



October 31, 2016

Big Boss Transport Inc.
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Original to follow via mail

Commissioner's Decision Big Boss Transport Inc. (CTC Decision No. 18/2016)

Introduction

1. Big Boss Transport Inc. ("Big Boss") is a licensee within the meaning of the *Container Trucking Act* (the "Act"). Big Boss holds a Joint Licence together with Royal City Roadline Inc. ("Royal City"). 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 26 of the Act, any person may make a complaint to the British Columbia Container Trucking Commissioner (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. (I note the Commissioner has authority under Section 31 to conduct such audits and investigations whether or not the Commissioner has received a complaint).
3. Section 27 of the Act provides, in essence, that complaints may be made confidentially to the Commissioner. That is, if a complaint is made on a confidential basis, the Commissioner "must make best efforts to avoid disclosing any identifying information respecting the complainant" unless disclosure becomes necessary for purposes of the Act.
4. 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."

5. 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.”

Facts

6. The *Act* and the *Regulation* came into effect on December 22, 2014, and a Commissioner was appointed on February 16, 2015. The Commissioner’s office received a confidential complaint alleging that Big Boss and Royal City were paying less than the required minimum rates of remuneration required under the *Act* to employee drivers.
7. Following receipt of the complaint the then Commissioner directed an auditor to audit Big Boss’s records to determine if Big Boss was paying its directly employed drivers (“Company Drivers”) in compliance with the minimum rates of pay required by the *Regulation*. The auditor was directed to audit the period from April 1, 2014 to May 31, 2015 (the “Initial Audit Period”). At the same time the auditor was also directed to audit Royal City Roadline Inc. The Royal City Roadline Inc. audit results are the subject of a separate decision.
8. The auditor reviewed all information requested from and provided by Big Boss and concluded that during the audit period Big Boss was not paying the minimum rates of remuneration required under the *Regulation* to its Company Drivers.
9. The minimum rates of remuneration which must be paid to directly employed operators are set out at Section 13(1) of the Container Trucking Regulation (the “*Regulation*”):

Minimum rates for directly employed operators

- 13 (1)** A licensee must pay a directly employed operator an amount equal to or greater than
- (a) \$25.13 per hour, inclusive of benefits, if the directly employed operator has performed less than 2340 hours of container trucking services on behalf of any licensee; or
 - (b) \$26.28 per hour, inclusive of benefits, if the directly employed operator has performed 2340 or more hours of container trucking services on behalf of any licensee.
- (2) This section applies whether the hours of container trucking services referred to in subsection (1) (a) or (b) were performed before or after the coming into force of this regulation,

and whether or not the hours of container trucking services were performed on behalf of the licensee.

10. Big Boss's records disclosed that during the Initial Audit Period all Company Drivers were being paid \$25.13 per hour regardless how many "hours of container trucking services they had performed on behalf of any licensee." The auditor determined that during the Initial Audit Period 7 out of 10 Company Drivers were in fact entitled to be paid at the higher rate of \$26.28. The auditor calculated the amounts owing to the underpaid Company Drivers totaled \$8,327.81
11. Big Boss agreed to pay the adjustment amounts owing to its Company Drivers and in April of 2016 issued adjustment cheques in the required amounts.
12. The auditor was satisfied that the adjustments calculated and paid by Big Boss fully compensated its Company Drivers for the amounts owing for the Initial Audit Period and that by making these payments Big Boss brought itself into substantial compliance with the *Act* and the *Regulation* for this period.
13. Upon receipt of the auditor's report covering the Initial Audit Period, which identified non-compliance, the Commissioner directed a further audit of Big Boss's Company Drivers covering the period following June 1st, 2015. (the "Subsequent Audit Period") The purpose of extending the audit period was to ensure that Big Boss had made the necessary payroll changes to bring itself into ongoing compliance with the minimum rates of pay required by the *Regulation*.
14. The auditor reviewed relevant Subsequent Audit Period payroll records and determined that:
 - a. Between June 1, 2015 and March 31, 2016 there were 3 Company Drivers who were paid at the lower rate of \$25.13 when they were entitled to the higher rate of \$26.28. Together these drivers were entitled to receive adjustments totaling \$2,655.52.
 - b. Big Boss has now issued adjustment cheques in the required amounts to remedy that non-compliance.
 - c. Since March 31, 2016, Big Boss has been paying its Company Drivers the minimum hourly rates required by the *Regulation*.
15. The auditor's report concludes that Big Boss is now in substantial compliance with the rates mandated by the *Regulation*.
16. Finally, the auditor reports that throughout the audit company representatives were courteous and promptly responded to all emails and telephone calls.
17. I accept the findings of the auditor which are not, so far as I am aware, contested by Big Boss.

Decision

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

- Big Boss has undergone an audit, during which it cooperated with the auditor;
 - Big Boss has paid out adjustment amounts totaling \$8,327.81 to compensate Company Drivers for the payment of non-compliant hourly rates during the Initial Audit Period. These adjustment cheques (which included adjustments for non-compliance during the retroactive period) were not paid out until April 2016, well after the January 22nd, 2016 deadline set by the former Acting Commissioner.
 - Big Boss has paid adjustment amounts totaling \$2,655.52 to remedy the payment of non-compliant hour rates during the Subsequent Audit Period.
 - Big Boss is now paying its Company Drivers the minimum rates required by the *Regulation*.
19. Big Boss has now paid the amounts owing under the *Act* and *Regulation* for both the Initial and Subsequent Audit Periods and is now paying hourly rates to its Company Drivers which comply with the legislated minimum hourly rates requirements. As a result I find it unnecessary to issue an order pursuant to Section 9 of the *Act* requiring Big Boss to comply with the *Act*.
20. 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.
21. 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.
22. 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.
23. In the present case, Big Boss cooperated fully with the auditor's investigation into the complaint. It complied with the directions given by the auditor, including disclosing records. It has paid the necessary adjustment amounts required to bring itself into compliance for both the Initial and Subsequent Audit Periods and is now paying compliant hourly rates to its Company Drivers. I am concerned, however, that the portion of the adjustment payments relating to the retroactive period

were not paid in advance of the January 22, 2016 deadline fixed by the former Acting Commissioner.

24. While I accept that Big Boss was working with the auditor to identify the amounts of retroactive pay owing, and that the auditor's busy schedule may have been a factor in prolonging the audit process beyond January 22nd, 2016, I cannot accept that these factors provide an excuse for not paying the retroactive amounts owing by the January 22nd, 2016 deadline.
25. Big Boss was aware prior to January 22nd, 2016 that it was paying all of its drivers the lesser rate of \$25.13 per hour. It should have also been aware, that many of its drivers had performed "2340 or more hours of container trucking services on behalf of any licensee" and thus were entitled to be paid \$26.28 per hour. If Big Boss was not aware of its obligation to pay some of its drivers the higher rate, I can only repeat the well-worn maxim that ignorance of the law is no excuse. Put simply, Big Boss was not entitled to rely on the assistance of the auditor to determine that it was out of compliance during the retroactive period, or to calculate the retroactive adjustment amounts owing. This could have and should have been achieved by Big Boss before January 22nd, 2016 deadline imposed by the former Acting Commissioner.
26. In *Olympia Transportation* (CTC Decision No. 02/2016) I made the following clear:

"...the onus to become and remain compliant with the requirements of the *Act* rest entirely with the licensee. Licensees should not rely on Commission auditors to determine whether or not they are compliant, nor should they wait until a Commission audit process is undertaken before taking steps to ensure compliance."
27. On December 11th, 2015 former Acting Commissioner Bell informed the industry that those licensees who fail to bring themselves into compliance by January 22nd, 2016 face a high risk of having a penalty imposed. Big Boss failed to meet this deadline and must now bear the consequences.
28. Taking into account all of the factors present in this case, including Big Boss' failure to bring itself into compliance by January 22nd, 2016, I conclude that this is an appropriate case to issue a penalty of \$1,500.00. Therefore in accordance with Section 34(2) of the *Act* I hereby give notice as follows:
 - a. I propose to impose an administrative fine against Big Boss in the amount of \$1,500.00;
 - b. Should it wish to do so, Big Boss 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 Big Boss provides a written response in accordance with the above I will consider its response, and I will provide notice to Big Boss 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.

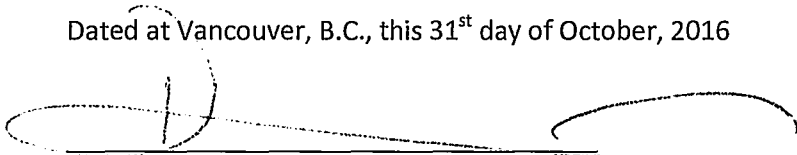
Conclusion

29. In summary, for the Initial Audit Period Big Boss was found to have owed a total of \$8,327.81 to 7

Company Drivers. A material portion of this amount related to payment of non-compliant rates during the retro-active period. During the Subsequent Audit Period it was determined that Big Boss owed a further \$2,655.52 to 3 Company Drivers. Big Boss cooperated in the audit process and has now paid the amounts found to be owing. Adjustment payments relating to the retroactive period were not paid until April of 2016, well after the January 22nd deadline imposed by the former Acting Commissioner.

30. Big Boss appears to now understand its obligations under the *Act* and is now paying its Company Drivers hourly rates which comply with the minimums established by the *Regulation*.
31. Finally I have decided, for the reasons given, that this is an appropriate case to impose a small administrative penalty and have proposed an administrative fine against Big Boss in the amount of \$1,500.
32. This decision will be delivered to Big Boss and published on the Commissioner's website: (www.bc-ctc.ca).

Dated at Vancouver, B.C., this 31st day of October, 2016

A handwritten signature in black ink, appearing to read 'Duncan MacPhail', is written over a horizontal line. The signature is stylized with a large initial 'D' and a long, sweeping tail.

Duncan MacPhail, Commissioner