

**EMPLOYMENT STANDARDS TRIBUNAL**

In the matter of an appeal pursuant to Section 112 of the

*Employment Standards Act*, S.B.C. 1995, c. 38

-by-

Borden Mercantile Co. Ltd.

(“Borden”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

**ADJUDICATOR:** Kenneth Wm. Thornicroft

**FILE No.:** 96/697

**DATE OF HEARING:** March 12th, 1997

**DATE OF DECISION:** March 19th, 1997

## DECISION

### APPEARANCES

Nancy Borden &  
Charlie Borden                    on behalf of Borden Mercantile Co. Ltd.

Jennie Smillie                    on behalf of Don Jansen

David Oliver                    for the Director of Employment Standards

### OVERVIEW

This is an appeal brought by Borden Mercantile Co. Ltd. (“Borden” or the “employer”), pursuant to section 112 of the *Employment Standards Act* (the “Act”) from Determination No. CDET 004541 issued by the Director of Employment Standards (the “Director”) on October 31st, 1996. The Director determined that Borden owed its former employee, Don Jansen (“Jansen”) the sum of \$778.96 on account of unpaid wages. Specifically, the Director determined that Borden failed to pay Jansen certain “tarping charges” and had made an unauthorized deduction from Jansen’s commission earnings relating to a March 1996 load.

The appeal in this matter was heard on March 12th, 1997 in Victoria at which time I heard testimony from Nancy Borden (Operations Manager) and Charlie Borden (President, Director and 50% shareholder) on behalf of the employer, and from Don Jansen on his own behalf. Mr. Jansen was represented at the hearing by Jenny Smillie. The Director was represented by David Oliver; Mr. Oliver did not present any evidence but he did question the parties and he also made a final submission as did Mr. Borden and Ms. Smillie.

### FACTS AND ANALYSIS

Jansen was hired as a truck driver by Borden on or about November 28th, 1995. Borden is a Victoria-based company that supplies feed and fertilizers to the local

agricultural industry. The business has been operating for about sixty years and is currently owned and managed by two brothers, Bruce and Charlie Borden.

Prior to 1990, the company received shipments of grain by rail, however, in 1990 circumstances dictated that grain be trucked in. In the interests of efficiency, Borden makes every effort to reduce “empty loads” and often trucks out lumber and other freight from Victoria by way of a contract with a company known as “Agra-Con” under that company’s freight licence.

*The “Tarping Charges” Claim*

As noted above, Jansen was hired as a truck driver in late November 1995. Jansen’s evidence is that when he was hired he was immediately dispatched on a ten-day trip. When he returned he met with Charlie Borden in a White Spot restaurant for fifteen to twenty minutes during which time the precise terms of employment were discussed. In particular, Jansen said that in his former position he was paid a 25% commission (based on the hauling contract price) plus a “tarping charge”, that is, an additional fee to compensate for the time and trouble involved in covering the load with a tarp prior to departure. Jansen says that Charlie Borden responded that he was only prepared to pay a 20% commission but that a higher commission might be “negotiable”. Jansen replied that the 20% figure would be acceptable if he also received a tarping charge--Jansen testified that they then agreed to a 20% commission plus a \$50 tarping fee per trip.

Charlie Borden, for his part, recalls the meeting at the White Spot but recollects that, although he knows some companies do pay tarping charges to their drivers, he advised Jansen that Borden would not pay such charges and that tarping charges are included in the overall 20% commission payable. Further, Charlie Borden says that he has never paid any of his drivers an additional tarping charge. Unfortunately, the parties agreement on this point was never reduced to writing.

On the balance of probabilities, I am satisfied that the Director’s delegate did not err when he concluded that the employer was obliged to pay tarping charges. However, I would note that the parties agreed at the hearing that Jansen’s claim for tarping charges was in the amount of \$350 not the \$450 allowed in the Determination. Accordingly, I will issue an order amending the Determination in this respect.

In concluding that Jansen was entitled to claim tarping charges I note that:

- the invoices that Jansen submitted for payment included tarping charges and these invoices were not, apparently, challenged by the employer during the period of Jansen's employment;
- payroll records produced by the employer show that, at least on two occasions, Borden paid Jansen's invoices, including tarping charges, without any question and, indeed, provided Jansen with written receipts (in the company bookkeeper's handwriting; see February 10th, 1996 receipt for \$900.20 and March 1st, 1996 receipt for \$1,014.07) that specifically accounted for tarping charges.

Although Charlie Borden asserts that these payments were made in error, I would further note that the bookkeeper merely prepared the payroll cheques which in turn were signed by Bruce Borden, an operating principal of the company. I might also note that neither the bookkeeper nor Bruce Borden testified before me and Charlie Borden frankly conceded that his responsibilities did not include the company payroll. In my view, at a minimum, by reason of Bruce Borden's actions in approving Jansen's invoices for payment, the company is now estopped from claiming that Jansen was not entitled to claim tarping charges.

#### *The Unauthorized Wage Deduction*

The Director determined that Jansen effectively abandoned his employment on or about March 12th, 1996. That finding has not been appealed by Jansen. The "final load" began when Jansen picked up a load of Durham wheat near Lethbridge, Alberta. After the grain was loaded, Jansen drove to Calgary to have a plugged fuel filter checked out at the Calgary Peterbilt service centre--at which point a further mechanical problem arose--and a day or so later was on the road to Abbotsford, B.C. ("Ritchie Smith") where he arrived on March 8th.

At Ritchie Smith's further problems ensued, this time because that firm refused to accept the grain due to a high moisture content. Ritchie Smith indicated that it was rejecting the grain after about 20 tons (of 36) had been unloaded. Although the decision to reject the grain was reversed, Jansen was not able fully unload the grain on March 8th, 1996 (a Friday). When Ritchie Smith first indicated that the grain was being rejected, Jansen parked the two trailers on an unpaved area at Ritchie Smith's site, and proceeded to drive his tractor to the ferry; en route he received a call on his cellular phone that the decision to reject had been reversed and thus Jansen returned to Ritchie Smith's only to then discover that, due to the partial unloading, he no longer had sufficient weight over one of the axles on the rear trailer and was stuck. He then drove to the ferry (where quite by accident he

met Charlie Borden) and returned to Victoria, his expectation being that he would return to Abbotsford on the Monday and finish the unloading.

For reasons that are carefully catalogued in the Reason Schedule appended to the Determination, Jansen never returned to Abbotsford and, on the following Tuesday he abandoned his employment with Borden. However, I am satisfied that on Monday, March 11th, Jansen was ready, willing and able to travel to Abbotsford to complete the unloading at Ritchie Smith's. I am further satisfied that the employer could have, but chose not to, dispatched Jansen to Abbotsford on the following Monday.

The employer may well have had a valid business reason for its failure to dispatch Jansen to Abbotsford on Monday (it may have been trying to secure a return load from Otter Co-op in nearby Aldergrove, B.C. so that the truck would not be returning to Victoria with an "empty load"). Nevertheless, insofar as Jansen's employment contract was concerned, he was willing to perform his side of the bargain (*i.e.*, return to Abbotsford on Monday to complete the unloading) but was frustrated in this by the unilateral decision taken by Borden not to dispatch him until a return load could be arranged.

Therefore, in my view, the employer's decision to deduct one-third of the normal commission that would otherwise have been payable for this fateful last trip (the deduction amounted to \$94.37), was unlawful.

## **ORDER**

Pursuant to section 115 of the *Act*, I order that Determination No. CDET 004668 be varied and that a new Determination be issued in the amount of \$678.96 together with interest to be calculated by the Director in accordance with section 88 of the *Act*.

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**Kenneth Wm. Thornicroft, *Adjudicator***  
**Employment Standards Tribunal**