



May 9, 2016

Harbour Link Container Services Inc.  
7420 Hopcott Road  
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Via email: david.payne@hlcsi.com  
Original via mail

Attention: David Payne

## **Commissioner's Decision** **Harbour Link Container Services Inc. (CTC Decision No. 04 /2016)**

### Introduction

1. Harbour Link Container Services Inc. ("Harbour Link") is a licensee within the meaning of the *Container Trucking Act* (the "Act"). Under Sections 22 and 23 of the Act, minimum rates that licensees must pay to truckers who provide container trucking services are established by Regulation, and a licensee must comply with those statutorily established rates. In particular, Section 23(2) states:

A licensee who employs or retains a trucker to provide container trucking services must pay the trucker a rate and a fuel surcharge that is not less than the rate and fuel surcharge established under section 22 for those container trucking services.

2. Under Section 31 of the Act, the Commissioner may initiate an audit or investigation to ensure compliance with the "Act, the regulations and a licence..." whether or not a complaint has been received by the Commissioner. Under Section 26 of the Act, any person may make a complaint to the Commissioner that a licensee has contravened a provision of the Act. Under Section 29, the Commissioner reviews such complaints and, under Section 31, may conduct an audit or investigation to ensure compliance with the Act, the *Container Trucking Regulation* (the "Regulation") or a licence.
3. On July 28, 2015, complaints were filed with the Office of the Commissioner against several licensee companies, including Harbour Link, alleging the company's payments to its owner operators for numerous trips from April 3, 2014 were not in compliance with the on-dock and off-dock rates that came into effect retroactive to that date with the passage of the Act and the *Regulations* in December 2014.
4. The then Commissioner directed an audit to begin with respect to the complaint. The auditor requested and received pertinent records and documentation from Harbour Link with respect to the payment of its owner operators for the period April 3, 2014 to July 31, 2015 (the "audit period").

### Facts

5. Harbour Link is certified to UNIFOR.

6. The auditor began the audit process by looking at the records produced by Harbour Link for the months of April and May, 2014 and discussing the records with company representatives. He found that:
  - a. With one exception on-dock rates complying with the requirements of the *Regulation* were implemented as of April 3, 2014.
  - b. Off dock rates continued to be paid at a lower rate in accordance with the collective agreement until February 1, 2015, when rates were increased to comply with the *Regulation*.
7. Spreadsheets for the April and May 2014 months were prepared and provided to company representatives and revised to reflect the correct fuel surcharge. It was agreed that Harbour Link would use the auditor's spreadsheets as a template for an internal audit to calculate the adjustments owing for the balance of the audit period.
8. In addition, on January 14, 2016 Harbour Link and UNIFOR entered into a Memorandum of Agreement ("MOA") which required Harbour Link to be fully compliant with the *Act* and *Regulation* on or before January 22<sup>nd</sup>, 2016. This was consistent with a December 11, 2015 bulletin issued by the then Acting Commissioner setting this deadline date for compliance.
9. Harbour Link concluded its internal audit process for the period April 3, 2014 to January 31, 2015. Rates were examined to ensure compliance with the statutorily required rates . On January 22<sup>nd</sup>, 2016 Harbour Link informed the Acting Commissioner that it had calculated pay owing for the audit period to be \$343,157.79 and committed to pay its drivers the monies owing by no later that January 22<sup>nd</sup>, 2016. A summary schedule detailing amounts owing to drivers was provided to the Acting Commissioner. PDF copies of cancelled cheques confirmed that the pay was in fact paid out to the drivers.
10. The auditor contacted UNIFOR representatives and was advised that, with the exception of some implementation issues regarding rates for some "short haul" moves, the union is satisfied that the company has met its obligation to pay the retroactive pay owing to its members. The "short haul" rate issue is being pursued through the grievance procedure.
11. Under the terms of the Harbour Link/UNIFOR MOA the parties agreed to an expedited arbitration procedure to deal with, amongst other things, disputes relating to the compliance with "...all provisions of the British Columbia *Container Trucking Act* or *Regulations* as they existed on November 24, 2015. Article 20.06 provides:

**Expedited Arbitration**

Arbitrator Jim Dorsey shall be seized to deal with any dispute arising out of alleged violations of Article 20 and the Parties agree that such disputes should be heard on an expedited basis.

Decision

12. As described above, the circumstances of this case are that Harbour Link:
  - a) has undergone an audit, during which it cooperated fully with the auditor;

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- b) performed its own internal audit for the period from April 3, 2014 to January 31<sup>st</sup>, 2015 and determined that it owed its drivers in excess of \$300,000;
  - c) by February 1<sup>st</sup>, 2015 modified its internal record keeping system to comply with the rates required by the Regulation;
  - d) paid the retroactive adjustment amounts calculated to be owing as determined by its own internal calculations based on the auditor's template by January 22<sup>nd</sup>, 2016.
13. As Harbour Link has paid the amounts owing under the legislation and corrected its non-compliant payment practices, I find there is no need to issue an order pursuant to Section 9 of the *Act* requiring the company to comply with the legislation.
14. Section 34 of the *Act* provides that, if the Commissioner is satisfied that a licensee has failed to comply with the *Act*, the Commissioner may impose a penalty or penalties on the licensee. Available penalties include suspending or cancelling the licensee's licence or imposing an administrative fine. Under Section 28 of the Regulation, an administrative fine for a contravention relating to the payment of remuneration, wait time remuneration or fuel surcharge can be an amount up to \$500,000.
15. The seriousness of the available penalties indicates the gravity of non-compliance with the *Act*. The *Act* is beneficial legislation intended to ensure that licensees pay their employees and independent operators in compliance with the rates established by the legislation (*Act* and Regulation). Licensees must comply with the legislation, as well as the terms and conditions of their licences, and the Commissioner is tasked under the *Act* with investigating and enforcing compliance.
16. The *Act* does not, however, require penalties to be imposed for non-compliance in all cases. Rather, the Commissioner is granted a discretion to impose penalties in appropriate cases. There are many circumstances in which discretion to impose a penalty or penalties is likely to be exercised. These include, but are not limited to, where a licensee:
- does not cooperate fully with an audit or investigation;
  - does not comply with orders or directions given by the Commissioner (or a delegate of the Commissioner, including an auditor);
  - engages in meritless dispute of, or delays in paying, amounts found to be owing;
  - engages in any form of fraudulent, deceptive, dishonest or bad faith behavior with respect to compliance with the requirements of the *Act*, the Regulation or a licence.
17. In the present case, Harbour Link cooperated fully with the auditor's investigation of the complaint. In addition it undertook its own internal audit process based upon the template worksheets prepared by the auditor for the period from April 3, 2014 – January 31, 2015. By its own calculations it determined that it owed retro-active pay well in excess of \$300,000, which it paid prior to the January 22<sup>nd</sup>, 2016 deadline imposed by the former Acting Commissioner.
18. In addition Harbour Link has taken steps to ensure that by February 1<sup>st</sup>, 2015 it's paperless record keeping system calculates rates to be paid to its drivers which comply with the rates set out in the Regulation. It has made adjustments and brought itself into compliance with the requirements of the *Act* and *Regulation*.

19. In addition through the collective bargaining process, Harbour Link and UNIFOR have successfully negotiated a resolution to outstanding issues related to the retroactive application and payment of statutorily required wage rates. UNIFOR has confirmed that it is satisfied Harbour Link is substantially compliant with the terms of this Agreement and it is pursuing any remaining issues through the grievance and arbitration process agreed to as part of the MOA.
20. Considering all of the circumstances of this case, I conclude this is not an appropriate case to issue a penalty.
21. Finally, I wish to note the expedited arbitration process agreed to by Unifor and Harbour Link to resolve issues relating to compliance with the provisions of the *Act* and its Regulation .
22. Section 29(2) recognizes that the *Act* does not necessarily require that all complaints be resolved by the OBCCTC. Under the *Act* complainants or their representatives may pursue complaints using other processes and importantly, where they do the Commissioner has the authority to defer to these proceedings or any resulting decisions or awards. In my view the availability of alternative proceedings to resolve complaints serves a number of useful and beneficial purposes. Firstly, access to expedited arbitration or similar processes may result in complaints being resolved more expeditiously. Secondly, the limited resources of the OBCCTC are augmented by recognizing other legitimate approaches to the resolution of complaints. Finally, in some cases, access to arbitration, mediation or the courts may be viewed as a preferred and more well suited means to resolving complaints. Alternative dispute resolution methods such as arbitration and mediation provide an important extension of the means by which complaints under the *Act* and the *Regulation* may be resolved, and I encourage parties to consider using these alternative proceedings where appropriate. Awards and decisions which result are likely to receive deference at the OBCCTC provided that complainants are treated fairly and any outcomes which result are consistent with the principles expressed or implied in the *Act* and the policies of the OBCCTC. In this case most of the compliance issues have been resolved. To the extent that issues remain outstanding I encourage the parties to use their agreed upon expedited arbitration process before bringing matters to the OBCCTC.

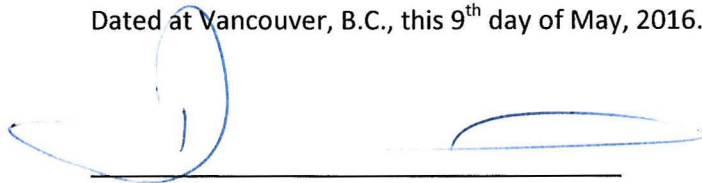
### Conclusion

23. In summary, as a result the audit process, it was determined that Harbour Link owed \$343,157.79 to its independent operator drivers under the *Act*. Harbour Link cooperated fully in the audit process, paid the amount owing by January 22<sup>nd</sup>, 2016, and has taken steps to adjust the rates used in its computerized record keeping system to ensure ongoing compliance. In these circumstances, while I record the fact of Harbour Link's non-compliance with the *Act* by way of this decision, as well as Harbour Link's appropriate actions to bring itself into compliance, I have declined to exercise my discretion to impose a penalty on Harbour Link in this case.
24. As well, I have taken this opportunity to bring to the attention of industry members the possibility of using other recognized processes as avenues to resolve disputes and complaints regarding compliance with the *Act*.

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This decision will be delivered to Harbour Link and published on the Commissioner's website ([www.bc-ctc.ca](http://www.bc-ctc.ca)).

Dated at Vancouver, B.C., this 9<sup>th</sup> day of May, 2016.



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Duncan MacPhail, Commissioner