

DECISION OF ADJUDICATOR
IN THE MATTER OF AN ADJUDICATION
PURSUANT TO SECTION 2-75 and 4-6 OF
THE SASKATCHEWAN EMPLOYMENT ACT

LRB File No. 176-15

Raymond Roen
represented by Ron Byers, Labour Standards Officer
COMPLAINANT

-AND-

Black Gold Boilers Ltd., Loren Anderson, and Gloria Pawluk
RESPONDENTS

DATES OF HEARING: November 5th, 2015
November 24th, 2015
December 15th, 2015

PLACE OF HEARING: Moose Jaw, SK and
Swift Current, SK

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INTRODUCTION

This matter was heard before me on November 5th, 2015 in Swift Current, Saskatchewan. Mr. Ron Byers, Labour Standards Officer represented the Complainant, Raymond Roen.

Mr. Anderson and Ms. Pawluk represented themselves and the Corporation Black Gold Boilers Ltd.

After hearing evidence the matter was adjourned until November 24th, 2015 for continuation, such hearing to take place in Moose Jaw, SK.

On November 24th, 2015 the hearing was further adjourned to December 15th, 2015. Such adjourned hearing to be heard at Swift Current, SK. The adjournment was granted to give opportunity for the Complainant to be able to attend the hearing.

On December 15th, 2015 the hearing recommenced and continued at Swift Current, SK. The Complainant did not attend.

The Wage Assessment was prepared pursuant to the Saskatchewan Employment Act is for \$2,485.58.

Sworn evidence was heard from Loren Anderson for the employer and directors. Sworn evidence was heard from Judy Taylor who gave evidence on behalf of the employee complaint.

II. PRELIMINARY MATTERS

There were no preliminary objections from any of the parties.

III. THE DISPUTE

The issues between the parties was, "Was Mr. Raymond Roen an employee of the corporation or not?"

And, if Mr. Roen was an employee, what compensation is he entitled to.

IV. FACTS

Oral testimony was heard from Mr. Loren Anderson. Mr. Anderson and Gloria Pawlyk own and operate Black Gold Boilers Ltd.

Black Gold Boilers Ltd. operates a high pressure boiler truck for which certification is required and, as well, operate a trucking service from the Shaunavon area to Moose Jaw hauling oil for Gibson Refinery.

In January of 2015 Mr. Roen contacted Mr. Anderson via telephone.

The conversation between Mr. Anderson and Mr. Roen revolved around Mr. Roen operating the Boiler truck for Mr. Anderson; however, Mr. Roen was not certified to operate the truck, but was in the process of studying and intended to write the exam for certification. Mr. Roen failed the exam.

Mr. Roen intended to re-write the examination at a later date. The employer was in need of an employee to operate his oil transport truck; however, before Mr. Roen could operate the same it was required that he attend an orientation course in Edmonton, Alberta which he did.

After attending the course, Mr. Roen made 5 trips with the oil truck from the Shaunavon area to Moose Jaw. On 2 of these 5 trips Mr. Anderson was present for training purposes and for the other 3 trips Mr. Roen did solo.

The parties agreed that Mr. Roen made 5 trips from Shaunavon to Moose Jaw. Mr. Roen takes the position that he should be paid for all 5 trips. Mr. Anderson takes the position that Mr. Roen should only be paid for the 3 trips he made by himself and not for the 2 trips that Mr. Anderson accompanied him as Mr. Anderson was training Mr. Roen with respect to hauling oil.

There was another load started from Shaunavon by the employee, Mr. Roen, who ran into problems with the truck in Gull Lake. Thereafter the truck required repairs which took approximately a week.

During this downtime of the truck Mr. Roen commenced working for another employer.

Mr. Anderson's evidence was that Mr. Roen was to be paid by the completed load from Shaunavon to Moose Jaw at the rate of \$200 per load.

The employment standards summary entered as "Exhibit EE1" shows the employee claiming 6 trips at \$225/trip. This was later modified by 5 trips by agreement between the parties.

There is has also been a claim for wages pertaining to work done by the employee North of Regina on a job the employer was doing for CN Rail. This work was with the employer's boiler truck. As the employee had failed his certification as a boiler truck operator, the employer says that the employee was not able to work on this particular job; however, the employer took the employee along with him on this job. The employer states that he took the employee with him in order to assist the employee in understanding the type of work that was done with the boiler truck and hopefully such observations would be of assistance to the employee in passing his certification exam. The employer says that the employee was not eligible to work on the job due to not being certified and therefore did not work. Mr Roen was able to leave the CN work site at any time he chose.

V. EVIDENCE OF THE EMPLOYEE

Ms. Judy Taylor was sworn in and gave evidence as to a telephone conversation that took place between her and Mr. Loren Anderson on 4 dates in March, April and May 2015.

The notes were initially hand written and entered as "Exhibit EE4" and subsequently transcribed by Ms. Taylor and entered as "Exhibit EE3".

Ms. Taylor stated that the notes represented conversations that she had with Mr. Anderson regarding attempts to settle the issue between the employer and employee.

No agreement between the parties was reached and on cross examination, Ms. Taylor stated that it was possible that she misunderstood the intent of the employer regarding his statements that she subsequently wrote down and transcribed.

VI. ANALYSIS/DECISION

Oil Hauling – the parties agreed during the course of the hearing that 5 trips were made by the employee from Shaunavon to Moose Jaw and on 2 of those trips Mr. Anderson was present.

The employee, Mr. Roen, takes the position that he was working on all 5 trips. The employer, Mr. Anderson, takes the position that on 2 of the trips he was training Mr. Roen and therefore should only be paid for 3 of the trips that Mr. Roen did solo at the rate of \$200 per trip.

The employer states that the first 2 trips were training trips for Mr. Roen and he should not be paid for those trips.

The Saskatchewan Employment Act, in the Interpretation Part, Section 2-1(f) states that, "an employee includes: (iii) a person being trained by an employer or the employer's business".

Clearly the 2 trips that Mr. Anderson accompanied Mr. Roen on from Shaunavon to Moose Jaw were training trips. Pursuant to the legislation Mr. Roen was an employee of Mr. Anderson on all 5 trips.

Regarding the rate of pay per trip, the employer states that Mr. Roen was to receive \$200 per trip. The Wage Assessment was calculated at the rate of \$225 per trip.

There is no evidence before me as to the \$225 rate per trip, therefore I accept the employer's assertion that the rate of pay was \$200 per trip for a total of \$1,000.

CN Rail Boiler Truck work – the parties admit that Mr. Roen was not qualified to operate the boiler truck as he failed his certification.

The employer's evidence is that Mr. Roen was only at the work site to observe the work as it may have assisted him in determining if he wanted to re-write his certification to do boiler work.

Mr. Anderson stated that this was not training as Mr. Roen was not qualified to work with or around the truck and, there would have been negative consequences for the employer, if Mr. Andersonson had permitted the employee to work or train on the job site when he was not certified.

The only evidence to the contrary is the evidence of Ms. Taylor regarding a telephone conversation that she had with Mr. Anderson on April 14th. In such conversation Mr. Anderson says he was either misrepresented or misunderstood by Ms. Taylor. In cross examination Ms. Taylor admitted that she may have misunderstood the intention of Mr. Anderson.

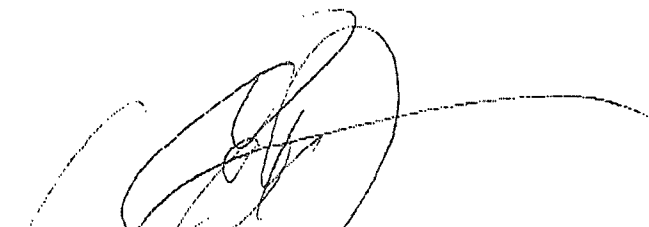
I find Mr. Anderson, the witness on behalf of the employer, to be a credible witness. With the lack of certification of the employee, I find that Mr. Roen was not an employee for the CN Rail Boiler job nor was he "training" as he was not certified and there could have been negative consequences for the employer, should he have permitted Mr. Roen to work or train on this particular job. Also Mr. Roen was able to leave the work site at any time he wished.

All of the above points to Mr. Roen not being an employee within the meaning of the Saskatchewan Employment Act at the CN Rail work site and therefore is not entitled to wages for this claim.

VII. CONCLUSION

The appeal is granted in part and the Wage Assessment is amended to the amount of \$1,000.00.

Dated at Moose Jaw, in the Province of Saskatchewan, this 1st of January, 2016.



Clifford B. Wheatley
Adjudicator

The Parties are hereby notified of their right to appeal this decision pursuant to Sections 4-8, 4-9 and 4-10 of *The Saskatchewan Employment Act* (the "Act").

The information below has been modified and is applicable only to Part II and Part IV of the Act. To view the entire sections of the legislation, the Act can be accessed at <http://www.saskatchewan.ca/>.

Right to appeal adjudicator's decision to board

4-8(1) An employer, employee or corporate director who is directly affected by a decision of an adjudicator on an appeal or hearing pursuant to Part II may appeal the decision to the board on a question of law.

(3) A person who intends to appeal pursuant to this section shall:

(a) file a notice of appeal with the board within 15 business days after the date of service of the decision of the adjudicator; and

(b) serve the notice of appeal on all persons mentioned in clause 4-4(1)(b) who received the notice setting the appeal or hearing.

(4) The record of an appeal is to consist of the following:

(a) in the case of an appeal pursuant to Part II, the wage assessment or the notice of hearing;

(c) the notice of appeal filed with the director of employment standards pursuant to Part II;

(d) any exhibits filed before the adjudicator;

(e) the written decision of the adjudicator;

(f) the notice of appeal to the board;

(g) any other material that the board may require to properly consider the appeal.

(5) The commencement of an appeal pursuant to this section does not stay the effect of the decision or order being appealed unless the board orders otherwise.

(6) The board may:

(a) affirm, amend or cancel the decision or order of the adjudicator; or

(b) remit the matter back to the adjudicator for amendment of the adjudicator's decision or order with any directions that the board

Appeal to Court of Appeal

4-9(1) With leave of a judge of the Court of Appeal, an appeal may be made to the Court of Appeal from a decision of the board pursuant to section 4-8 on a question of law.

(2) A person, including the director of employment standards, intending to make an appeal to the Court of Appeal shall apply for leave to appeal within 15 business days after the date of service of the decision of the board.

(3) Unless a judge of the Court of Appeal orders otherwise, an appeal to the Court of Appeal does not stay the effect of the decision being appealed.

Right of director to appeal

4-10 The director of employment standards has the right:

(a) to appear and make representations on:

(i) any appeal or hearing heard by an adjudicator; and

(ii) any appeal of an adjudicator's decision before the board or the Court of Appeal; and

(b) to appeal any decision of an adjudicator or the board.