March 18, March 19 and March 20. The Union also obtained a statement from Macdonald. Macdonald was disappointed with the speed at which his grievance was processed through the grievance procedure. He talked to Higgins and told him to pursue his grievance. Higgins responded, "you're a nobody".

The step three meeting was very short. Higgins was advised by the Employer that it was not prepared to settle the matter. On April 4, 1991, the Union invoked arbitration and retained legal counsel to act on behalf of the Union.

Macdonald maintains that Higgins and other members of the Union executive bear some animosity towards him. Macdonald became active in Union politics in October 1988 when he was elected Plant Chair. The role of the Plant Committee is to take grievances to the step two level. During Macdonald's first term as Plant Chair many grievances were filed. Macdonald pressured the Union Executive to resolve these grievances to the Plant Committee's satisfaction. Macdonald's term as Plant Chair expired on October 1989 when he was defeated in the election. For several reasons Macdonald believed that the election was rigged. Macdonald and his supporters obtained considerable support for this position among the bargaining unit. Macdonald believes that his relationship with Frank Everett, the President, and Higgins, deteriorated at this time. One manifestation of this deteriorating relationship, in Macdonald's view, was the Union's decision not to proceed with an arbitration arising out of a suspension from work.

In January 1991 Macdonald was elected a delegate to attend the IWA convention scheduled for April. After Macdonald was discharged the Union took the position Macdonald was not entitled to sit as a delegate.

Plant Chair elections were to occur in April 1991, one month after the date of Macdonald's discharge. Macdonald intended to run for this position and after his discharge from employment he sought to continue his campaign for the position of Plant Chair. The Union was concerned about his eligibility to continue to run for this position because as a discharged employee he would be unable to attend at the plant to deal with grievances. The Union obtained an opinion from the national office that led the Union to conclude Macdonald was not eligible to run for the office of Plant Chair. The Union's decision was to delay the elections until after Macdonald's arbitration. Macdonald takes the position that this decision is contrary to the Constitution and further illustrates the Union's bad faith and animosity towards him.

The Union directed the balloting committee to delay the elections. The balloting committee, made up of several of Macdonald's supporters, ignored this direction and proceeded

with the balloting. Macdonald won the election handily.

The Convention took place April 1991. When Macdonald arrived at the Convention Everett told him he could not attend as a delegate, he could just sit as a guest. Macdonald ignored this direction and sat with the delegation. Everett took the position that the Convention would not start until Macdonald moved to the guest area. Everett had two people escort Macdonald to the back of the room. Macdonald was not permitted to speak at the Convention as a delegate. Macdonald relies upon this incident as further evidence of animosity towards him by the Union executive.

David Pidgeon was retained by the Union to pursue Macdonald's grievance. He received the Union file in April 1991 and reviewed it to ascertain who should be interviewed. He contacted Higgins and had him arrange appointments to interview those involved. Macdonald was notified that he would meet with Pidgeon June 25, 1991. Pidgeon prepared for the arbitration on the understanding that his instructions were to take the matter to arbitration and obtain Macdonald's reinstatement to employment. Pidgeon's only discussion with Higgins prior to June 25 was about the line-up of witnesses for the arbitration.

On the way up to Quesnel in the airplane, Pidgeon sat with Tom Roper, the lawyer representing the Employer in the case. At some point during their discussions, settlement was raised. Roper indicated that the Employer would not agree to reinstate Macdonald but might agree to pay some damages in order to avoid the cost of the arbitration. Pidgeon drove in from the airport with Higgins. Again the discussion about the grievance was brief. Pidgeon proceeded on the basis that his instructions were to do everything he could to properly represent Macdonald's interests.

Pidgeon met with Macdonald at approximately 2 p.m. January 25. Macdonald's testimony and Pidgeon's testimony differ significantly as to what occurred at this meeting. Macdonald testified that the meeting with Pidgeon was relatively short, between ten and fifteen minutes. Macdonald testified he asked "What does it look like?" early in the meeting and Pidgeon responded "not too good". Macdonald then became angry and stated "What do you mean it's not too good?" Macdonald testified Pidgeon put his papers aside and said that he was on the plane with the company lawyer who suggested a settlement of the grievance. Macdonald's

became angry and decided Pidgeon wasn't interested in his case and wouldn't represent him properly at the arbitration. He concluded that rather than take a chance and lose everything at the arbitration, he would take a settlement and see what he could do against the Union later.

Macdonald said that he never told Pidgeon that he didn't seek reinstatement and says that Pidgeon never spoke to him of the impact of an agreement which included no reinstatement. Macdonald denies ever telling Pidgeon he wanted damages and not reinstatement. Macdonald also disputes that Pidgeon discussed his disciplinary record with him.

Pidgeon took notes of the meeting which confirmed that the meeting took considerably longer than the time estimated by Macdonald and proceeded with Pidgeon first asking for some personal information about Macdonald. They then discussed the events of March 5, 18, 19 and 20, and went through the discipline record. Pidgeon testified that as they were going through Macdonald's work record, Macdonald volunteered that he didn't want to go back to work. In response to this Pidgeon asked Macdonald what he wanted to achieve with the arbitration. Pidgeon testified that Macdonald then said that he sought compensation for his lost wages. Pidgeon said "If that is what you want, full back wages, I will have to get you totally reinstated, I will have to prove you did absolutely nothing wrong". In this context, Pidgeon said Macdonald asked him of the chances of success and Pidgeon's response was "Frankly, there will be a fight to get you reinstated. What I see is we'll get you reinstated if you say you made a mistake and that you will accept the direction of the utility man. If you do that then I can see you can get reinstated but without full wages". At this point Pidgeon concluded that if all Macdonald wanted was his full lost wages the Employer might be prepared to pay that in order to avoid the risk of reinstatement.

Both Pidgeon and Macdonald agree that at some point they went through a calculation of his gross wage loss and reached the conclusion that it was \$7,500 dollars. Pidgeon says that he did ask Macdonald if he understood that the \$7,500 they were discussing was on the basis of no reinstatement and Macdonald said that was clear to him. Pidgeon also recalls saying "Are you sure that is what you want because house construction isn't year around in Quesnel" and again asked him, "Are you sure?" and Macdonald said "yes". Macdonald denies this discussion occurred.

Macdonald and Pidgeon differ in how the settlement discussions proceeded. Macdonald

said that when he agreed that his wage loss was \$7500 Pidgeon told him to leave the room and go home and he would see what he could do. Pidgeon recalls that Macdonald was present in the room when he made the first call to Roper and made the initial offer. Pidgeon also recalls that Macdonald was present when Roper called with the counter offer of \$3,500. Pidgeon told Macdonald that it was lower than he expected. Pidgeon told Roper that that would not be enough as the grievor was out of pocket \$7,500.

Sometime between 4:15 and 4:30 Roper called Pidgeon and offered \$6,000 upon several conditions including an acknowledgement the discharge was for cause. Pidgeon communicated this to Macdonald and told him that that was as far as the company would go. Macdonald told Pidgeon to accept the \$6,000 dollars.

Macdonald says that in his mind it was clear to him that Pidgeon was not going to represent him or do a good job in the arbitration and that is the only reason that he agreed to the settlement.

Macdonald says that before he agreed to accept the \$6,000 he said "what about my UIC?" and asked Pidgeon whether the settlement funds would be added to his UIC claims. Macdonald testified Pidgeon replied that it wouldn't be added to his UIC or wouldn't affect his UIC. Macdonald says that on this basis he agreed to accept the \$6,000 payment. Macdonald's evidence is that he felt he had no choice as this was as much money as the company was prepared to offer. Pidgeon denies that there was any discussion at this time about UIC.

While Pidgeon was phoning Roper and accepting the offer, Macdonald phoned UIC and was advised that the settlement funds would be considered income, would be split over several weeks, and would in effect lengthen his disqualification period. Macdonald contacted Pidgeon and said that he did not wish to accept the \$6,000. Pidgeon advised him that it was too late. Pidgeon nonetheless phoned Roper and tried to withdraw from the agreement, but the Employer declined to release the Union.

Pidgeon agrees Macdonald phoned him and said that he had changed his mind and didn't want to settle. Pidgeon testified that he asked Macdonald to return to the Hotel where they were meeting, and it was only then that they discussed the impact of UIC. It is common ground that

Pidgeon at this point accurately described to Macdonald the impact of the settlement funds on his UIC entitlement. There is no dispute that Macdonald, after being advised by Pidgeon that the Employer would not set aside the deal, agreed to accept the \$6,000.

Pidgeon again phoned Roper and that evening Macdonald signed a settlement agreement. The next day Macdonald received and cashed the cheque for the settlement funds.

Macdonald says that even before he met with Pidgeon a decision had been made by the Union that his case would be settled and that the Union would not proceed to arbitration. He reached this conclusion on the basis of what Alexander told him. Alexander testified that he had a telephone conversation with Higgins in the early afternoon of January 25. Alexander said he phoned from work at 1:45 p.m. to confirm that he was going to meet with Pidgeon later that afternoon. Higgins told Alexander not to bother, that the arbitration was settled. Higgins denied any such conversation with Alexander. Ellen Worobetz, with payroll, testified that Alexander was not on his coffee break at 1:45 p.m. June 25.

Alexander denied meeting with Pidgeon on June 25. Pidgeon testified he met with Alexander that afternoon.

IV. ANALYSIS AND DECISION

Macdonald says the Union breached the Act when Higgins failed to tell him to sign an agreement to take direction from the utility man. Macdonald testified Higgins told him the Employer could not require him to sign an undertaking and argued he relied upon this advice and was, as a consequence, dismissed. Macdonald says the advice was given either arbitrarily, without sufficient thought, or in bad faith, because Higgins wanted him discharged. Macdonald testified that he would have signed if Higgins had told him to sign.

Macdonald does not agree that he should have signed the undertaking he understood he was asked to sign by the Employer. Macdonald maintains that utility men are not entitled to give direction to other employees, and he persisted in this view on March 18, March 19, and March 20, 1991, throughout the step 2 grievance meeting, and during this hearing when he testified September 28, 1993. Macdonald doesn't say Higgins should have told him to sign the

undertaking because that would have been the correct advice. If Macdonald had been told by Higgins to sign the undertaking, Macdonald may have done so, but without in anyway agreeing that he was under an obligation to take direction from utility men.

Why does Macdonald argue that Higgins should have told him to sign an undertaking which Macdonald maintains throughout the Employer was not permitted to demand? I can only surmise that Macdonald believes Higgins should have assumed responsibility for having Macdonald agree to what Macdonald considered an improper exercise of management authority.

I am satisfied that Higgins adequately advised Macdonald that in the absence of a foreman a utility man could direct, but could not impose discipline. Higgins testified he told Macdonald this on March 20 when Macdonald came to him for advice. Macdonald agrees he had this discussion with Higgins, but testified it occurred prior to March 20. In any event Macdonald knew this was Higgins' view.

Higgins was under no obligation to advise Macdonald to sign an undertaking particularly after Macdonald told Higgins his position that he shouldn't be required to sign it and didn't agree with it. Higgins did not act in an arbitrary manner in not providing this advice.

Macdonald argues that Higgins didn't like him, was fearful of his winning the upcoming Plant Chair elections and acted in bad faith in his discussions with Macdonald on March 20. I find no evidence whatsoever to support any allegation that Higgins acted in a less than completely fair and competent manner in his discussions with Macdonald on March 20.

Macdonald says Higgins should have gone to the March 20 meeting when Macdonald was called in to see LaLonde. Higgins explained that he does not get involved in grievances until the third stage and that he would never attend such a meeting with a member. Higgins explained that he services a number of areas, spending only one day a week in Quesnel, and was holding his regular office hours at the time Macdonald requested his attendance. I accept this evidence and am satisfied that Higgins did not fail in his duty to Macdonald by not attending this meeting.

Macdonald also complains that the Union did not act sooner to get him reinstated. He suggests Higgins should have immediately, and in person, gone to the Employer and objected strenuously to the actions taken. Instead Higgins merely told Macdonald and the Union

representative to grieve it and the matter proceeded through the grievance procedure. Macdonald was unable to establish any foundation for his argument that Higgins would ever become involved in the early steps of the grievance procedure. In fact, the evidence established that the Plant Committee was charged with handling the second step of the grievance procedure and Higgins only became involved at the third step.

There is certainly no basis for any assertion by Macdonald that the Union in any way failed to process his grievance in a proper fashion. Macdonald was discharged March 20, the second step occurred March 26, the third step April 3. Arbitration was invoked immediately, legal counsel retained, and the matter set down for arbitration June 26 and 27, 1991. The Union acted in an exemplary fashion in processing this grievance.

Macdonald says that Higgins had decided to settle the grievance by 1:45 p.m. the day before the hearing, before Macdonald had met with Pidgeon. Macdonald asks me to conclude that the entire discussion between him and Pidgeon was a sham as the decision had already been made before this exchange occurred. Macdonald's entire case on this point rests upon the testimony of Alexander who says he was at work that day and phoned Higgins during his coffee break at 1:45 p.m. Higgins denies this call and this denial is consistent with all the other evidence. Despite cross-examination on this point there is no evidence that Higgins spoke with any Employer representatives about settling Macdonald's grievance at any time. The evidence is that all such discussions occurred between Pidgeon and Roper. It is extremely unlikely that Higgins would have settled the case, not told Pidgeon and stood by while Pidgeon prepared for the arbitration. Roper also testified. He never heard that the arbitration had been settled and on that day he interviewed the management capable of settling the grievance. I am drawn to the conclusion that Alexander was completely mistaken. No phone call as alleged occurred. Higgins did not settle the case with the Employer prior to the exchanges later that day between Pidgeon, Macdonald and Roper.

Macdonald's second major complaint is that Pidgeon failed to warn him that the consequences of the settlement included no reinstatement to employment.

It is noteworthy that at no time during the hearing did Macdonald assert that he thought reinstatement was part of the settlement. To the contrary, Macdonald's evidence at the hearing

was that he was unsatisfied with the settlement because "the Company would have paid a lot more to get rid of me", not that he lost reinstatement to his former position. Macdonald could not maintain he was unaware of the impact of the settlement in light of the agreement he signed. Just above Macdonald's signature the document reads "Upon payment of the net sum pursuant to paragraph 1 above, the termination grievance will be withdrawn and Macdonald shall have no further claims against the Company".

Pidgeon's evidence was that he did advise Macdonald that the acceptance of the settlement meant no reinstatement. He went further and suggested Macdonald carefully think before settling because his work building houses was seasonal. It is unnecessary to determine whether Macdonald's denial of this discussion is credible in order to dismiss this aspect of the complaint, as I find Macdonald was fully aware that a consequence of the settlement agreement was no reinstatement.

Macdonald testified that before he accepted the \$6,000 settlement proposed by the Employer he discussed with Pidgeon the impact which acceptance of this money may have upon his UIC claim. Macdonald testified Pidgeon told him it would have no impact upon his UIC entitlement and Macdonald accepted the settlement on this basis.

This discussion is denied by Pidgeon. Pidgeon's evidence is that the impact of the settlement upon Macdonald's UIC entitlement was not discussed at all before Macdonald instructed Pidgeon to accept the offer. Pidgeon says only after the Union's acceptance of the Employer's settlement offer was communicated to the Employer's lawyer, did the subject of UIC come up. At that time Pidgeon told Macdonald that the settlement would have an impact.

I do not accept Macdonald's testimony that Pidgeon misled him as to the impact of the settlement of his claims on his UIC entitlement prior to Macdonald agreeing to accept the offer. Macdonald agrees Pidgeon was very aware of the UIC implications of the settlement immediately upon the subject being raised after the deal had been concluded. It is unlikely that shortly before this Pidgeon would have said something completely different. I have applied the test outlined in *Faryna vs. Chorney*, [1952] 2 DLR 354, 4 WWR (NS) 171 (BCCA) to all the evidence before me and have concluded that Macdonald's recollection of his discussions with Pidgeon on June 25 was in several respects inaccurate. I prefer the evidence of Pidgeon over that of Macdonald.

In any event, Macdonald later affirmed the settlement. He signed the settlement agreement, and accepted and cashed the cheque for the settlement funds. He did all this after having been fully advised by Pidgeon as to the effect of the agreement on his UIC entitlement. Macdonald is bound by this agreement. He knew what he was signing, and the effect of his signature.

Macdonald says he felt pressured to sign the agreement because Pidgeon told him the Union had agreed to the settlement and would be held to the settlement by the Employer. This is not pressure. It is a realistic appraisal of the situation. At the conclusion of the hearing Macdonald withdrew any allegation that Pidgeon had been set up by the Union to defeat Macdonald's claims, as well as any allegation that Pidgeon coerced Macdonald or used undue influence to obtain his agreement to the settlement.

V. CONCLUSION

I find no basis for Macdonald's complaint that the Union breached the Act in its representation of him prior to his discharge, during the grievance procedure, and throughout the settlement negotiations. The complaint is therefore dismissed.

LABOUR RELATIONS BOARD

KATE YOUNG
VICE-CHAIR