Labour Relations Board
Saskatchewan

T.L. and C.L. v. UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL & SERVICE WORKERS INTERNATIONAL UNION – USW (formerly INTERNATIONAL WOODWORKERS OF AMERICA, CANADA LOCAL 1-184) and WEYERHAUSER SASKATCHEWAN LTD., Respondents

LRB File No. 056-04; November 21, 2008
Chairperson, James Seibel; Members: Leo Lancaster and Gerry Caudle

For the Applicants:	Brian Scherman, Q.C. and Crystal Wasylyshen
For the Respondent Union:	Neil McLeod, Q.C.
For the Respondent Employer:	Len Andrychuk and Leah Schatz

Duty of fair representation – Contract administration – Board's function not to determine merits of grievance or substitute Board's opinion for union's opinion – Board's function to determine whether union fairly and reasonably arrived at decision without acting in bad faith or in an arbitrary or discriminatory manner – Where union fairly investigated and considered facts and circumstances, sought legal advice, took not unreasonable view of situation and made thoughtful decision not to advance grievance, Board finds no violation of duty of fair representation.

***The Trade Union Act*, s. 25.1.**

REASONS FOR DECISION

Background:

[1] At all material times, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union – USW (formerly International Woodworkers of America, Canada Local 1-184), (the "Union"), was the certified bargaining agent for a unit of employees of Weyerhauser Saskatchewan Ltd. (the "Employer"), which operated three mills in the Hudson Bay area of Saskatchewan – the OSB 1000 mill, the OSB 2000 mill and the plywood mill — and a sawmill at Carrot River. The Applicants, T.L. and C.L., were employees of Weyerhauser and members of the bargaining unit represented by the Union at the OSB 1000 mill. The Applicants are brothers.

[2] The Applicants filed an application with the Board alleging that the Union had committed an unfair labour practice in violation of s. 25.1 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"). Section 25.1 provides as follows:

> *Every employee has the right to be fairly represented in grievance or rights arbitration proceedings under a collective bargaining agreement by the trade union certified to represent his bargaining unit in a manner that is not arbitrary, discriminatory or in bad faith.*

[3] In the Application it is alleged, *inter alia*, as follows:

(a) That the Applicant, C.L., initially commenced employment with MacMillan Bloedel ("MacBlo") in October 1973 at its oriented strand board OSB 1000 mill ("OSB 1000") at Hudson Bay, Saskatchewan. The Employer purchased certain assets of MacBlo including OSB 1000 in November 1999, and C.L. worked continuously at that mill until his employment was terminated on May 24, 2002;

(b) That the Applicant, T.L., commenced employment at OSB 1000 in 1974 for a short time; he then left the company's employ, rejoining it in 1976 until early 1982, when he again left the company's employ, and again rejoined it in May 1984, thence working continuously at OSB 1000 until his employment was terminated on May 24, 2002;

(c) Prior to the sale to the Employer, MacBlo had commenced construction of a second OSB mill, the OSB 2000 mill ("OSB 2000"). After the purchase by the Employer, OSB 2000 commenced operation in the fall of 2000. The Union and the Employer agreed on the manner of staffing the mill, *inter alia*: to the extent possible, it would be staffed with newly hired employees; it was desirable for long-term employees at OSB 1000 to remain at that mill, however, because of their seniority, long-term employees at OSB 1000 would have the right to work in OSB 2000 when it opened; therefore, it would be necessary to provide those employees with a guarantee that OSB 1000 would continue to operate to induce them to remain at that mill. According to the Applicants, the inducement

was that the Employer would guarantee that OSB 1000 would continue to operate for at least ten years from and after June 2000;

(d) That at a series of meetings in June 2000, the Union specifically represented to the employees, including the Applicants that it was desirable that long-term employees at OSB 1000 should remain there and, although they had the right to move top OSB 2000, and that as an inducement to them to remain, the Employer had guaranteed to operate OSB 1000 for at least a further ten years;

(e) That based on these representations, the Applicants elected to remain at OSB 1000, and that subsequent to June 2000, although they had further opportunities to transfer to OSB 2000, they declined to do so because they were advised that their seniority would not be preserved if they did;

(f) That in February 2002 the Employer announced that it would close OSB 1000 on May 24, 2002;

(g) The Applicants' employment was terminated on that date when OSB 1000 was closed; OSB 2000 continued to operate;

(h) The Applicants sought to file a grievance of their terminations, but the Union refused to do so;

(i) The Applicants say further that the Employer and the Union conspired to misrepresent the guarantee of the continued operation of OSB 1000 so as to deter OSB 1000 employees from moving to OSB 2000 in order to maximize the number of new positions that could be filled by relatives and new employees;

(j) The Applicants say further that the Union facilitated the Employer to enter into specific agreements with certain employees at OSB 1000 that provided those employees with more favourable assurances and payouts than those offered to the Applicants; and

(k) The Applicants say that this is a violation of the Union's duty of fair representation within the meaning of s. 25.1 of the *Act*.

[4] In its Reply, the Union denied the salient allegations, stating, in summary, as follows:

(a) That the Union and Employer entered into a "Start-Up Agreement" regarding OSB 2000 providing for a transfer process, wherein opportunities were offered to employees in the following order: (1) By seniority to OSB 1000 employees hired before January 1, 1999; (2) by the combined seniority lists to employees hired before January 1, 1999 in the Hudson Bay plywood mill ("the plywood mill") and the Carrot River sawmill ("the sawmill"); (3) By seniority to OSB 1000 employees hired after January 1, 1999; (4) By the combined seniority lists to employees hired after January 1, 1999 at the plywood mill and the sawmill; (5) New hires.

(b) That the Union and the Employer entered into a Letter of Understanding dated June 6, 2000 ("Letter of Understanding") whereby: (1) an enhanced severance and retirement package was made available to OSB 1000 employees that chose not to transfer to OSB 2000, and that would again be made available should there be a future full or partial closure of OSB 1000; and, (2) a retention bonus was provided to employees at OSB 1000, the plywood mill and the sawmill, who were eligible for transfer to OSB 2000, but chose not to do so.

(c) That the Applicants attended a Roll-out Meeting on June 12, 2000, at which representatives of the Employer discussed the terms of the Letter of Understanding and employees were fully informed of the options available for transfer to OSB 2000; the employees were further told at the meeting that their own personal circumstances would determine which decision was in his or her best interests;

(d) That the Applicants had the option to transfer to OSB 2000, but chose not to do so;

(e) That there was no guarantee by the Employer, nor did the Union so represent to the Applicants, that OSB 1000 would continue to operate for at least ten years, nor did the Union represent that it was in their best interests to remain at OSB 1000 rather than transfer to OSB 2000;

(f) That although the Union was unhappy with the Employer's subsequent decision to close OSB 1000, it concluded that such action was not contrary to the collective agreement[1], or any guarantee, representation or undertaking; that the Union pursued and obtained additional; transfer, severance and retirement opportunities for employees who had elected to remain at OSB 1000 in 2000;

(g) That the Union discussed at length the matter of filing grievances with the Applicants, but advised them that same were without merit because the Employer had committed no breach; nonetheless, the Union processed grievances on the Applicants' behalf to a meeting with the Employer on April 24, 2002, which the Applicants attended; that subsequently, the Union determined not to process the grievances further, and withdrew them on May 8, 2002, on the basis that in its opinion there was no violation of the collective agreement or of any other alleged binding commitment by the Employer;

(h) That upon closure of OSB 1000, the Union negotiated severance packages and retirement-bridging terms that were more beneficial to the affected employees than was provided by the technological change provisions of the collective agreement.

[5] In its Reply, the Employer stated, in summary, as follows:

[1] The term of the collective agreement for OSB 1000 was April 1, 1996 to March 31, 2002, extended to March 31, 2003.

(a) That rather than striving to retain as many long-term employees as possible at OSB 1000 when OSB 2000 opened, the Employer sought to achieve a balance whereby each of its mills would have sufficient skilled and experienced employees; that to this end it entered into a Special Start-Up Agreement ("Start-Up Agreement") and Letter of Understanding with the Union;

(b) That the Letter of Understanding provided that:

(1) as part of the Start-Up Agreement, a retention bonus of $3500 would be provided to employees at OSB 1000, the plywood mill and the sawmill, who were eligible for transfer to OSB 2000, but who chose not to transfer; and,

(2) (i) in the event of a partial or full closure of OSB 1000, an enhanced severance and early retirement package ("the enhanced severance package") would be made available to then current employees at OSB 1000 who chose not to transfer to OSB 2000 that would match the features and scope of the package offered to the Employer's British Columbia employees in 1998/1999;

(ii) all OSB 1000 employees would be eligible for the enhanced package for ten years from June 1, 2000 as a minimum entitlement;

(c) That the Letter of Understanding was distributed to all employees that attended a Roll-out meeting convened by the Employer and the Union on June 12, 2000; the agreement was discussed and explained at the meeting, and there was a question and answer session; at no time did the Employer represent that it guaranteed that OSB 1000 would remain open for ten years;

(d) That all employees were encouraged to make the decision that was best for them;

(e) That subsequent to June 2000, the Applicants had other opportunities to transfer to OSB 2000, and would have retained their company service date, vacation entitlements and pension plan, but not their seniority;

(f) That the closure of OSB 1000 was not in violation of any agreement or guarantee;

(g) That in respect of the closure of OSB 1000, the Employer and the Union entered into a Memorandum of Agreement dated April 15, 2002 clarifying the manner in which the Letter of Understanding would be applied to the OSB 1000 employees affected by the closure;

(h) That upon closure of OSB 1000, the Applicants had the following option:

(1) to transfer to a permanent position at OSB 2000, and also receive severance under the terms of the collective agreement covering OSB 1000; or,

(2) to terminate their employment and receive lump sum severance under the enhanced package available only to the employees, including the Applicants, that had remained at OSB 1000 after June 2000;

(i) That on a Preliminary Information Form, each of the Applicants indicated favouring the option to terminate their employment and receive the enhanced severance package; neither of the Applicants completed a Final Information Form to indicate their final decision, as requested by the Employer, and so were deemed to have selected the termination-enhanced-severance-package option; the Applicants were terminated and offered severance of approximately $77,000, in the case of C.L., and $49,000, in the case of T.L.;

(j) On April 22, 2002, the Applicants submitted a “Request for Consideration of Grievance” form alleging that the Employer “. . . had failed to honour

the commitment of the ten year guarantee as stated on page 8 of OSB 1000 Rollout meetings dated June 12 to 15, 2000;"

(k) That the Employer's reasons for denying the grievance included, in part, that ". . . the commitment was if OSB 1000 closed in a ten year period, [the Employer would] try to provide jobs at PW/OSB2000 or provide an enhanced severance package. Both are available".

[6] The Board heard the evidence of 15 witnesses and argument over 5 days of hearing.

Evidence:

[7] A not insignificant amount of the extensive evidence of the many witnesses at the hearing was repetitious or irrelevant. In the main, it was consistent with the basic facts – but not necessarily the conclusions – posited by the parties in the initiating application and replies as set out above. Accordingly, following is a summary of additional details and highlights germane to the issues.

[8] For ease of reference a copy of the Letter of Understanding is attached to these reasons as Schedule "A".

[9] In his evidence, the Applicant, T.L., specifically confirmed, *inter alia*, that: he attended the Roll-out Meeting on June 12, 2000 (the "roll-out meeting"); he received copies of the Letter of Understanding and the Start-Up Agreement at the meeting; that the options for transfer to OSB 2000 were reviewed at the meeting; in response to his specific query of a Union official, Raymond Dease, he was told that it was his own decision as to what was the best option for him; that he knew that if he remained at OSB 1000 and later transferred to OSB 2000 (after the June 26, 2000 deadline), he could not bring across his seniority.

[10] The questions and answer session at the roll-out meeting was transcribed and distributed to the employees, including the Applicants, a few days later. In his evidence, T.L. referred specifically to the following question and answer as proof in

support of his contention that the Employer had guaranteed to keep OSB 1000 operating for at least a further ten years:

> *Q: Why the 10-year guarantee?*
> *A: Where the 10 years comes from is the Western O.S.B. business reviewed a number of scenarios for O.S.B. 1000 over a 10-year period. Six different options/financial prices models were reviewed and the results suggested the best scenario was to continue to operate both lines over a 10-year period with some capital investment. That's where the 10-year commitment came from.*

[11] T.L. also referred to the meeting presentation outline prepared for the Employer's representatives, where some of the points to cover included the following:

- *The company is prepared to commit up to 4.5 million dollars (with justification) for #1 line improvements [at OSB 1000] . . . .*
- *Out of the 61 operating OSB mills in North America, our OSB 1000's manufacturing costs are about in the middle of the pack.*
- *However, we know the other companies are also looking for ways to reduce costs, so we must stay focused on this as well. When the selling prices are good and everyone's making money even the worst mills continue to run. When the prices fall, only low cost producers continue to run.*
- *Rod Dempster's comments to us on Friday that he wanted to share with you were "With respect to the OSB 1000 and Plywood Operations, after some initial review, the best option for the Company is to continue to operate and even consider some capital improvements, however, today's business a process of continual review and improvement."*
- *What about the future.*

  [Following are some rhetorical questions regarding different scenarios].
- *These are all good questions and I wish I could give you concrete guaranteed answers but I cannot.*

[12] T.L. testified that he based his decision to remain at OSB 1000 on what he believed to be the case, as follows: that he would receive the retention bonus for

employees who remained at OSB 1000; that there was a plan to upgrade OSB 1000; that there would be other jobs for OSB 1000 employees in the event of closure; and what he repeatedly called “the ten year guarantee” to keep OSB 1000 open.

[13] Approximately seven months later, the Employer announced that OSB 1000 would be closed in May, 2001. T.L. said that he did not immediately know whether the closure would be temporary or permanent, because the mill had been closed a number of times before due to market conditions, but had always reopened. In March 2001, one of the Employer’s managers asked T.L. if he wanted to transfer to OSB 2000, but he declined because he could not bring his seniority across. In early May, both work Lines #1 and #2 at OSB 1000 were shut down, and the Applicants were laid off indefinitely. But Line #2 was partially restarted later in the month, and, because of their seniority, both Applicants were recalled to work, T.L. at OSB 1000 and C.L. at OSB 2000. OSB 1000 eventually came back up to full capacity and continued to operate until September 2001. Sixteen (16) other employees at OSB 1000, who were then laid off, were offered alternate employment at the Employer’s plywood mill.

[14] In February 2002, T.L. (and all other employees at OSB 1000) received a letter from the Employer advising him that the mill would close permanently on May 24, 2002, because, “It has now been determine that the operation of OSB 1000 is no longer economically viable”. The letter also stated that, “As of this date, all employees from OSB 1000 will either be transferred to another Weyerhauser facility, or offered a severance or early retirement package.”

[15] The Union held a meeting on April 15, 2002. The discussions between the Union and the Employer regarding the closure were discussed at the meeting. It was disclosed that the Employer would be offering early retirement packages to as many employees at the plywood mill and OSB 2000 as would be necessary to make room for all the OSB 1000 employees who chose to transfer to either of those mills. To that end, the employees were advised that the Employer required them to indicate if they planned to transfer or terminate their employment by April 24, 2002. The vacancies created at the mills would be filled on the basis of seniority. T.L. did not attend the meeting because he said he was out of town obtaining legal advice regarding the closure. Although he knew that the OSB 1000 employees were to advise the Employer of their

decision whether to transfer or not by April 24, 2002, he did not bother going to the Union or the Employer to ask about his options.

[16] On April 22, 2002, the Applicants delivered a "request to consider grievance" form referring specifically to the "10-year guarantee" set out in the questions and answers from the roll-out meeting (set forth in detail, *supra*). This resulted in three meetings on April 24, 2002. First, the Applicants met with five Union officials regarding their request. Later that day, the Applicants and several Union representatives met with the Employer's human resources manager to file a grievance and discuss the matter. Still later that day, the Union's secretary met with the Applicants and advised them that in the Union's opinion there was no valid grievance. On May 8, 2002, the Union advised the Employer that the grievance was withdrawn.

[17] The Employer had asked the OSB 1000 employees to indicate whether they would opt to transfer to OSB 2000 or the plywood plant, or take early retirement (if eligible) or elect severance and an enhanced package. The employees were first asked to provide a preliminary indication, on a Preliminary Information Form that provided as follows:

> *This election sheet is **not binding**, but provides the company and the union with some planning abilities. Please identify your preference by checking the appropriate box and completing required sections:*
>
> ___ ***Option #1 Transfer to another mill:*** *I wish to be transferred to either the Plywood Mill, OSB 2000, or Carrot River depending on openings that my seniority allows me to secure, and receive a lump sum transfer severance.*
> *Transfer Severance: 8 hours x 7 days x years of service x permanent bid rate*
>
> ***Please list in order (#1 – 1st preference #2 – 2nd preference etc.) any or all of the mills that you would be willing to accept employment in***
>
> ___ ***Option #2 Severance:*** *I wish to terminate my employment with Weyerhauser and receive a lump sum severance (must be under 55 years of age as of May 24, 2002.*
> *Severance = 8 hours x 15 days x years of service x permanent bid rate*

> ___ ***Option #3 Early Retirement:*** *. . .*
> *Note: Applications will be finalized at a later date, once all relevant information is finalized.*

[18] The Applicants each checked off Option #2 Severance, but did not deliver the forms to the Employer. T.L. stated that was because the preliminary indication was "non-binding".

[19] The Final Election Form was exactly similar to the Preliminary Information Form, except that the first sentence in the above form was deleted. When it came time to indicate their final choice – i.e., by April 24, 2002 – neither Applicant completed and returned the Final Election Form. As neither Applicant had advised that they wished to transfer to any of the Employer's other facilities, the Employer deemed that they had selected the only other choice open to them, that is, severance with an enhanced package (because they were under 55 years of age, they were not eligible to chose the third option of early retirement), and tendered payment. The Applicants did not accept the funds. T.L. said he rejected payment because the accompanying T-4 referred to "retirement", and he did not want to leave any impression that he had agreed to "retire".

[20] In cross-examination, T.L. acknowledged that OSB 1000 employees who had less seniority than he and C.L. had transferred to jobs at OSB 2000, and by the time of hearing of this application, no one had been laid off at that mill. He also agreed that he could have remained employed with the Employer in another capacity and receive the original basic severance under the OSB 1000 collective agreement (see, Preliminary Information Form, Option #1, above), rather than accepting termination and enhanced severance under the Letter of Understanding, and he would actually have been better off financially than if he had accepted transfer to OSB 2000 in June 2000 – that is, he could have remained employed and received basic severance. Rather, he felt the Employer was wrong in closing OSB 1000 and that the Union ought to have taken to arbitration the issue that he and C.L. should have received a further 8 years' pay on the basis of the "10-year guarantee" referred to in the questions and answers at the June 2000 roll-out meeting (see, *supra*).

[21] The Applicants received letters from the Employer dated April 25, 2000 – the day after the deadline to indicate their option – stating that the Employer had made

efforts to have them make their election, but as they had not, they had defaulted to the severance option. The letter provided, in part, as follows:

> *This letter serves as confirmation of the severance package you are entitled to because of your termination, due to the permanent mill closure of OSB 1000. Despite our repeated efforts to have you complete the document entitle, Final Information for Transfer, Severance or Early Retirement OSB 1000 Permanent Plant Closure – May 24, 2002, you declined the opportunity, and have therefore defaulted to the severance option. . . .*
>
> *The severance is calculated using the following formula:*
> *[formula is set out with calculation and total amount]*
>
> *[Description of various continuing benefits follows.]*

[22] In cross-examination, T.L. acknowledged that the Employer had made repeated efforts to get him to complete the final election form. He also acknowledged that the reason the severance he was offered was approximately twice that provided for under the collective agreement was because of the Letter of Understanding provision in the event of the closure of OSB 1000 within ten years. He agreed that the Letter of Understanding did not say that that the Employer guaranteed to operate OSB 1000 for ten years, but said that he nonetheless assumed that the words "10 year guarantee" meant a ten year guarantee to operate the mill because of what was stated in the question and answer document from the roll-out meeting.

[23] T.L. also agreed in cross-examination that he understood that the Letter of Understanding actually contemplated the possibility of the closure of OSB 1000 at any time within ten years, but said that the Union should specifically have told the employees that there was no binding commitment to keep the mill open for ten years – if it had done so he could have made a more informed decision whether to transfer to OSB 2000. He also acknowledged that he was not pressured to remain at OSB 1000, and that it was his own decision. He said the only thing that prevented him from remaining with the Employer when OSB 1000 was closed in 2002 was the fact that he could not bring his seniority with him if he transferred to another mill.

[24] The evidence of the Applicant C.L. was substantially consistent with that of the Applicant T.L. When it was put to him in cross-examination that the Letter of

Understanding did not guarantee to keep OSB 1000 open for ten years, he said "it was made to manipulate" and "it's very close to a guarantee". In any event, he said that he refused to acknowledge the validity of the Letter of Understanding because it was not ratified by the Union membership. He too insisted that the pertinent question and answer from the roll-out meeting constituted a written guarantee on the part of the Employer to operate OSB 1000 for ten years, and that was what he based his decision on in initially deciding not to transfer to OSB 2000. With respect to later opportunities to transfer to OSB 2000, C.L. said that he did not do so because he could not bring his seniority. He in fact said that "someone", either from the Union or the Employer should have come to him in April 2002 and asked him to transfer to OSB 2000: – "They never came to me to say I should transfer" – despite the fact that he knew what his options were and declined to indicate which he chose, saying this was "because I had a grievance."

[25] Scott Reid is a human resources manager for the Employer at Hudson Bay. He testified that when he joined the Employer in January 2000 the future plans for OSB 1000 were under review; options being considered included, continuing to operate it as is, closing it, modifying it, or injecting capital to upgrade it.[2] In the spring of 2000, a plan was settled upon to upgrade the mill. However, an unforeseen market depression later in the year forced a temporary closure in early 2001. The mill partially re-opened and then fully re-opened later in the year. Unforeseen continuing market concerns led the Employer to change its plan to upgrade the plant and decide to close the mill in May 2002.

[26] Mr. Reid testified that the negotiations with the Union regarding the Letter of Understanding took into account not only the transfer of employees to OSB 2000, but the treatment of employees who remained at OSB 1000 in the event that mill closed within ten years. He said that the Employer was not looking to dissuade senior employees from transferring to OSB 2000, but rather to ensure that if they transferred, it would be for the right reasons and with full information about the new work system that would be in place.

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[2] The product being produced by OSB 1000 was not the newest industry standard: because the surface was an older-style dimple, instead of an anti-slip screen pattern like that produced by competitors' oriented strand board mills, the sale price of the product was discounted. There were also environmental emissions concerns raised by provincial environment authorities.

[27] That is, OSB 2000 was a state-of-the-art mill, employing the latest technology and computerization; it would be using different machinery and new processes; it would be using a merit-based work system rather than one strictly based on seniority, and all employees, no matter how senior, would be required, to complete a probationary period. The retention bonus for employees who chose to remain at OSB 1000 was intended to offset the fact that higher wages would be paid at OSB 2000 under the collective agreement negotiated with the Union for the new mill. During negotiations regarding the startup of OSB 2000, the Employer would not make any guarantee regarding the continued operation of OSB 1000 because there were issues regarding its viability; indeed, the Employer would not provide any guarantee as to the continued operation of OSB 2000. The Union then looked to negotiate for an enhanced severance package in the event of closure of OSB 1000, as the Employer had done at some of its other mills. This was included in the Letter of Understanding.

[28] Dennis Bonville was the most senior and experienced local Union member on the Union's bargaining committee for the collective agreement at OSB 2000. He testified that the Union's objective in bargaining the Letter of Understanding arose from the fact that there had been so many different versions over the years about the fate of OSB 1000 that the Union wanted assurances from the Employer (who would not guarantee that the mill would not close) as to what would happen to employees who remained at OSB 1000 in that eventuality. He put the Union's position as follows: "If you [i.e. the Employer] are so sure that OSB 1000 will continue to run, then you should not have a problem agreeing to what will happen if it does not continue to run." He said the template used was the Employer's agreement with the union at its Lumby-Merit operation in British Columbia, which the Union brought to the bargaining table at Hudson Bay. Mr. Bonville's evidence in this regard was corroborated by that of both Paul Hallan, local Union president, and Raymond Dease, long-time recording secretary and workplace change coordinator for the Union.

[29] Despite the fact that he felt from the outset that the Applicants' grievance was without merit, Mr. Hallan sought and obtained legal advice regarding the matter before attending the meeting with Mr. Roos to discuss the grievance and before the Union decided to withdraw the grievance. The Union's grievance committee met with the Applicants prior to the meeting with Mr. Roos, listened to what they had to say – they

kept repeating that the Employer had guaranteed to keep OSB 1000 open for ten years -- and tried to explain to them why the grievance made no sense to the Union. Nonetheless, the Union arranged for the grievance committee to meet with Mr. Roos, with the Applicants in attendance, to discuss the grievance. After the committee heard back from Mr. Roos that the Employer denied the grievance, the committee met again to discuss the matter, sought further legal advice, and unanimously concluded that there was no merit to the grievance.

Arguments:

[30] We have reviewed the written briefs of argument and accompanying cases filed by counsel.

[31] Mr. Scherman, counsel on behalf of the Applicants, submitted that the failure of the Union to progress the Applicants' grievance to arbitration constituted a failure to fulfill the duty of fair representation contrary to s. 25.1 of the *Act*. The Union is sophisticated; the Applicants are not; they drew the grievance themselves without Union assistance. They were entitled to have the grievance heard because of what counsel called the "negligent misrepresentation element." Counsel submitted that it was not for the Board to determine whether there was negligent misrepresentation, but rather to determine there was a serious issue that should have gone forward to arbitration. Based on the obligations of the Employer under the provincial forest management agreement and the lumber availability forecast published in the MacBlo newsletter in 1999 the OSB 1000 employees had a reasonable expectation in 2000 that the mill would continue to operate for some time. In dismissing the Applicant's grievance, the Union took a narrow view of what was in the Letter of Understanding rather than a broader perspective based on this reasonable expectation, and the Employer's inducement to keep employees at OSB 1000 rather than transferring to OSB 2000 when it opened. The question and answer in the document from the roll-out meeting that referred to a ten year guarantee did not qualify that it was tied to the enhanced severance package as opposed to keeping the plant operating.

[32] Counsel stated that the Applicants' position in 2002 was that they should be able to transfer to OSB 2000 without loss of seniority or be paid loss of wages for the balance of the ten years remaining on the "guarantee", and an arbitrator could grant

such a remedy. In this regard counsel referred to the well-known decision in *Weber v. Ontario Hydro, [1995] 2 S.C.R. 929* (S.C.C.).[3]

[33] Ms. Wasylyshen continued with the argument on behalf of the Applicants with respect to the elements of the tort of negligent misrepresentation. Mr. Scherman concluded the argument on behalf of the Applicants, asserting that the Union did not consider the matter, and if it did, it gave it only a cursory review, while it had a duty to make a thorough investigation. This amounted to "arbitrariness" on the part of the Union within the meaning of the Board's case law. The Union had a duty to hold the Employer liable for its negligent misrepresentation. The Union's failure amounted to gross negligence within the meaning of *Canadian Merchant Services Guild v. Gagnon, [1984] 84 CLLC 12,181 (S.C.C.),* and involved critical job interests, ie.: loss of employment.

[34] Mr. McLeod, counsel on behalf of the Union, argued that the Union had not breached the duty of fair representation, and that it had arrived at the determination not to carry the grievance forward after appropriate consideration that was neither cursory nor arbitrary. With respect to the notion of a guarantee by the Employer to operate OSB 1000 for a ten year period, counsel pointed out that the Union's negotiations with the Employer regarding OSB 1000 arose out of negotiations for an initial collective agreement for OSB 2000: the new collective agreement for OSB 1000 had already been made. The Union's objective in the negotiations was to obtain a benefits protection package for OSB 1000 employees, including opportunity for alternative employment within the Employer's operations, in the event of closure. Counsel submitted that the Union never contemplated seeking a guarantee of continued operation. There was no binding obligation for the Employer to operate OSB 1000 for any length of time.

[35] Counsel asserted that the Applicants were the only persons who appear to have concluded that there was such a guarantee – the most that their own witnesses said on the point was that they thought the mill would not have shut down so soon. That is, the reasonable expectation of employees may have been that they did not expect the mill to closed so soon, but not that there was any "guarantee" that it would continue operating. Everyone knew that OSB 1000 was an old mill and there had been questions about its

[3] Counsel on behalf of each of the Union and Employer conceded that if a wrong arises out of the collective bargaining relationship it is grievable and arbitrable.

possible fate for many years. Counsel submitted that there was a guarantee regarding what would happen in the event of closure, but there was no misrepresentation in that regard – the Letter of Understanding is clear. The Union's negotiations had ensured one of the best protection packages ever. There was no logical or credible basis for the Union to advance an argument that the Employer had guaranteed to keep the mill operating.

[36] Counsel further argued that the Applicants never advised the Union that receiving a position at OSB 2000 with a preservation of seniority would resolve their complaints. They always maintained the position that they were entitled to the balance of ten years' employment at OSB 1000, and, indeed, wanted the Union to try to force the Employer to keep the mill operating. The Union had no basis for advancing such a position and was within its rights and obligations to the membership to decline to do so.

[37] With respect to the notion that the Union gave only cursory or no consideration to the idea of negligent misrepresentation, although there was no foundation for it, the Union nonetheless considered the matter in depth and sought legal advice. The fact that employees were surprised when the mill closed so soon, is not evidence of misrepresentation. What the Union achieved in negotiations, and what was communicated to the employees, was that in the event of closure the employees would receive severance and another job if they so chose.

[38] Counsel argued that the Union did not act arbitrarily or in bad faith in declining to advance the Applicants' grievance.

[39] Mr. Andrychuk, counsel on behalf of the Employer, essentially reiterated the Union's argument that there was no misrepresentation and no guarantee of continued operation. While the Employer communicated intent to keep OSB 1000 at the time in 2000, it did not guarantee to do so for any length of time, and it is common sense that such plans always depend on market conditions. There is no evidence that even if there was a misrepresentation that it was made negligently.

Analysis and Decision:

[40] All parties appearing at the hearing of this matter were provided with the full opportunity to participate, to introduce relevant evidence, to examine and cross-

examine witnesses, and to argue orally and file briefs. These reasons for decision are based on the whole of the evidence, the demeanour of the witnesses, and consideration for reasonable probability. Where witnesses have testified in contradiction to the findings we have made, we have discredited their testimony as either being in conflict with credited documentary or testimonial evidence, or because it was inherently incredible or unworthy of belief.

[41] The Board's general approach to applications alleging a violation of s. 25.1 of the *Act* was summarized as follows in *Lawrence Berry v. Saskatchewan Government Employees' Union*, [1993] 4th Quarter Sask. Labour Rep. 65, LRB File No. 134-93, at 71-72:

> *This Board has discussed on a number of occasions the obligation which rests on a trade union to represent fairly those employees for whom it enjoys exclusive status as a bargaining representative. As a general description of the elements of the duty, the Board has indicated that it can do no better than to quote the principles outlined by the Supreme Court of Canada in the case of Canadian Merchant Services Guild v. Gagnon, [1984] 84 CLLC 12,181:*
>
> > *The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.*
> >
> > *1. The exclusive power conferred on a union to act as a spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.*
> >
> > *2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.*
> >
> > *3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.*
> >
> > *4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.*

> *5. the representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employees.*

The terms "arbitrary," "discriminatory," and "in bad faith," which are used in the legislative description of the kind of conduct on the part of a trade union which is to be prevented, have been held to address slightly different aspects of the duty. The Supreme Court in Gagnon used the following comments from the decision of the British Columbia Labour Relations Board in Rayonier Canada (B.C.) Ltd. (1975), 2 CLRBR 196, at 201, to convey the distinct attributes of the duty of fair representation:

> *... The union must not be actuated by bad faith, in the sense of personal hostility, political revenge, or dishonesty. There can be no discrimination, treatment of particular employees unequally whether on account of such factors as race and sex (which are illegal under the Human Rights Code) or simple, personal favoritism. Finally, a union cannot act arbitrarily, disregarding the interests of one of the employees in a perfunctory manner. Instead, it must take a reasonable view of the problem before it and arrive at a thoughtful judgment about what to do after considering the various relevant and conflicting considerations.*

This Board has also commented on the distinctive meanings of these three concepts. In Glynna Ward v. Saskatchewan Union of Nurses, LRB File No. 031-88, they were described in these terms:

> *Section 25.1 of The Trade Union Act obligated the union to act "in a manner that is not arbitrary, discriminatory, or in bad faith". The union's obligation to refrain from acting in bad faith means that it must act honestly and free from personal animosity towards the employee it represents. The requirement that it refrain from acting in a manner that is discriminatory means that it must not discriminate for or against particular employees based on factors such as race, sex or personal favoritism. The requirement that it avoid acting arbitrarily means that it must not act in a capricious or cursory manner or without reasonable care. In other words, the union must take a reasonable view of the problem and make a thoughtful decision about what to do.*

[42] It is our opinion that, on the whole of the evidence, the Union did not violate s. 25.1 of the *Act*. We cannot conclude: that there was a negligent misrepresentation; that there was a guarantee of continued operation of OSB 1000 for ten years; nor that the Union failed in its duty of fair representation.

[43] The Union's representatives fairly investigated and considered the facts and circumstances pertinent to the Applicants' grievance, including obtaining legal advice. While it is not for us to assess the merits of the grievance, other than for the purposes of determining the fairness of the Union's actions, we are compelled to observe that, while the Applicants no doubt believe there was a guarantee for continued operation of the mill, this view is at odds with the whole of the evidence. We have tried to view the matter from the Applicants' point of view, but, frankly, it defies common sense and, in our opinion, is not supported by the Letter of Understanding or the pertinent question and answer in the roll-out meeting summary of same. We cannot even say that at best any evidence of verbal discussion on the point between the Applicants and Union officials in 2000 was ambiguous. In our opinion, the import of a guarantee of continued mill operation that the Applicants have read into anything said to them, or to the employees collectively at the roll-out meeting, is simply not reasonable

[44] But, those observations aside, we find that the Union did not fail to fulfill its duty of fair representation of the Applicants. In determining not to file the grievance, the Union took a not unreasonable view of the situation and made a thoughtful decision. The fact that the decision was made in a short period of time is not necessarily indicative of a lack of consideration; rather, what is pertinent is that it listened to the Applicants, had all the relevant facts, considered the situation fairly, and acted without a level of negligence that in all the circumstances would taint its decision. We conclude that the Union did not act arbitrarily or in bad faith and did not discriminate against the Applicants in taking its course of action and making its decision not to advance the grievance beyond a first step meeting with the Employer.

[45] For the above noted reasons, this application is dismissed.

DATED at Saskatoon, Saskatchewan, this **21st** day of **November, 2008.**

LABOUR RELATIONS BOARD

James Seibel
Chairperson

LETTER OF UNDERSTANDING

Between

Weyerhauser Saskatchewan Ltd.
And
I.W.A.-CANADA
Local 1-184

RE: HUDSON BAY OSB 1000 AND RELATED ISSUES

During our March 28, 2000 negotiations session for OSB 2000 a number of issues were discussed regarding the company's future plans for OSB 1000 and the potential impact of these plans on people and the OSB 2000 organization. As we discussed the company was in the process of reviewing various options, ranging from continuing operations through closing the OSB 1000 facility.

> In April we concluded these studies and have made the decision that continuing operation of OSB 1000 is the best business decision. The study looked at various risk factors over the next 10 years and the conclusion was that there is little risk of a full or partial closure.

From our discussions and from employee input we understand that many employees will continue to have concerns, regardless of the company's decision. As a result these concerns could cause employees to transfer to OSB 2000 out of fear for the future, rather than a strong desire to move to the new organization. In order to alleviate this fear you have on repeated occasions made recommendations that the company consider some form of guarantees or incentives to help people make the right decision for both themselves and the business.

We have listened to your concerns, those of other union representatives and of employees and will provide the following:

1. An enhanced severance and retirement package, for current employees of OSB 1000 that choose not to transfer to OSB 2000, will be made available should there be a full or partial plant closure of OSB 1000. Made during negotiations, it is understood that this commitment is binding.

2. As part of the Special Start-up Agreement retention / signing bonus will be provided to employees in OSB 1000, Plywood and the Carrot River Sawmill who are offered a position in OSB 2000 and decide not to transfer.

Details of these provisions are covered on attached documents.

Signed this "6th" day of "June, 2000."

"Weyerhauser Saskatchewan Ltd." "I.W.A. – CANADA, Local 1-184"