

EMPLOYMENT STANDARDS TRIBUNAL

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

Employment Standards Act, R.S.B.C. 1996, c. 113

-by-

North Shore Taxi (1996) Ltd.

(“North Shore Taxi” or the “employer”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 98/403

DATE OF HEARING: September 15th, 1998

DATE OF DECISION: November 23, 1998

DECISION

APPEARANCES

Israel Chafetz	for North Shore Taxi (1966) Ltd.
Barry Douch	on his own behalf
Wendy L. Jones	for the Director of Employment Standards

OVERVIEW

This is an appeal brought by North Shore Taxi (1966) Ltd. (“North Shore Taxi” or the “employer”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on June 1st, 1998 under file number 002343 (the “Determination”).

The Director determined that North Shore Taxi owed its former employee, Barry Douch (“Douch”), the sum of \$8,364 on account of unpaid wages (minimum wages, statutory holiday pay and vacation pay) and interest. Further, by way of the Determination, a \$0 penalty was issued pursuant to sections 98 and 29(2)(a) of the *Act* and *Employment Standards Regulation*, respectively.

This appeal was heard at the same time as four other employer appeals involving four other former North Shore Taxi drivers. The employer’s evidence was common to all five appeals.

ISSUE ON APPEAL

North Shore Taxi asserts that the delegate erred in rejecting the employer’s “daily trip sheets” which show, in Douch’s own hand, that he worked 8 hours or less each day, regardless of the duration of his shift. The time beyond 8 hours was recorded by Douch as “break” time and thus the employer says that Douch should not be compensated for these latter hours as he was not working.

Douch, for his part, alleged (and this was accepted by the delegate) that the daily trip sheets do not accurately reflect his total working hours and that, in fact, he was working throughout his entire shift each and every day.

FACTS

North Shore Taxi is a licensed taxicab company whose operations, consisting of some 78 taxicabs in the North Shore Taxi livery, span from Deep Cove to Lions' Bay on the "north shore" of greater Vancouver. The company schedules its drivers for one of two basic shifts, the day shift from 4:00 A.M. to 4 P.M. and the night shift from 4:00 P.M. to 4:00 A.M. However, there is a certain amount of variance regarding these shift times--some drivers start late and finish earlier; an individual cab is available to a driver within a designated 12-hour shift period but the actual hours worked are, to some degree, within the driver's own discretion. During the time period in question, North Shore Taxi drivers were paid a percentage (typically 45%) of the fares that they generated while on shift.

Douch commenced his employment with North Shore Taxi in 1985, left the company in 1987, rejoined in 1991 and quit his employment on June 29th, 1997 because of what he considered to be inadequate compensation.

As noted above, the principal issue in this appeal, and in four other appeals that were heard at the same time involving four other former North Shore Taxi drivers, is whether the Director's delegate was entitled to disregard the complainant employees' "Daily Trip Sheets"--which, in all cases, showed that the employees worked no more than 8 hours per day regardless of their "start" and "end" times--in favour of the employees' assertions that they were typically "on duty" for more than 8 hours but only recorded 8 hours "working time" as directed by their employer.

While a number of Douch's "Daily Trip Sheets" were placed into evidence, his February 9th, 1996 trip sheet is typical (this document was appended to the Determination). It shows a start time of 3:30 P.M. and a finish time of 3:00 A.M. for a total "shift duration" of 11.5 hours; Douch recorded 8 hours as "hours worked" and 3.5 hours as "total breaks". The delegate accepted Douch's position that he was in fact working throughout his entire shift and thus was entitled to be paid at the statutory minimum wage for all hours worked, not just the 8 hours (or less) he recorded as having worked on the individual daily trip sheets.

Douch testified that he was working--either driving a customer or waiting to be dispatched--the entire duration of all of his shifts. During his earlier years with the employer he was able to earn a reasonable living but in recent years he could generate only modest earnings by working extended hours. As he put it, "after 8 hours I would not have made enough money to bring the car back". He testified that while on shift he did not leave the car to take a break and that a good deal of his day was spent in his cab, waiting to be dispatched. While waiting to be dispatched he often read newspapers; he ate his meals in the cab. On some occasions he slept in his cab when things were slow; he awoke to the "beep" of the computerized onboard dispatch system although he admits that he may have missed the odd call. Douch's evidence is that often as many as 50 to 60 North Shore cabs were idle, waiting to be dispatched. He stated that the employer required him, and other other drivers, to record no more than 8 hours of working time on a shift regardless of the actual time on-duty. The balance of the shift beyond 8 hours was to be recorded as "break time". If he did not follow this directive, he understood that he would be fired.

ANALYSIS

At the outset it should be noted that during the time period material to this appeal, section 37.1 of the *Regulation* exempted taxicab drivers from certain provisions of the *Act* including the meal break and overtime provisions. However, taxicab drivers have never been exempted from sections 16 and 17 of the *Act* and thus are entitled to be paid at least the minimum wage for all hours worked. “Work means the labour or services an employee performs for an employer whether in the employer’s residence or elsewhere” and “an employee is deemed to be at work while on call at a location designated by the employer” (other than the employee’s residence)--see subsections 1(1) and (2) of the *Act*.

The employer’s position is quite straight-forward. In late 1995, with the pending introduction of a new *Employment Standards Act*, the employer took steps to ensure that it would not be liable for paying its drivers for anything more than 8 working hours per day. To that end, it directed its drivers that they could no longer work more than 8 hours per day. Although a cab would be made available to each driver for a 12-hour shift, the onus would be on the driver to work only 8 hours within that 12-hour shift period. The drivers were told to take as many breaks as they wished but not to work any more than 8 hours per day. Further, at the end of each shift their total working hours as well as their “break times” were to be recorded on the daily trip sheet.

The employer placed into evidence Douch’s daily trip sheets for January and February 1997. During this period, Douch drove the night shift typically coming on shift between 3:00 and 4:00 P.M. While there is some variance, Douch typically drove a 10-hour shift recording 8 “hours worked” and 2 hours “total breaks” on his trip sheets. Douch’s “breaks” are individually identified on the trip sheets as are the fares for the night which are particularized as to pick-up time and the pick-up address--although there is a space to record the “drop-off time”, Douch’s consistent practice was not to record this latter information.

The January and February 1997 trip sheets show a fairly consistent pattern of 2 to 3 breaks being taken each shift. The “break” times are specifically recorded on the trip sheets among the listing of individual fares during the shift and, taking into account the “pick-up” time immediately preceding the break and the next “pick-up” time after the break, the “total breaks” recorded on the trip sheet appear to be entirely consistent with the total duration of the individual breaks as recorded on the trip sheet.

I should note that this pattern of recorded “break time” stands in marked contrast to that of the other respondent drivers *Azad* (BCEST Decision No. 465/98), *Vaziri* (BCEST Decision No. 466/98) and *Puar* (BCEST Decision No. 468/98) who typically recorded 3 to 6 hours of break time each shift. In two of those three appeals, I held that the employees’ recorded break time was inaccurate (overstated) by several hours each day.

Douch typically drove a 10-hour shift although he did record longer shifts on occasion; on several occasions over the period in question, Douch’s total shift did not exceed 10 hours. The trip sheets appear, on a balance of probabilities, to be consistent with Douch’s recorded evidence that he took about 2 hours in breaks during each shift. For example, on February 19th, 1997, Douch drove

a 10-hour shift and recorded 8 “hours worked” and 2 hours “total breaks”--two breaks are recorded on the trip sheet, one between a 5:05 P.M. and a 6:04 P.M. pick-up and a second break between an 8:25 P.M. and a 10:21 P.M. pick-up. In each case, the fare immediately prior to the break would not have taken that long to drive because of the relatively modest fare charged. Thus, while it is obvious that the break would not have commenced until after the recorded “pick-up” time, given the comparatively short trip, the break would have commenced within 10 or 15 minutes (or less) after the recorded “pick-up” time. Clearly, on the basis of the forgoing times, Douch could easily have taken a total of 2 hours in breaks during the shift. It should also be remembered that the trip sheet is completed on an on-going basis during the shift--it is a chronological record of fares and breaks during the course of the shift.

I find it to be most probable that Douch took, as his own time records indicate, 2 to 3 breaks during each shift. During these breaks--which were of an extended duration--he was not on-duty (perhaps, as he testified was his habit, he was sleeping or reading the newspaper or getting meal) and thus he cannot expect to be paid for this time.

Based on the evidence before me, I am satisfied that Douch was “working” only during the times he recorded as working hours on his daily trip sheets, *i.e.*, typically 8 hours per shift. It follows that the Determination must be varied inasmuch as the delegate proceeded on the assumption that Douch was working throughout his entire shift each day.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be varied so that Douch’s wage entitlement is calculated on the basis that the “break time” recorded in his daily trip sheets is considered to be noncompensable nonworking time. This matter is referred back to the Director solely for the purpose of calculating Douch’s unpaid wage entitlement, including any necessary adjustments with respect to statutory holiday pay, vacation pay and interest in accordance with these reasons.

It may well be, after the appropriate calculations have undertaken, that Douch is not entitled to any further monies on account of unpaid wages. In that event, the \$0 penalty set out in the Determination is cancelled; on the other hand, if, following the appropriate calculations, the employer remains liable to Douch on account of unpaid wages, the \$0 penalty is confirmed.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal