

BRITISH COLUMBIA LABOUR RELATIONS BOARD

WASTE MANAGEMENT OF CANADA CORPORATION

(the "Employer")

-and-

INTERNATIONAL UNION OF OPERATING ENGINEERS,
LOCAL NO. 115

(the "Union")

PANEL:	Jitesh Mistry, Vice-Chair
APPEARANCES:	Barry Y. Dong, for the Employer John MacTavish and Nicole O'Young (Articled Student), for the Union
CASE NO.:	66214
DATES OF HEARING:	January 28, 2014 and April 2-3, 2014
DATE OF DECISION:	May 8, 2014

DECISION OF THE BOARD

I. NATURE OF APPLICATION

1 This matter arises out of the Union's application to vary its existing certification as the bargaining agent for employees of the Employer to include employees "at and from Kamloops", pursuant to Section 142 of the *Labour Relations Code* (the "Code").

2 A representation vote of potential bargaining unit members employed by the Employer at and from Kamloops was conducted. The Union objected to the ballot cast by Benjamin Boileau and, consequently, his ballot was double-sealed. The Union says that Boileau does not meet the legal test of having a "sufficient, continuing interest" in the potential bargaining unit. The Employer disputes the objection.

II. FACTS

BACKGROUND

3 The Union is certified to represent employees of the Employer (except office and sales staff) at and from the following locations in British Columbia: Prince George, Dawson Creek, Kelowna, Vernon, Penticton, Cranbrook, Invermere, Golden, Castlegar and Fort St. John.

4 On November 15, 2013, the Union applied under Section 142 of the *Code* to vary the certification to include employees of the Employer "at and from Kamloops".

5 On November 25, 2013, a representation vote of potential bargaining unit members employed by the Employer at and from Kamloops was conducted (the "Vote"). The ballot box from the Vote was sealed pending resolution of any objections. The Union objected to the ballot cast by Boileau and, consequently, his ballot was double-sealed.

6 (By "double-sealed", I mean that the ballot was placed inside an unmarked, anonymous envelope which, in turn, was placed inside an envelope marked with Boileau's name. If the Union's objection is upheld by this Panel, then his ballot is simply discarded. If this Panel finds in favour of the Employer and concludes that Boileau is an eligible voter, then the first envelope is removed and the remaining unmarked, anonymous envelope is mixed in with the other ballots for eventual counting. By double-sealing the ballot, the returning officer is able to segregate the disputed ballot without compromising its secrecy: see *Hospitality Industrial Relations*, BCLRB No. B151/2013, 230 C.L.R.B.R. (2d) 23 at paras. 32-36.)

BOILEAU'S HISTORY WITH THE EMPLOYER

7 On December 6, 2011, Boileau received an offer of employment from the Employer (the "Offer") for a full-time position as a commercial driver in Kamloops.

8 Boileau accepted the Offer by returning a copy of the employment agreement,
signed and dated by Boileau December 7, 2011.

9 Around this period, Boileau resided in Kamloops, having moved there to open a
restaurant business and give his children an opportunity to grow up in a city. When
Boileau's business venture closed, it forced him to move back to Magna Bay, a very
small town where he owned property and would not have to pay rent.

10 Once back in Magna Bay, the one hour and twenty minute commute each way
from Magna Bay to Kamloops made working for the Employer less attractive, and he
accepted temporary employment from a friend in Magna Bay instead.

11 Consequently, in early-January 2012, Boileau resigned from the Employer.

12 The Employer did not want to accept his resignation, as Boileau was an excellent
employee that would be difficult to replace. The then-Route Manager at Kamloops,
Doreen Pritchard, offered to place Boileau on a "Spare Board" (akin to a casual
employee list), a concept borrowed from the Collective Agreement in place in the
unionized locations.

13 Boileau and Pritchard agreed that when work was available, the Employer would
call Boileau and offer it to him.

14 From January to February 2012, Boileau continued to provide occasional
commercial driving services for the Employer.

15 Shortly thereafter, Boileau began to work exclusively for his friend in Magna Bay
where he made more money, and could keep more of that money in his pocket because
he did not have to make the long commute to Kamloops.

16 In February 2012, the Employer hired a new full-time driver, Darrell Thompson.

17 After working a February 13, 2012 shift, Boileau did not work again at the
Employer's operation until October 2012.

18 From October 2012 to December 2012, Boileau worked part-time for the
Employer. Specifically, Boileau worked three shifts in October, eight shifts in November
and one shift in December.

19 In 2012, Boileau worked a total of 207 hours for the Employer.

20 On January 16, 2013, Boileau worked a 7.8 hour shift for the Employer.

21 In January of 2013, Boileau's wife suffered a severely broken leg that made her
unable to attend to herself or her and Boileau's child's needs. She was walking with
crutches by April 2013, and walking with a cane by June 2013.

22 Boileau's personnel file contains no documentation either requesting or
approving a leave from the Employer.

23 In February 2013, Thompson suffered a serious injury which disabled him from
working until late-September 2013.

24 When the Employer called Boileau to work shifts after Thompson's injury, Boileau
declined because of his wife's broken leg.

25 In March 2013, Pritchard called Boileau again, but he was still unavailable. In the
months following March 2013, Pritchard called Boileau two or three times.

26 Boileau did not work any relief shifts during Thompson's disability leave, nor did
he provide any relief during Thompson's graduated return to work.

27 From February 2013 to July 2013, as a result of Thompson's disability leave and
Boileau's unavailability, the remaining three drivers (Robb Glass, Corey Meecham and
Clint Toews) worked substantial overtime. Any vacation requests were denied.
Virtually the entirety of this period occurred while Boileau's wife was injured and in a
wheelchair, or walking with crutches or a cane.

28 In June 2013, Pritchard attempted to hire a new relief driver, as it became
evident that Thompson would be off work for an extended period of time as his injury
was very serious.

29 The Employer's first attempt to hire a new driver was unsuccessful.

30 In July 2013, the Employer hired Trevor Herron as its new relief driver. Herron
worked full-time from July 2013 until early-January 2014, when Thompson was fit to
return to full-time duties.

31 By July 2013, Boileau's wife was substantially recovered from her broken leg
(that is, she was walking without a cane or crutches).

32 After January 16, 2013 until the November 25, 2013 Vote, Boileau did not work
any shifts at all. In particular, Boileau did not work any shifts from July 2013 through
November 24, 2013, despite Thompson's injury and Boileau's wife's substantial
recovery.

33 On November 25, 2013 (the day of the Vote), Boileau was paid for 4 hours work
by the Employer. The Employer's payroll record indicates he was paid for "Front Load"
work that day. However, Boileau gave evidence that the shift was to allow him to attend
a long outstanding safety meeting. Boileau further gave evidence that this timing was
his idea so that he would not have to drive to Kamloops twice. All employees attended,
and were paid for, the safety meeting.

34 On December 5, 2013, Boileau worked a single relief shift of 6.5 hours. Boileau testified that he worked this shift only because it was "an emergency" as there was nobody available to replace another injured employee, Meecham.

35 After December 5, 2013, Boileau refused any additional relief shifts offered to him. For example:

(a) Boileau did not accept any subsequent shifts during the two weeks that Meecham was injured and limited to light duties working in the office; and

(b) In December 2013, Thompson again fell ill, but Boileau did not come in to provide relief.

36 In February 2014, the Employer advertised a driver position at the Kamloops location to replace Herron. It has now hired a new driver.

37 At an unspecified date, Boileau was told by Pritchard to keep the keys to the Kamloops location, he continues to have the keys.

BOILEAU'S OTHER OCCUPATIONS

38 Boileau is a businessman, and has been working at three of his businesses since his date of hire, including throughout the time he has been unavailable to provide relief at the Employer's operation.

Magna Bay Resorts

39 The first such occupation involved the development of a resort on the Shuswap called Magna Bay Resorts (the "Resort").

40 Boileau managed the Resort during the busy summer season (primarily July to September with some business in May and June), but also had employees during these months.

41 In 2013, Boileau turned his mind to working out a deal with a developer to sell the Resort in exchange for relief from the significant business debt Boileau and his wife had incurred.

42 As such, in January 2013, Boileau applied to the Columbia Shuswap Regional Development Board for zoning amendments on the Resort that would allow for "one dwelling unit in each Development Area and 80 *Resort Residential Spaces* in Development Area 2" (emphasis in original). In addition, Boileau requested mapping amendments that would change the boundaries of the development areas.

43 In October 2013, Boileau sold the Resort to a developer. As part of this transaction, Boileau has committed himself and his other business (Magna Bay Trucking and Excavating, discussed below) to continue working full-time on the Resort until at least the end of May 2014. Boileau is also still involved in the Resort's

management, and is still listed as the primary contact on the Resort's website for site rentals and amenities.

Magna Bay Adventure Sports

44 Another of Boileau's business ventures is Magna Bay Adventure Sports ("Magna Sports"). It is in the business of renting boats and Sea-Doo's.

45 Magna Sports operates mainly in July and August, with some business in the surrounding months. The work at Magna Sports is performed by either Boileau or another employee.

Magna Bay Trucking and Excavating

46 Boileau owns and operates Magna Bay Trucking and Excavating, a trucking and excavating business which advertises that it provides many services including:

- Snow removal;
- Septic systems;
- Lot clearing;
- Gravel delivery;
- Excavations;
- Landscaping;
- Drainage;
- Irrigation;
- Water features;
- Driveways;
- Construction;
- Chain link; and
- Foundations.

47 Magna Bay Trucking and Excavating advertises that it operates 24 hours a day, 7 days a week, although it is likely that this refers to Boileau's availability to field inquiries. Boileau testified that under normal circumstances, the company will do any work someone will pay them to do. Boileau placed an advertisement in the January 2014 edition of the North Shuswap Kicker, a local North Shuswap newspaper, advertising this business' services, and emphasizing Magna Bay Trucking and Excavating's snow removal service for the winter.

48 As noted above, Magna Bay Trucking and Excavating is currently committed to providing full-time work redeveloping the Resort. Boileau works alongside his employees on a full-time basis as part of his commitment to making the sale of the

Resort attractive to the Resort's purchaser. He has been providing this full-time work since October 2013.

III. ANALYSIS AND DECISION

49 The question before me is: Does Boileau meets the threshold of having a sufficient, continuing interest in the issue of union representation?

50 The legal test for determining a sufficient, continuing interest is set out in *Edoco Healey Technical Products Ltd.*, BCLRB No. 81/79, [1980] 1 Can LRBR 570, and adopted in *Waldun Forest Products Ltd.*, BCLRB No. B158/93 ("*Waldun*"). In *Waldun*, the Board stated at p.13:

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 workforce
- Nature and organization of the employer's business
- Each individual's particular employment circumstances

51 With respect to permanence of employment, I note that in *Certain Employees of Playtime Peardonville Ventures Ltd.*, BCLRB No. B155/2008, 161 C.L.R.B.R (2d) 130 ("*Playtime*") the Board stated: "[i]n assessing permanence of employment, the individual's work history prior to the date of the application is one of the key factors the Board will examine": para. 14.

52 Boileau's work history prior to the date the Union applied for certification does not suggest permanence of employment. In the ten months preceding the certification application, Boileau did not work at all for the Employer. Put another way, after January 16, 2013, Boileau did not work again for the Employer until the November 25, 2013 Vote.

53 With respect to the second factor, the proportion of casual/temporary employees in the total workforce, I acknowledge that the Employer's locations for which the Union holds certifications do include a Spare Board. However, the evidence before me does not establish that Boileau can be similarly categorized. The unionized Spare Board

employees are also required under the Collective Agreement to be available at least four days a week, which Boileau clearly is not. What is left then is that there are five permanent employees and Boileau.

54 The third factor is "the nature and organization of the Employer's business". I accept that the Employer's operation is a "reactive business" with fluctuations in the amount of work available. However, on the basis of the entirety of the evidence before me, I find that this factor weighs against a finding of sufficient, continuing interest. Contrary to the Employer's pleadings, the evidence is clear that Boileau is not important to its operation and does not serve a significant role in providing vacation relief, sick leave coverage or otherwise. To the extent that the Employer requires an employee to fill that role, it has on multiple occasions simply hired another part-time employee. Boileau has either been unavailable or the Employer has not called him in, nor has it insisted he make himself available.

55 While I accept the Employer did call Boileau as early as September 2013 to come in for an overdue training session, the fact also remains that the Employer also allowed Boileau to avoid attending the training until the day of the Vote. This supports an inference that Boileau is not important to the operation. Furthermore, if I accept that this training session was necessary and required, it also suggests that Boileau was not fully qualified to perform work for the Employer in the months preceding the Vote.

56 The fourth factor is the particular employment circumstances of the individual. The relevant evidence with respect to Boileau's particular employment circumstances, discussed above, weighs strongly against a finding of sufficient, continuing interest. For example:

(a) Since working 7.8 hours on January 16, 2013, Boileau's work for the Employer has been limited to 4 hours for the safety training on November 25, 2013 (the day of the Vote), and one 6.5 hour shift on December 5, 2013. In a number of recent cases, the Board has found that employees with comparable recent hours worked did not meet the threshold of sufficient, continuing interest: *Waldun*, pp. 14-15; *Playtime*, paras. 14-28; *Certain Employees of West Boundary Senior Housing Society (Parkview Manor)*, BCLRB No. B125/2011, 198 C.L.R.B.R. (2d) 313, paras. 23-24 and 31; and *Intercon Security Limited*, BCLRB No. B199/2009, 172 C.L.R.B.R. (2d) 257, paras. 74-77.

(b) I understand that the Employer takes the position that Boileau was on leave to attend to his injured wife in accordance with the Employer's duty to accommodate. However, even if I were to put aside that Boileau's personnel file contains no documentation either requesting or approving a leave from the Employer, I am still left with evidence that Boileau's wife was substantially recovered (i.e., walking without a cane or crutches) by July 2013, at the latest. Any accommodation-related leave was over by July 2013, but was followed by four months without any work for the Employer.

(c) Prior to January 16, 2013, Boileau's employment circumstances are best described as short, sporadic periods of employment followed by long stretches of absence.

(d) Boileau has a number of other employment and business ventures occupying his time. I accept that having multiple employment or business ventures is not uncommon in small communities. However, the fact remains that Boileau has been unavailable since October 2013 because he is committed to working full-time on the Resort, which is expected to continue until May 2014.

(e) I accept that Pritchard told Boileau to keep the keys to the Kamloops location and, in fact, he still has them. This suggests that Boileau is a trustworthy individual; however, it does not overcome the considerable evidence that he does not have a sufficient, continuing interest in the issue of union representation.

57 On the basis of the entirety of the evidence before me, it is clear that Boileau does not meet the threshold of having a sufficient, continuing interest in the issue of union representation.

IV. CONCLUSION

58 The ballot cast by Boileau at the Vote will be set aside, uncounted. The remaining ballots will be unsealed and counted.

LABOUR RELATIONS BOARD

"JITESH MISTRY"

JITESH MISTRY
VICE-CHAIR