

UNITED STATES DISTRICT COURT  
DISTRICT OF IDAHO

CLAY BEACH, et al,

Plaintiffs,

vs.

JD LUMBER, INC.,

Defendant.

No. CV-08-416-N-JLQ

MEMORANDUM OPINION;  
FINDINGS OF FACT and  
CONCLUSIONS OF LAW

This matter came regularly on for trial by the court in Coeur d' Alene, Idaho on the 3<sup>rd</sup> day of August, 2010 and concluded on August 4, 2010. The Plaintiffs appeared in person and with their attorneys Mel Crawford and David Whedbee of MacDonald, Hoague, & Bayless, Seattle, Washington, appearing *pro hac vice*, together with Robert Huntley, Esq. of Boise, Idaho. The Defendant appeared by Jeffrey Weimer, represented by attorneys Brian K. Julian and Stephen Adams of Anderson, Julian, & Hull, Boise, Idaho.

Evidence having been introduced and the court having heard the argument of counsel the court announced its oral decision for the Plaintiffs. The following represent the court's:

**Findings of Fact**

The Defendant JD Lumber, Inc. is an Idaho corporation which for 26 plus years had continuously operated a lumber mill near Priest River, Idaho employing over 200 persons prior to its sale on or about August 2, 2008 and its closing on October 3, 2008. For the 26 years prior to its sale to Riley Lumber Company JD Lumber had operated its

1 mill twelve months per year with two shifts per day (a day shift and a night shift), five  
2 days per week. Except for a shutdown of the mill due to equipment or other failures, mill  
3 workers were employed two shifts per day without interruption. During its 26 years of  
4 operation the mill had never been shut down nor shifts reduced from two per day to one  
5 per days for any reason including a shortage of logs.

6 Commencing in the spring of 2008, the Defendant negotiated with Riley Lumber  
7 Company to the end that the Priest River mill and assets would be sold to Riley and the  
8 mill closed. By Agreement dated August 5, 2008, JD Lumber, Inc. agreed to sell all of  
9 its Priest River mill assets including real property, machinery, and inventory to Riley  
10 Lumber Company of Orofino, Idaho. That sale was publically announced in the area  
11 newspapers. By reason of the sale to Riley Lumber Company, on August 3, 2008, JD  
12 Lumber gave all of its employees, including the Plaintiffs, the sixty (60) day Notice  
13 required by the Worker Adjustment and Retraining Notification Act (WARN), 29 U.S.C.  
14 § 2101, *et seq.*, informing all of its employees of the permanent mass layoff and  
15 termination of all employees effective October 3, 2008.

16 JD Lumber continued to operate the Priest River mill two shifts per day on an  
17 ongoing basis until Friday, August 22, 2008, when it immediately terminated the  
18 employment of the 40 Plaintiffs working the night shift. The alleged reason for  
19 termination of these employees within the 60 day WARN period was an insufficient  
20 supply of logs to run the mill for two shifts per day and the "poor market conditions."  
21 At no prior time in the history of the 26 year operation of the Priest River mill had  
22 employees been laid off due to an insufficient supply of logs. There was no evidence that  
23 the Defendant had made a concerted effort to obtain logs prior to the termination of the  
24 Plaintiffs. However, following the termination of the employees, the Defendant ran  
25 newspaper ads in early September, 2008, stating that they were "still buying logs."  
26 There was no evidence of the running of such logs solicitation ads prior to the  
27 termination of the Plaintiffs on August 22, 2008 for an alleged shortage of logs. Contrary

1 to the Defendant's position that it had laid off the night shift due to an inability to obtain  
2 logs, in the period following the Plaintiffs' August 22, 2008 termination the Defendant  
3 sold 2,444,902 board feet of logs it owned to its competitors. A night shift ordinarily  
4 processed 165,000 board feet of lumber per shift. The court concludes that the running  
5 of ads "that it was still buying logs" after the termination of the Plaintiffs' employment  
6 was a *post facto* effort by the Defendant to support its position that the termination of the  
7 Plaintiffs was due to a shortage of logs, rather than, in fact, the impending termination  
8 of all log milling operations which had been previously scheduled for September 25,  
9 2008 as part of the closing of the mill.

10 The Defendant did not produce reliable and sufficient evidence to satisfy the court  
11 that the layoff of the Plaintiffs on August 22, 2008, was the result of unforeseen business  
12 circumstances. Rather, the court finds that the motivating factor in the claimed lack of  
13 log supply and the layoff of the night shift within the 60 day WARN period was the sale  
14 of the mill and its assets and the scheduled termination of mill operations set for  
15 September 25, 2008.

16 Pursuant to the stipulation of the parties the Plaintiff's back pay from August 24,  
17 2008 to October, 2008 was in the amount of \$86,220. The court finds that pursuant to  
18 29 U.S.C. § 2104(a)(6), the Plaintiffs are the prevailing party and are entitled to recover  
19 a reasonable attorney's fee.

### 20 Discussion

21 In its pretrial and trial briefing the Defendant has taken the position that since on  
22 August 22, 2008, it terminated only 40 of its 200 employees, all of whom had previously  
23 been given the WARN notice, the termination within the 60 day period did not violate  
24 the WARN Act even if the actual reason for the termination was the plant sale and  
25 closing as has been found by this court. That position has been previously rejected by  
26 Judge Lodge in the Order Adopting Report and Recommendation (Doc. 75), p. 5 and is  
27 also rejected by this court. Judge Lodge's reasoning in that Order is a correct

1 interpretation of the WARN statute and this court adopts that ruling. A finding approving  
2 the periodic termination of less than 50 previously WARNed employees at a time  
3 because of a plant sale and closing would render that Act a nullity.

4 The WARN Act provides in part that “an employer shall not order a plant closing  
5 or mass layoff until the end of a 60 day period after the employer serves written notice  
6 of such an order . . . to each affected employee.” 29 U.S.C. § 2102(a). A violation of the  
7 Act entitles each employee to recover back pay for each day of violation. 29 U.S.C.  
8 §2104(a)(a). In addition, the court may, pursuant to 29 U.S.C. § 2104(a)(6), award  
9 aggrieved employees their reasonable attorney fees incurred. The court has found that  
10 the “good faith” exception to a violation of the Act has not been established pursuant to  
11 29 U.S.C. § 2104(a)(4) and therefore the Plaintiffs’ lost wages of \$86,220 should not be  
12 reduced.

13 The court has also found that the true and factual reason for the early layoff of 40  
14 employees during the 60 day WARN period was the sale and closing of the mill, rather  
15 than “unforeseen business circumstances,” as referenced in 29 U.S.C. § 2102(b)(2)(A).  
16 Being an exception to the WARN Act, the exception is to be construed narrowly so as  
17 not to eviscerate the real purpose of the Act. *Local Union 7107 v. Clinchfield Coal Co.*,  
18 124 F. 3d 639, 641 (4<sup>th</sup> Cir. 1997). A party claiming existence of the exceptional  
19 circumstances has the burden of proof. *Childress v. Darby Lumber, Inc.*, 357 F. 3d  
20 1000, 1008 (9<sup>th</sup> Cir. 2004). The Department of Labor has issued a regulation, 29 C.F.R.  
21 § 639(9), concerning the “unforeseen business circumstances” exception providing in  
22 part:

23 An important indicator of a business circumstance that is not reasonably  
24 foreseeable is that the circumstance is caused by some sudden, dramatic, and  
25 unexpected action or condition outside the employer’s control. A principal  
26 client’s sudden and unexpected termination of a major contract with the employer,  
27 and an unanticipated and dramatic major economic downturn might each be  
28 considered a business circumstance that is not reasonably foreseeable. A  
government closing of an employment site that occurs without prior notice also  
may be an unforeseeable business circumstance.

1 The employer must exercise such commercially reasonable business judgment as  
2 would a similarly situated employer in predicting the demands of its particular  
3 market. The employer is not required, however, to accurately predict general  
4 economic conditions that also may affect demand for its product or services.

5 As found by this court, the Defendant did not establish the existence of the  
6 exception. The court has determined that the termination of the 40 Plaintiffs on August  
7 22, 2008 was by reason of the Defendant's failure to obtain and maintain an adequate  
8 supply of logs and that this was in contemplation of the closing of the mill.

9 The attorney fee language in the WARN Act has been accurately described as  
10 being "virtually identical" to the fee shifting language in many civil rights cases. *United*  
11 *Steelworkers v. North Star Steel Co., Inc.*, 5 F. 3d 39, 44 (3<sup>rd</sup> Cir. 1993). This court cited  
12 counsel to *Hensley v. Eckerhart*, 461 U.S. 424 (1983). *Hensley*, at 429, held that where  
13 a fee-shifting statute applies, the prevailing party "should ordinarily recover an  
14 attorney's fee unless special circumstances would render such an award unjust." No  
15 such special circumstances exist in the matter *sub judice*.

16 In its oral opinion this court cited counsel to the wise admonition of Justice  
17 Lewis Powell, a former President of the American Bar Association In *Hensley* at 437,  
18 Justice Powell advised:

19 A request for attorney's fees should not result in a second major litigation.  
20 Ideally, of course, litigants will settle the amount of a fee. Where settlement is not  
21 possible, the fee applicant bears the burden of establishing entitlement to an award  
22 and documenting the appropriate hours expended and hourly rates.

23 This court also cautioned counsel about a "second major litigation" in setting a  
24 reasonable attorney fee. This court recognizes that this matter was diligently prosecuted  
25 and defended by able and experienced counsel with many more billable hours being  
26 expended on both sides than the \$86,220 at issue would seem to warrant. That is a  
27 choice that the parties elected and it appears to the court that what may, at first blush,  
28 appear to be a disproportionate attorney fee, may be appropriate in this case due to the  
extensive nature of the litigation. This court also advised the parties and counsel that in  
some cases, where a "second major litigation" arises in the determination of a reasonable

1 attorney fee, the fees charged by the losing party may be relevant in determining if the  
2 attorney fee request of the prevailing party is reasonable. However, that observation by  
3 the court should not be construed as authorizing, at this point, inquiry into attorney fees  
4 expended by the Defendant. The rule of law also recognizes that the time and monies  
5 expended in the establishment of the amount of reasonable attorney fees may, in  
6 appropriate cases, also be recovered by the prevailing party.

7 **Conclusion**

8 The Plaintiffs are entitled to judgment against the Defendant in the amount of  
9 \$86,220. The Plaintiffs are also entitled to recover their reasonable attorney fees. In the  
10 event the parties are unable to agree on the amount of attorney fees to be awarded, the  
11 Plaintiffs shall file their application and supporting documentation within twenty (20)  
12 days from the date of this Order. The Defendant shall file any response and  
13 documentation within fifteen (15) days after receipt of the Plaintiff's application. The  
14 court will then determine the matter without further argument or testimony, unless  
15 requested by a party and granted by the court. The court will thereafter direct the entry  
16 of final judgment.

17 The Clerk shall enter this Order and furnish copies to counsel.

18 Dated this 24<sup>th</sup> day of August, 2010.

19 s/ Justin L. Quackenbush  
20 JUSTIN L. QUACKENBUSH  
21 SENIOR UNITED STATES DISTRICT JUDGE  
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