



An appeal

- by -

Jerry Becker, Operating as Becker's Pilot & Hotshot Services  
(“BPHS”)

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

pursuant to Section 112 of the  
*Employment Standards Act* R.S.B.C. 1996, C.113

**ADJUDICATOR:** David B. Stevenson

**FILE No.:** 2001/133

**DATE OF HEARING:** June 25, 2001

**DATE OF DECISION:** July 26, 2001

## DECISION

### APPEARANCES

on behalf of Jerry Becker

Ken Johnston  
Mary Becker

on behalf of the individual

In person

### OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Jerry Becker operating as Becker’s Pilot and Hotshot Service (“BPHS”) of a Determination that was issued on January 23, 2001 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded BPHS had contravened Part 4, Section 34(2)(a), Part 5, Section 45 of the *Act* and Part 7, Section 37.6 of the *Employment Standards Regulation* (the “*Regulation*”) in respect of the employment of Douglas Lamb (“Lamb”) and ordered the BPHS to cease contravening and to comply with the *Act* and to pay an amount of \$3,479.29.

BPHS has raised two grounds of appeal: first, and primarily, that the Director had no jurisdiction to issue the Determination as BPHS operates under federal jurisdiction; and second, and in any event, that the Director wrongly believed the assertions of the complainant, about the amount of time worked.

### ISSUE

There are two issues raised in this appeal. The first is whether the Director had jurisdiction to issue the Determination and the second, in the event the first issue is decided against BPHS, is whether BPHS has demonstrated the Director incorrectly or improperly accepted the record provided by Lamb of his hours worked.

### THE FACTS

The Determination set out the following by way of background:

Beckers operates a pilot and hotshot service in the Peace Region of British Columbia. Mr. Lamb worked as a pilot and hotshot driver and swamper. . . . Mr. Lamb worked from February 12, 2000 to July 31, 2000 as a driver at the rate of 22.5% of whatever the truck made.

On the jurisdictional issue, the following facts were fleshed out at the appeal hearing

1. BPHS has been operating for about 8 years. The company hauls goods in the Peace Region, mainly for persons performing work in oil field exploration and operation.
2. During Lamb's period of employment, he crossed the provincial boundary between British Columbia and Alberta on approximately twelve occasions during his 5½ months of employment. There was no cogent evidence concerning the operations of BPHS outside of this period. Mrs. Becker did testified that BPHS hauls goods in British Columbia and Alberta.
3. Until December, 2000, BPHS had no licence or other authority allowing it to transport goods and/or equipment outside of the province of British Columbia. Since the complaint was filed, BPHS has secured an International Fuel Tax Agreement (IFTA) Carrier Licence pursuant to the provincial Motor Fuel Tax Act.
4. In March, 2001, a complaint was made under Part III of the *Canada Labour Code*, alleging non payment of wages and overtime by a person identified in HRDC correspondence as Robert Johnston. Jurisdiction was assumed by HRDC on the basis of information received by the Inspector that BPHS "regularly moved common goods across Provincial borders". Correspondence from the Inspector, dated June 18, 2001 and requested by BPHS for the purpose of this appeal, also stated:

This was a preliminary jurisdictional issue and I was able to resolve the complaint I had without going into a great deal of detail regarding jurisdiction.

5. BPHS is provincially registered and operates out of a single location in Ft. St. John, British Columbia.
6. Lamb testified that when he was dispatched to hauls goods to a location in Alberta, he was never told to acquire a permit to haul goods in that province and in some cases was dispatched to haul the goods on days or at times that allowed him to avoid weigh scales and transport officials.

It was asserted in the appeal submission that BPHS held itself out to the general public and to customers as being ready at any time to transport goods extra-provincially at any time, without interruption, however no such evidence was provided in support of that assertion. There was evidence that BPHS declined a contract to haul goods or equipment from Ft. St. John to Brooks, Alberta. There was no evidence that BPHS had ever operated outside the Peace Region.

On the issue of whether the Director erred in accepting Lamb's record of hours worked, there was nothing in the way of new evidence presented. The same information that was provided during the investigation was submitted through Mrs. Becker at the hearing of this appeal. In

respect of the information received from Lamb and BPHS during the investigation, the Determination stated the following:

The best evidence of the hours of work performed by Mr. Lamb is the record of hours he maintained on a daily basis in his journal calendar, combined with the evidence of the invoices of hours charged to the customer. I do not find that the various submissions of Beckers regarding Mr. Lamb's hours of work to be an accurate reflection of the actual hours of work he performed, for the following reasons:

- Beckers did not maintain a record of the daily hours of work performed, rather, the evidence indicates that Margaret Becker generated a record of the hours of work by listing the dates and hours from invoices at some later date;
- Beckers claims Mr. Lamb's hours of work were equal to one hour for each 100 km of distance traveled. While, at times, it may be reasonable to assume that Mr. Lamb was able to travel 100 km/hour when traveling from Ft. St. John to an oil lease site, it is not reasonable to assume that he was able to maintain that speed at all times. Much of Mr. Lamb's travel occurred during winter months, much of Mr. Lamb's travel occurred on unpaved oil lease roads, and much of Mr. Lamb's travel occurred while he was hauling a thirty foot trailer loaded with various equipment;
- The hours as suggested by Beckers do not take into account the time Mr. Lamb would have spent loading and unloading equipment, difficulties he may have experienced locating the lease site, time he would have spent completing invoices and paperwork, and/or time he may have spent waiting for crew to arrive at the oil lease site; and
- At a later date, Beckers submitted handwritten notes created by Margaret Becker of cellular telephone calls made to/from Mr. Lamb regarding various jobs. While the notes Mrs. Becker has made regarding cellular telephone calls is helpful to establish that Mr. Lamb had received calls at certain times, it does not provide sufficient evidence to disprove Mr. Lamb's journal describing the work performed, the times it took, and the difficulties he experienced along the way.

There was some suggestion in the evidence of Mrs. Becker that Lamb may have disposed of a company diary containing his "real" hours of work, but that suggestion was not borne out by any cogent evidence. The suggestion was denied by Lamb. His denial was reasonable in the context of other evidence given by him.

## **ARGUMENT**

Mr. Johnston, appearing on behalf of BPHS, argued that BPHS was a federal undertaking because it operates on both sides of the boundary between British Columbia and Alberta, regularly transports goods and/or equipment into Alberta and holds itself out as being ready at

any time to provide service extra-provincially. He submits that the correct test is found in the following statement:

Generally speaking, the federal government has jurisdiction over employment matters of a road transportation company if the operation either provides extra-provincial services on a continuous basis or provides such services on an unscheduled basis but holds itself out to the public as being ready at any time to provide such services without interruption to its normal customer or service base. If either of those two situations prevail, the road transportation company is subject to federal jurisdiction in respect of employment matters by virtue of the nature of its business, . . .

In reply, the Director has argued that the test for determining whether an undertaking, service or business is in federal jurisdiction must take account of the normal or habitual activities of the business, without regard to exceptional or casual factors. In that regard, the Director submitted that BPHS's normal and habitual activities occur within the province and activities occurring in Alberta are of a casual or exceptional nature.

## ANALYSIS

The starting point of the jurisdictional analysis is Section 92(10)(a) of the *Constitution Act*, 1867:

92. *In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,*

10. *Local Works and Undertakings other than such as are of the following Classes:*

(a) *Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province: . . .*

In *Re Eastern Canada Stevedoring Company Limited*, [1955] S.C.R. 529, the Supreme Court of Canada found there is a jurisdiction in the Parliament of Canada to legislate with respect to labour and labour relations in those situations in which labour and labour relations are: (a) an integral part of or necessarily incidental to the headings enumerated under s. 91 of the *Constitution Act*; (b) in respect to federal government employees; (c) in respect to works and undertakings under Sections. 91(29) and 92(10); and (d) in respect of works, undertakings or businesses in Canada but outside of any province.

There is no dispute that the business of BPHS is to transport goods and equipment, which is owned by those with whom it contracts. It does not haul its own goods or goods exclusively for

one customer. The essential character of the business is to provide timely and location specific transportation and delivery of those items it has been contracted to carry.

In *Northern Telecom Limited v. Communications Workers of Canada et al.*, [1980] 1 S.C.R. 115 the Court summarized certain premises applicable to a consideration of federal jurisdiction over labour and labour relations:

1. Parliament has no authority over labour relations as such nor over the terms of a contract of employment; exclusive provincial competence is the rule.
2. By way of exception, however, Parliament may assert exclusive jurisdiction over these matters if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject.
- . . .
5. The question whether an undertaking, service or business is a federal one depends on the nature of its operation.
6. In order to determine the nature of the operation, one must look at the normal or habitual activities of the business as those of “a going concern”, without regard for exceptional or casual factors; otherwise, the Constitution could not be applied with any degree of continuity and regularity.

Several leading cases have established the analytical framework for determining whether or not a transportation operation connects provinces or extends beyond the limits of a province, so as to bring the operation under federal jurisdiction: *Attorney-General for Ontario et al. v. Winner et al.*, [1954] 4 D.L.R. 657 (P.C.); *Regina v. Toronto Magistrates, Ex Parte Tank Truck Transport Ltd.*, [1960] O.R. 497 (H.C.J.); *Regina v. Cooksville Magistrate's Court, Ex parte Liquid Cargo Lines Ltd.*, [1965] 1 O.R. 84 (H.C.J.); and *Re Ottawa-Carleton Regional Transit Commission and Amalgamated Transit Union, Local 279 et al.* (1983), 44 O.R. (2d) 560 (C.A.). Those cases have identified the following principles:

1. The whole undertaking, which is in fact being carried on, determines the jurisdiction within which it falls. One must look at the “pith and substance” of the activity. Whether or not there is an interconnecting activity depends upon the facts of each case and the “pith and substance” of the applicable Act or Regulation (*Attorney-General for Ontario et al. v. Winner et al.*, *supra*, at pages 679-680).
2. The undertaking that connects or extends into another province must do so on a regular and continuous basis to be found to be within federal jurisdiction, regardless of whether the extra-provincial work is greater or less than the intra-provincial work. Percentages are not a sound basis upon which to determine “regular and continuous” (*Regina v. Toronto Magistrates, Ex Parte Tank Truck Transport Ltd.*, *supra*, at page 508).

3. Extra-provincial trips do not have to be predetermined in order to be considered “regular and continuous”. In certain cases, where the “applicant stands ready at any time to engage in hauls outside the boundaries of the [province] at the instance of any of its customers, and for that purpose has gone to the pains and expense of acquiring transport permits and licences from a number of jurisdictions” may be sufficient to constitute “regular and continuous” (*Regina v. Cooksville Magistrate's Court, Ex parte Liquid Cargo Lines Ltd., supra*, at pages 88-89).
4. In assessing the facts in relation to “regular and continuous”, a qualitative as opposed to a quantitative approach is proper (*Re Ottawa-Carleton Regional Transit Commission and Amalgamated Transit Union, Local 279 et al., supra*, at page 570).

Applying the above analysis to the circumstances, I am not convinced that BPHS is a federal undertaking. Clearly, BPHS does not “connect or extend” to another province on a regular or predetermined basis. If BPHS is to be considered to be a federal undertaking, such conclusion must be justified on the basis that the on-demand and irregular extra-provincial activity of BPHS is such that this activity should be considered to be “regular and continuous”. That is a factual determination. As indicated above, there was no evidence before me to indicate that BPHS was ready to haul goods and/or equipment outside the boundaries of British Columbia at any time and at the instance of its customers. The fact that from time to time BPHS transported goods and/or equipment into Alberta is not in itself a sufficient foundation upon which to base a general finding that BPHS held itself out to the general public that it was ready to provide extra-provincial service. What the evidence did show that while BPHS occasionally transported goods and/or equipment into Alberta, such extra-provincial work was intermittent, was performed on demand and was carried out without BPHS acquiring the licences or permits allowing them to do so. That does not, on the facts, make BPHS a federal undertaking.

I find BPHS was not a federal undertaking during the relevant period and the Determination correctly concluded Lamb’s employment was governed by the *Act*.

On the issue of whether the calculation of the amount owed to Lamb was correctly calculated, I refer to the Tribunal’s decision in *Re Mykonos Taverna operating as Achillion Restaurant*, BC EST #D576/98, where it was stated:

After the Director has determined that a person has lost wages because of a contravention of the *Act*, the task of establishing what amount of wages are payable can be a difficult one. That task can be made more difficult where the information necessary to determine the amount owed by reason of the contravention is unavailable or incomplete. Consistent with the statutory objective of achieving “efficient” resolution of disputes, the Director has considerable latitude in deciding what information will be received and relied upon when reaching a conclusion about the amount of wages that may be owing. If that decision is sought to be challenged *on its facts*, the burden on the appellant

is to show either that the decision was manifestly unfair or that there was no rational basis upon which the conclusions of fact relevant to the decision could be made. This is consistent with the statutory and legal obligation of the Director to adhere to the principles of fairness and reasonableness when exercising her authority under the *Act* (see *Shelley Fitzpatrick operating as Docker's Pub and Grill*, BC EST #D511/98). In this case, the question is whether the appellant has shown the decision is unfair or unreasonable.

BPHS has not met the burden of showing there was any manifest error in the Determination or that the conclusion reached in the Determination was unfair, unreasonable or was not rationally supported by the available evidence.

For all the above reasons, the appeal is dismissed.

## **ORDER**

Pursuant to Section 115 of the *Act*, I order the Determination dated January 23, 2001, be confirmed in the amount of \$3,479.29, together with any interest that has accrued pursuant to Section 88 of the *Act*.

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**David B. Stevenson**  
**Adjudicator**  
**Employment Standards Tribunal**