Claim No: 387758

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Premiere Van Lines v. Romeril, 2012 NSSM 20

BETWEEN:

PREMIERE VAN LINES

Claimant

\- and -

JASON ROMERIL

Defendant

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on May 14 and 28, 2012

Decision rendered on June 1, 2012

APPEARANCES

For the Claimant Jason Buchanan, President

For the Defendants Sharon Cochrane
Legal Counsel

BY THE COURT:

[1] This is a claim brought by Premiere Van Lines to collect $15,451.58 in outstanding advances and other monies that it claims are owed by its former subcontractor (driver), Jason Romeril, who drove for the Claimant for much of the time between December 2008 and July 2011. The Defendant has defended on the basis that, he claims, the state of the account is not clear and the Claimant has not sufficiently proven that the monies are owing. In turn, he has counterclaimed for approximately $30,000 for amounts that he says are owing to him because they were not properly credited during the course of the relationship.

[2] The Claimant is a trucking company associated with the well-known national firm, Atlas Van Lines. Atlas does not itself operate trucks, but functions through its various contractors such as the Claimant. Premiere is a Halifax-based trucking company that appears to haul from no further west than Ontario, but covers the entirety of Eastern Canada.

[3] During the approximately 3-½ years of working with the Claimant, the Defendant hauled both freight, i.e. commercial cargo, and also furniture which appears to be a quite different aspect of the business.

[4] The relationship was documented to an extent. Initially, the Defendant was hired to carry freight. The parties executed a contract dated October 1, 2008, which contained a number of provisions which are relevant to this claim. That contract does not have a title per se, but may loosely be characterized as a contract establishing the Defendant as an independent contractor working in the Claimant's trucking business. There was also a second document titled "Broker

Administration Agreement" dated the same day, which, though not directly signed by Atlas, nevertheless involved Atlas in the capacity of supplying an accounting service to the Defendant, described therein as a "Truckman," and which further provided for Atlas to supply advances to the Defendant for a fee.

[5] At some point fairly early on in the relationship, in April 2009, the Defendant opted out of the Broker Administration Agreement, after which the Claimant began to fulfill that administrative and financial role.

[6] As became quite apparent in the evidence, the accounting between a trucking firm and a driver such as the Defendant, is a complex matter. Perhaps it would be less complex if the driver were an employee, but the relationship of the company to its subcontractors appears to be an important feature of this industry. As subcontractors, drivers are essentially operating their own businesses with whatever advantages, real or perceived, that status may provide.

[7] It is also apparent that the Defendant was not sophisticated in his understanding of all of the various debits and credits that were being applied to his account, and understandably he relied upon the Claimant to do so honestly and fairly.

[8] Notwithstanding the written contract that was supposed to be governing the relationship, there were also verbal understandings and industry practices at work.

[9] In schedule B of the written contract there is a provision which states that the "owner," meaning the driver such as the Defendant, would receive 80% of the "net linehaul" earned by the company, namely the Claimant. The term "net

linehaul" is not defined, but appears to be understood in the trucking industry as the net amount that Premiere would have been paid by Atlas. The accounting between Atlas and Premiere was equally complicated, with different percentages applying to different things, and various other charges and discounts being applied. As such, it can be difficult to predict what actual percentage of a gross amount paid to Atlas would eventually be paid to Premiere.

[10] As became clear in the evidence, the practice used by Premiere for compensating drivers hauling furniture was, at least at times, based on the gross rather than the net. Premiere contends that there was always a different arrangement with the Defendant for hauling freight, which was 80% of net linehaul, and furniture which was for most of the time 54% of gross.

[11] The Defendant does not accept that there was to be any distinction between these two types of freight being carried, and now seeks retroactively to adjust his earnings on freight haulage from 54% of gross to 80% of net. As will be discussed below, this exercise would change the state of account between the parties, although not to the extent that it would completely eliminate the amount owing, or claimed to be owing, to the Claimant.

[12] I get the impression that there is a certain mystique to driving long-haul. Certainly, there is an attraction to being in business for oneself, and there is the allure of the road. However, it is not necessarily an easy way to make money. This is particularly true when one acquires equipment and begins to pay all of the fixed expenses of owning and operating that equipment, but does not necessarily attract the amount of business that keeps that equipment fully occupied. I believe it is fair to say that this is the problem that got the Defendant off on the wrong foot. As a new driver with Premiere, and as far as Atlas was concerned,

he was not on the preferred list of drivers receiving loads. As the evidence would suggest, he very early on fell into a serious arrears problem on his account with Premiere, and no matter how much he drove over the next three years, he never seemed able to dig himself out of the hole.

[13] Under the relationship, the Defendant was supplied with a Superpass fuel card which allowed him to make fuel purchases from PetroCanada while on the road. Fuel is a significant expense in operating a large rig. Premiere also supplied insurance and, although this was not apparently understood by the Defendant, premiums for Workers Compensation. It was also supplying cash advances which were necessary to allow the Defendant to pay his personal expenses during times when trucking revenue was not supplying an adequate (or any) income. Premiere also paid for truck repairs and a host of other expenses which were tracked in the company's computer system.

[14] Twice per month the Defendant was applied with a statement, entitled "commission posting," and referred to at the hearing as an "invoice," which contained information on all of the earnings accumulated during that period, as well as all of the other entries for things such as fuel purchases and other expenses. It also contained adjustments for things such as damaged goods claims made by customers, which had to be adjusted and which would rebound to an extent on the driver.

[15] At the end of that document was a balance showing the state of account between the Defendant and the Claimant. The evidence at the hearing included all of the statements between April 2009 - when Premiere took over from Atlas - and September 2011 when the last entries or adjustments were made to the

account, approximately two months after the Defendant quit. It does not appear that the period of time under the administration of Atlas is in any question.

[16] The earliest Premiere statement shows a net amount payable of minus $18,204.05. In other words, by then the Defendant already owed Premiere more than $18,000.00. As of the last statement in the series, notwithstanding all of the earnings over a three-year period, he was still in arrears to Premiere in the amount, as stated, of $15,612.49, and by the end of the year with a few adjustments was in a deficit position of $15,451.58. When he finally exited the relationship out of frustration, the Defendant in theory owed his employer that much money.

[17] The Defendant's wife, Tracey Romeril, acted throughout the relationship as the Defendant's bookkeeper. It was she who received these bimonthly statements and entered them into her computer system operating a QuickBooks accounting program. She also was the one who met with the accountant annually in order to have Jason's tax returns prepared. My impression is that she is an intelligent and capable woman, although not with a great deal of accounting background or experience, and with limited understanding of the peculiarities of the trucking industry.

[18] Once they were served with this lawsuit, the Defendant and his wife began to question whether or not they had been properly compensated for all of the work that Jason had done, and they also questioned whether or not he had been charged expenses properly. As I indicated to the parties during the hearing, I am in no position to perform a forensic audit on literally thousands of data entries. However, in order to attempt justice between these parties I must make certain findings of fact, which will in large part determine whether or not the state of

account as presented by the Claimant is correct. These issues of principle are not many.

80% of gross versus 54% of net

[19] It was the evidence of Mr. Buchanan on behalf of Premiere, that at the time the Defendant first began hauling furniture, the prevailing rate was 54% of gross. It was his evidence that the Defendant had initially been hired strictly to haul freight, and it was this business that was being documented in the written agreements and being paid at 80% of net. In fact, after about eighteen months of hauling freight and falling seriously into arrears, the Defendant left Premiere and was working elsewhere. That only lasted a few months. In the summer of 2010 he went back to Premiere with an understanding that he could now get in on the furniture hauling business. As described by Mr. Buchanan, which makes intuitive sense, the furniture hauling business is typically most active during the summer.

[20] Mr. Buchanan testified that there had been a time when furniture hauling was compensated at the same rate as freight, but that it had been changed to 54% of gross at the request of drivers who had found it too complicated to attempt to estimate their anticipated income on the basis of net. The complexity arose because Premiere did not always receive the same percentage of gross from Atlas. As such, if a driver wanted to know how much he would likely earn on a given load, it might have seemed simpler to base his expected earnings on the gross amount that the customer would be paying to Atlas. According to Mr. Buchanan, the amounts should have been approximately equal. On the evidence before me, I'm not sure that this is entirely true, although the difference is not huge and I am far from certain that the sampling of information that is

available to me represents the full picture. Still, over time, it could amount to real money.

[21] Nevertheless, the real question is whether or not the Defendant agreed to haul furniture at 54% of net. Mr. Buchanan testified that this was explained to the Defendant. He also introduced into evidence a memorandum dated March 2, 2009, which he says was given to the Defendant. Both the Defendant and his wife deny any knowledge of this memorandum. The important part of that memorandum reads as follows:

> As discussed, you have requested our Premiere office takes over the administration of your revenue and statements from Atlas Van Lines. With that are to changes – advance fees will be set at 7.5% (all in) and your insurance payments will be fixed as opposed to floating based on your linehaul. The insurance payment for 2009 is $7,500.
>
> While your contract is specific to freight hauling you may haul furniture during the summer months which is paid to our other contractors at 54% of the gross revenue. You currently are paid 80% of the net revenue for freight shipments.

[22] As can be seen, this is a memorandum that set out a number of changes to the relationship. It was at that time that the Defendant switched his administration from Atlas to Premiere. It marked a change in the cost of advance fees, from 5% to 7.5%, (about which more will be said later), as well as a change in the way insurance payments were to be made. In the case of insurance, at Atlas there was some kind of a floating rate system which was now to be replaced by a flat annual Premium of $7,500. The statement about freight hauling as opposed to furniture hauling, and the different percentages that applied, seems almost like an afterthought to the main purpose of the memo. It

is also noted that this memo was more than a year prior to the Defendant actually getting into the furniture hauling part of the business.

[23] On the question of whether or not the Defendant ever received this memorandum, there is not much to go on. Mr. Buchanan stated that a copy was given to the Defendant and a copy was placed in his file. It is signed by Mr. Buchanan, although not countersigned in any way by the Defendant. The Defendant simply says that he never got it. On a balance of probabilities, I am prepared to accept that this memorandum was given to the Defendant. I say this in part because the professionalism of Premiere seems to have been fairly high, and it stands to reason that it would not simply generate memoranda such as this and place them in a file without giving them to the intended recipient. On the other hand, the Defendant was probably overwhelmed by all that was going on, and I do not believe that he was necessarily so well organized that his copy of this memorandum would necessarily have survived beyond receiving an initial glance. Moreover, in March 2009 the question of furniture hauling was not really on the Defendant's mind, since he was hauling freight, and he may well have ignored that part of the memorandum.

[24] Even so, whether or not he saw the memorandum, he operated under those terms (or at least some of them) for more than two years. During that time, he paid insurance, incurred the advance fees, and worked at the rates specified. In my view, he would be bound to these terms simply by conduct. It is well understood in contract law that a binding agreement may be reached in various different ways. Some contracts are meticulously documented. In other cases, there are clear verbal agreements. In other cases, where the writing is sketchy and the verbal understandings difficult to discern, courts are willing to conclude that parties have reached an agreement if they operate on particular terms

without protest. Certainly the Claimant operated on a clear understanding, and in the absence of any protest from the Defendant would have believed that this was also understood by him. It is not sufficient for the Defendant, three years later, to say that he never agreed to work on this basis and seek retroactively to rewrite that agreement.

[25] As such, I reject any effort by the Defendant to have the account re-calibrated on the basis that compensation at 54% of net, where it was credited in that fashion, should be 80% of gross. I appreciate the effort that the Defendant's wife put into this exercise, but it is based on something of a fallacy.

The 7.5% charge on advances

[26] The disputed memorandum of March 2, 2009 refers to the "advance fee" being set at 7.5%, which was a change from the 5% being charged by Atlas. Although I do not fully understand that, it appears that the 5% being charged by Atlas was in addition to certain other charges, which in the aggregate may have been similar to the 7.5% which Premiere was going to charge. On the bimonthly invoices supplied to the Defendant, the line item was called "interest on purchases."

[27] As explained by Mr. Buchanan at the hearing, what Premiere was doing was to charge a fee of 7.5% on all advances made to the Defendant, as well as on all purchases made by him on Premiere's credit, such as fuel or repairs. This was a one time fee rather than some monthly charge on the debit balance in the account, which might have been a different way of reflecting the fact that Premiere was carrying the Defendant on its books. While the 7.5% may seem like a fairly steep fee, on reflection it does not seem to be that extreme. As

pointed out by Mr. Buchanan, not all drivers ask for advances or expect Premiere to front their expenses of operation. As such, this charge is not inevitable, but reflects a choice by the driver to have Premiere supply the credit and the administrative effort necessary. In the case of advances, as explained by Mr. Buchanan and also as testified to by Darlene Cole, an administrative employee of the Claimant, drivers such as the Defendant often request advances on a rushed basis. Ms. Cole described receiving phone calls from the Defendant basically instructing her to make a deposit into a bank on his behalf, and insisting that it be done immediately in order to stave off some financial problem. At times this required her to drop whatever else she was doing, write a cheque, and attend at the Defendant's bank to make the deposit.

[28] In the case of fuel purchases and repairs, or similar outlays made by Premiere, this would have involved basically running up Premiere's credit. Given that someone like the Defendant was chronically in arrears on his account in amounts that ranged between $10,000 and $30,000, this 7.5% one-time charge is probably less than what might have been charged had Premiere sought to charge interest on the debit balance, or had the Defendant carried a similar balance on a credit card.

[29] Even so, the real issue is whether or not there was an agreement to submit to this charge. I am far from convinced that the Defendant, or his wife, ever really understood precisely how this charge was levied, but I would find it far more difficult to believe that it was not explained to the Defendant early on in the relationship that there would be such a charge, and he would have been expected to know that the provision of advances and payment of his expenses was not something extended for free. I find that he did agree to this charge, and that he lived with it for more than three years without ever taking a clear position

that he was not satisfied with it. He could’ve opted out at any time, at least in theory, and found a different way to float his deficit and pay his expenses.

[30] There is no evidence before me to the effect that the advance fee or interest on purchases was improperly calculated, and I do not believe it is appropriate to attempt any adjustments to those fees.

Failure to credit compensation properly

[31] In support of both the defence and counterclaim, the Defendant’s wife engaged in a significant effort to reconcile the bimonthly invoices with the source documentation upon which it would ostensibly have been based. She obtained from Atlas a great deal of documentation which would not otherwise have been supplied to a driver such as the Defendant, and created a spreadsheet to reflect her findings. Part of the exercise was to recalculate the compensation that had been paid at 54% of gross, by using 80% of net revenue. I have already rejected this principle. I do note that in almost every case, 80% of net would have exceeded 54% of gross. Often the difference is relatively small and occasionally it is trivial, although over three years it would have added up to as much as $10,000.00. However the larger ticket items that she has identified in her spreadsheet appear to be based on something other than this difference in methodology. There are ten or more items where the difference is in the range of between $1,500.00 and $3,000.00.

[32] In response to this spreadsheet, and the inherent claim that the Defendant had been shortchanged by tens of thousands of dollars, the Claimant produced documentation which appears to explain all of these discrepancies. Most of the instances where there are large discrepancies can be explained by the fact that

the Defendant did not carry the entire load, or did not carry the load for the entire distance. This would not necessarily be apparent in looking at the Atlas documents, without further information.

[33] To give an example, in the case of a customer in Ontario wishing to have her furniture shipped to Newfoundland, the load would be picked up in Ontario by the Defendant and dropped at the warehouse operated by Premiere in Halifax. A different driver would take the load from Halifax to Newfoundland. In the documentation supplied by Atlas, and which the Defendant's wife used to base her calculations, the amount of the haulage was expressed as one gross and one net dollar figure, and typically only the driver number of the individual picking up the load was noted. As such, it might appear that the Defendant was associated with the amount paid by the customer to have the goods shipped from Ontario to Newfoundland. This ignored the internal issue which Premiere had to work out, which was to split the money equitably between the two drivers based on the distances driven. There were also issues about who had actually loaded the cargo, and other situations where the haulage might have to be divided between two or more drivers.

[34] Ms. Romeril was cross-examined on her spreadsheet, and she was obliged to concede that there was a considerable amount of information which she did not have. It appears that she did not sit down with her husband and ask him whether there was some innocent explanation for why he might have been significantly shortchanged on any given load. Either he was not asked, or if asked, his recollection was lacking.

[35] Given all of the innocent explanations supplied by Premiere, it is difficult to attach any real credibility to this accounting undertaken by Ms. Romeril. Again, I

am not being critical of her effort or her motives. It is not easy to understand the accounting produced by Premiere. However, with one small exception which I will address shortly, it appears that its accounting was done honestly, fairly and accurately. The Defendant has not succeeded in proving that there are any reasons to question the methodology.

[36] I am not ignoring the fact that the onus is on the Claimant to prove its claim, but I regard that onus as having been satisfied on the totality of the evidence supplied to me. It is beyond the scope of a claim in Small Claims Court to ask Premiere to verify every number shown on the accounts, of which there are hundreds, if not thousands. As noted, this was a relationship of more than three years involving a complex set of accounts which changed daily. Had the Defendant demonstrated to me that there was a flaw in the way these accounting records were being kept, or that the methodology did not reflect the agreement between the parties, then I obviously would have concluded differently.

Last fuel bill

[37] As noted above, the Defendant was supplied with something called a SuperPass which was a credit card usable at Petro-Canada facilities. This was how the Defendant was able to fuel his truck. Typically, the fuel used during the applicable periods would be reflected on the bimonthly invoices. And, the backup information in the form of a SuperPass report would be attached to the invoice.

[38] The relationship between the Defendant and the Claimant ended poorly in the middle of July 2011, with the result that a load of freight ended up parked at the Defendant's home in Canning, Nova Scotia, rather than being dropped at the

Premiere yard in Halifax. It is unimportant for me to recite the details of how the relationship ended, and I decline to make any findings as to whether or not the Defendant behaved badly. It does not appear that this would affect the state of the financial account between the parties, at least as far as this claim is concerned. However, attached to the final invoice was a SuperPass report listing a number of transactions on this particular card between July 22 and July 26, 2011. These dates were later than the date on which the Defendant took his last load and returned the card to Premiere. The amount charged during that relatively short period of time was $1,843.21. Most of it was for diesel fuel purchased in Québec, Ontario, New Brunswick or Nova Scotia. One telltale transaction was for some unleaded gas purchased in Dartmouth Nova Scotia on July 23, 2011, suggesting that the card had been used to fuel an automobile. This does not make any sense, given that the Defendant would only have used the card for diesel purchases for his truck, and that he handed in the card a week or more before the charges appear to have been incurred.

[39] Despite having had a full opportunity to do so, Premiere did not seek to explain this apparent anomaly. As such, I find that this sum was improperly charged to the Defendant's account. Consistent with its practice, Premiere would have also charged the Defendant a 7.5% interest on purchase fee, which according to my calculations would be $138.24. The total of those two numbers is $1,981.45, which is the amount by which I will reduce the judgment in favour of the Claimant.

[40] As such, I find that the Claimant is entitled to recover from the Defendant the sum of $13,470.13, plus its cost of issuing this claim in the amount of $182.94. Given my findings, the counterclaim must be dismissed.

Eric K. Slone, Adjudicator