Commissioner’s Decision
Dayal Transportation Systems Inc. (CTC Decision No. 11/2016)

Introduction

1. Dayal Transportation Systems Inc. ("Dayal") 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. As well, under Appendix D to Schedule 1 of the Container Trucking Services Licence the Commissioner may direct a licensee to provide a compliance letter from a Certified Professional Accountant.

Facts

4. On November 30, 2015, pursuant to Appendix D to Schedule 1 of the Container Trucking Services Licence, the then Acting Commissioner directed Dayal to provide a compliance letter for company drivers from a Certified General accountant for the periods between April 1, 2014 - April 30, 2014 and June 1, 2015 and June 30, 2015 (“the Appendix D audit period”).

5. On February 15, 2016 the Office of the British Columbia Container Trucking Commissioner ("OBCCTC") received a compliance letter from Dayal’s Certified Professional Accountant stating that Dayal was in compliance with the Act during the Appendix D audit period.

6. Following receipt of the compliance letter then Acting Commissioner directed an OBCCTC auditor to conduct a spot audit on the work performed by the Certified Professional Accountant to determine
if Dayal was in fact in compliance with the Act during the Appendix D audit period. The auditor requested and received payroll records and documentation from Dayal.

7. From the records provided by Dayal the auditor discovered that in April 2014 all company drivers were being paid an hourly rate of $25.13 per hour. This was a concern to the auditor because under Section 13(1)(b) of the Regulation company drivers are entitled to a rate of $26.28 per hour if the driver has performed, “2,340 or more hours of container trucking services on behalf of any licensee.”

8. When the auditor raised her concerns with Dayal’s accountant she was advised that Dayal believed that company drivers had to work 2,340 hours for Dayal before they were entitled the higher rate of $26.28 per hour and that only hours cumulated after April 3rd, 2014 (the date the legislated minimum hourly rates took effect) were to be taken into account. As a result Dayal did not raise the rate payable to its drivers from $25.13 per hour to $26.28 per hour until April 1st, 2015.

9. The auditor determined that on April 1st, 2015 Dayal raised the rate for all of its drivers to $26.28 per hour.

10. Dayal acknowledged to the auditor that it had misinterpreted the legislation and that some of its drivers had been underpaid prior to April 1st, 2015. It reviewed its records to determine which of its drivers qualified for the higher hourly rate having performed 2,340 container trucking hours for all licensees and calculated the amount of retroactive pay owing.

11. Dayal’s internal review disclosed that of 10 drivers employed by Dayal prior to April 1, 2015:

   - 5 were underpaid and entitled to receive retroactive pay.
   - 4 had no previous container trucking experience prior to being hired by Dayal and therefore were not entitled to the higher rate;
   - 1 was already being paid at a rate of $27 per hour.

12. Dayal calculated the retroactive amounts owing to the 5 underpaid drivers and issued cheques to these drivers on April 25th, 2016, well after the January 22nd, 2016 deadline imposed by the former Acting Commissioner. In total Dayal paid out a total $9,143.65 to compensate its underpaid drivers.

13. The auditor reviewed Dayal’s calculations and records (including time sheets and job applications) and satisfied herself that the amounts shown by Dayal as owing accurately capture and record the retroactive amounts owing to its company drivers for the period prior to March 31, 2015. The auditor further examined Dayal’s bank statements and satisfied herself that the underpaid company drivers were in fact paid the amounts found to be owing.

14. In the end result the audit report discloses that while Dayal was not initially paying all of its drivers the hourly rate required under the Regulation during the period for April 3rd, 2014 to March 31st, 2015 it made adjustment payments on April 25th, 2016 Dayal and thereby retroactively brought itself into substantial compliance for this period.
15. In addition to the above, the auditor also audited the first pay period of June 2015 and determined that, with some small deficiencies which were unrelated to legislated rates and which were subsequently rectified, Dayal was paying its drivers in accordance with the legislative requirements.

16. Additionally, the auditor identified company drivers hired since June 2015 and determined that they are being properly compensated under the Regulation.

17. Ultimately the auditor concluded that she is satisfied that between April 1, 2015 and June 20, 2015, (the date of the audit report) Dayal paid its company drivers in accordance with the Act and Regulation.

18. I accept the audit results and the auditor’s findings as recorded above.

Decision

19. As described above, the circumstances of this case are that:

a) the then Acting Commissioner ordered an Appendix D audit and subsequently a further spot audit of Dayal;
b) the spot audit process identified, and Dayal later acknowledged, that for the period from April 3, 2014 to March 31st, 2015 Dayal was not paying all of its company drivers the minimum hourly rate required by the legislation. More particularly, Dayal failed to pay the $26.28 per hour rate required by Section 13(1)(b) to company drivers who qualified for this rate;
c) since April 1, 2015 Dayal has been paying its company drivers hourly rates which meet the requirements of the Act and Regulation;
d) Dayal failed to bring itself into compliance for the period April 3, 2014 to March 31, 2015 by the January 22, 2016 deadline established by the former acting commissioner;
e) Dayal eventually calculated the retroactive amounts owing for this period, and on April 25, 2016 issued cheques to the underpaid company drivers, thereby bringing itself into substantial compliance. The auditor reviewed and accepted Dayal’s calculations and satisfied herself that the proper amounts were in fact paid out.

20. As Dayal 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.

21. 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.
22. 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.

23. On November 16, 2015 the then Acting Commissioner communicated the following to the TLS community:

As previously stated, licence holders who voluntarily bring themselves into compliance in a timely way to the satisfaction of the Commissioner are far less likely to incur penalties for non-compliance than those who fail to do so. Please see section 34 of the Act, which sets out the penalties that can be imposed for the failure to comply.

24. On December 11, 2015 the Acting Commissioner followed up with a further communication wherein she informed the TLS community that:

On the issue of retroactive pay, we once again ask for immediate voluntary compliance of that legislation. While we have not yet exercised our discretion as Commissioners to impose penalties for non-compliance for retroactive pay to date, we are putting the industry on notice that the Office expects all retroactive pay owing to drivers can be fully paid by licence holders prior to Friday, January 22, 2016 at the very latest. Companies that come into compliance between now and January 22, 2016 may still be subject to penalties pursuant to the Act. Each case will be assessed on a case by case basis and the reasons for non-compliance will be assessed on that basis. It will not be acceptable for a TLS licence holder to simply wait until January 21, 2016 to come into compliance.

It is expected that all companies pay the retroactive pay owing to drivers immediately, and that the industry will be in full compliance of retroactive pay owing by January 22, 2016 at the latest. After January 22, 2016, the imposition of a penalty pursuant to s. 34 of the Act will be highly likely for any company found in non-compliance with the retroactive provisions of the legislation.

25. On January 20, 2016 the then OBCCTC issued a further communication to the industry reinforcing its expectation that all licensees be in full compliance of retroactive owing by January 22, 2016:

1. Retroactive Pay
The Office of the BC Container Trucking Commission (“OBCCTC”) issued a memo on December 11, 2015 indicating that all companies should come into compliance with respect to retroactive pay on or before January 22, 2016. That date is this Friday. We thank the many stakeholders who have already complied and provided verification of these efforts to the OBCCTC. For those TLS licence holders who have not yet come into voluntary compliance, please be advised that when such non-compliance is identified by the OBCCTC, penalties pursuant to Section 34 of the Container Trucking Act (the “Act”) are likely to result after the abovementioned date.
As recorded above Dayal failed to meet this deadline for bringing itself into compliance.

26. As I noted in Olympia Transportation (CTC Decision No. 02/2016):

"...the onus to become and remain complaint with the requirements of the Act rest entirely with the Licensee."

27. The Act is beneficial legislation intended to ensure that drivers are paid legislated rates in a timely manner. The former Acting Commissioner provided clear and repeated notice to licensees that a failure to become compliant by January 22\textsuperscript{nd}, 2016 will likely result in a penalty. In light of these circumstances, and taking into account all of the facts present in this case, I find this is an appropriate case to issue a penalty. While the amount is not large, it reinforces that licensees must comply with the legislation, as well as with notices and directions issued by this office. These notices and directions are issued to further the purposes of the legislation, which include fostering industrial stability and fairness for companies and drivers through the timely payment of required wages by all licensees.

28. In the result and in accordance with Section 34(2) of the Act, I hereby give notice as follows:

a. I propose to impose an administrative fine against Dayal in the amount of $2,000.00;

b. Should it wish to do so, Dayal has 7 days from receipt of this notice to provide the Commissioner with a written response setting out why the proposed penalty should not be imposed;

c. If Dayal provides a written response in accordance with the above I will consider its response, and I will provide notice to TMS of my decision to either:
   i. Refrain from imposing any or all of the penalty; or
   ii. Impose any or all of the proposed penalty.

Conclusion

29. With this decision I remind licensees that under Section 13 of the Regulation company drivers are entitled to receive an hourly rate of $26.28 once they have performed 2,340 hours of container trucking services on behalf of any licensee.

30. I also once again remind the industry that the onus to become and remain compliant with the requirements of the Act and the Regulation rest with the licensee. Finally, this decision reinforces the principle that there will be consequences for failing to meet the January 22\textsuperscript{nd}, 2016 compliance deadline imposed by my predecessor.

This decision will be delivered to Dayal and published on the Commissioner's website (www.bc-ctc.ca).

Dated at Vancouver, B.C., this 6 day of July, 2016.

Duncan MacPhail, Commissioner