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Forfar Enterprises Ltd.
17471 29 Avenue
Surrey, B.C. V3Z 0E7

Via email: goforfar@gmail.com
Original via mail

Commissioner's Decision

Forfar Enterprises Ltd. (CTC Decision No. 20/2016)

Introduction

1. Forfar Enterprises Ltd. ("Forfar") 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.

Facts

3. In February of 2016, the then Acting Commissioner directed that an audit of Forfar be undertaken. The purpose of the audit was to determine if Forfar was paying its directly employed operators ("company drivers") the minimum rates required under the *Container Trucking Regulation* (the *Regulation*). The audit review periods identified in the Acting Commissioner's direction were April 1-30, 2015 and October 1-31, 2015.
4. The auditor requested, and received, trip sheets, payroll records and other documentation from Forfar identifying container moves, hours worked and wages paid.
5. The audit disclosed that Forfar company drivers perform both Container Trucking Services work ("CTS work") and work which is not Container Trucking Services work ("Non CTS work").
6. It further revealed that in April of 2015 Forfar paid its drivers \$22 per hour for all work performed (both CTS and Non-CTS work.) In addition, Forfar provided paid group health benefits valued at \$308.36. per month and paid bonuses and a phone allowance.
7. In August of 2015 Forfar increased its pay rate to \$26.00 per hour for all work performed and ceased paying the group health benefit premiums. At this point, drivers who wished to maintain the group health coverage had the cost of the benefits deducted from their pay.

8. Forfar has not paid any retroactive pay adjustments to its drivers.
9. The auditor made several attempts to calculate amounts owing for the audit periods based on information that Forfar provided during the course of the audit. Ultimately she concluded the company owes its six company drivers a total of \$707.74 for the two audit periods.
10. The auditor then asked the company to perform a self-audit for compliance for the periods not covered by the audit (that is, April 3, 2014 to March 31, 2015, May 1 to September 30, 2015, and November 1, 2015 to present). Forfar refused to perform this task because it disagreed with the auditor's method of calculating compliance and believed it was in compliance.
11. During the audit process, Forfar raised a number of issues with the auditor's calculations which will be addressed in the next part of my decision.
12. In addition, following receipt of the auditor's report, Forfar was invited to provide the Commissioner with a written submission explaining its position on issues raised during the audit. On October 14, 2016 Forfar filed a written submission with the Office of the British Columbia Container Trucking Commissioner. Forfar's submission has been carefully considered in my deliberations.

Issues Arising

13. Forfar's submission raises the following issues.
 - a. Rail yard and other off-dock moves
14. Forfar submits that a company which only transports containers between off-dock locations, such as CN and CP rail yards and a customer's location in the Lower Mainland, does not require a TLS licence and is not subject to CTC regulation. Therefore, Forfar says, it is unreasonable that, when it performs such off-dock moves, it is subject to CTC rates and regulation. Forfar further submits on this issue: "Also not considered, many rail container moves are of rail owned, marine non-approved containers".
15. For the reasons which follow I am not persuaded that the movements of marine-approved containers by company drivers of TLS licensee companies such as Forfar between off-dock locations such as the rail yards and customer locations in the Lower Mainland are excluded from the scope of CTC legislation.
16. Section 13 of the *Regulation* requires that a licensee pay directly employed operators (company drivers) the minimum hourly rates set out in that provision for the performance of container trucking services.
17. The *Act* defines "container trucking services":

"container trucking services" means the transportation of a container by means of a truck."

18. The definition of a container is found in Section 1(1) of the *Regulation*:

“**container**” means a metal box furnished or approved by an ocean carrier for the marine transportation of goods.”

Forfar argues that the containers moved by Forfar to and from CN, CP and Delco are not furnished or approved by marine carriers and accordingly are not “containers” as that term is defined in the *Regulation*.

19. However, when asked by the auditor to identify which containers it was referring to, Forfar was unable or unwilling to identify the specific containers at issue.
20. To come to a decision on whether or not the containers at issue were “a metal box furnished or approved by an ocean carrier for the marine transportation of goods”, the auditor examined the driver trip sheets. The trip sheets identified each container moved by company drivers by reference to a sequence of 4 letters printed on the side of each container. The auditor reports that in each case the referenced sequence of letters was consistent with those normally stamped on containers “..... furnished or approved by an ocean carrier for the marine transportation of goods”.
21. In the result, the auditor presumed that these containers were marine “containers” as defined in the *Regulation*. The auditor then provided Forfar with an opportunity to rebut her presumption. As noted above, Forfar was unable or unwilling to identify the specific containers at issue and the presumption went un rebutted.
22. Absent a response from Forfar, the auditor concluded that the containers met the definition of “container” for the purposes of the *Act* and *Regulation* and that the movement of these containers attracted the rates set out in Section 13 of the *Regulation*.
23. I agree with the approach taken by the auditor. Containers which are identified by a 4 letter identification codes consistent with containers, “furnished or approved by an ocean carrier for the marine transportation of goods” are to be presumed to be “containers” as defined in the *Regulation*. Where containers are so identified, the onus lies with the licensee to rebut this presumption.
24. In this case, Forfar was unwilling or unable to rebut the presumption. Thus the auditor correctly concluded that the containers fell within the definition of “container” found in the *Regulation* and accordingly the movement of these containers attracts the rates proscribed by the *Act* and *Regulation*. It follows that I also agree with, and accept, the auditor’s conclusions on this part of the audit.
25. Forfar further argues that, because it is not moving containers to or from marine terminals, it is not required to pay the rates proscribed by the *Act* and *Regulation* for trips to or from CN, CP and Delco.
26. However, Forfar is a licensee engaged in container trucking services and as such is subject to the requirements of the *Act* and *Regulation*.
27. Under Section 8 of the *Interpretation Act* R.S.B.C. 1996 c.238, every enactment must be construed

as being remedial, and must be given a fair, large and liberal construction and interpretation as best ensures the attainment of its objectives”.

28. An important objective of the *Act* and *Regulation* is to ensure that both company drivers and independent operators engaged in container trucking services are paid a fair wage in a timely way. In Machtiger v. HOJ Industries [1992] 1 S.C.R. 986, Iacobucci J., speaking for the majority, made it clear that where the objective of an *Act* is to benefit employees (in this case company drivers) then,

“... an interpretation of the *Act* which encourages employers to comply with the minimum requirements of the *Act*, and so extends its protections to as many employees as possible, is to be favoured over one that does not.”

29. I find the rate protections set out in Section 13 of the *Regulation* apply to all container trucking services performed by company drivers employed by licensees including off-dock trips. Off dock trips are not excluded from the scope of that provision, either expressly or, in my view, inferentially.

30. Off-dock trips are defined in the *Regulation* to mean:

"off-dock trip" means one movement of one or more containers by a trucker from one facility in the Lower Mainland to a different facility in the Lower Mainland, but does not include

(a) an on-dock trip, or

(b) a movement of a container from one location in a facility to a different location in the same facility;

31. My interpretation is consistent with the Section 12(3) of the *Regulation* which requires, that where a licensee pays an independent operator on a per trip basis for an off-dock trip, the licensee must pay the independent operator no less than the minimum regulated trip rates set out Table 2 of Schedule 1 of the *Regulation*.
32. Regulated rates for independent operators expressly include both on dock and off dock moves, as defined in the legislation. Off-dock trips include the movement of marine containers between rail yards and customer locations.
33. In my view it would be absurd to interpret the legislation as requiring that licensees pay independent operators paid on a per the trip basis the required minimum trip rates for off-dock trips, but exclude company drivers paid by the hour from the minimum rate requirements contained in the *Regulation* for doing exactly the same work.
34. Such an interpretation would be directly at odds with the purpose and objective of the legislation, which includes providing for stability in the remuneration of drivers who provide container trucking services, by establishing standardized minimum rates for all who provide such services. I find such an interpretation would be contrary to my obligation to give a “... fair, large and liberal construction and interpretation as best ensures the attainment of its objectives”.
35. Finally, with respect to the argument that it is unfair or unreasonable that trucking companies which do not hold TLS licenses can provide trucking services in the Lower Mainland without being subject

to the regulation while TLS licensees are subject to the legislation, the short answer is that the legislation makes the payment of the legislated rates a term of the privilege of holding a TLS license. In return for being licensed to perform on-dock container trucking work, the licensed trucking company must comply with the legislation, including required pay rates for all work falling within the scope of the legislation.

36. In the result, I find that the minimum rates established by Section 13 of the *Regulation* apply to licensee employed company drivers performing container trucking services, whether those services are in relation to on-dock or off-dock trips, including the movement of containers by company drivers from CN, CP and Delco to a different facility in the Lower Mainland.

b. *Attribution of medical month benefit cost paid by Forfar prior to August of 2015*

37. Forfar position is outlined in its October 14, 2016 submission:

“Extended benefits are currently¹ provided to all drivers and paid in full by Forfar. Before the mandated wage increases, we intended to end paid benefits and shift the onus to the employee. Trucking rates continued to deteriorate and we needed to alleviate some cost. The only reason we decided to keep paid benefits was the mandate. We were not ready to increase the per hour wage so instead decided to keep paid benefits and offer bonuses on paychecks if we felt there was a shortfall. Due to these circumstances, benefit dollars should be applied only to TLS hours. As we were no longer willing to offer this benefit to employees, it must be deemed as a port benefit. Therefore, all medical benefit dollars must be applied to TLS hours.”

38. The auditor attributed the monthly benefit cost to all hours worked, and applied the benefit cost proportionally.

39. I do not accept the argument advanced by Forfar on this point.

40. Where benefits provided to company drivers are paid for on a global monthly basis it is reasonable to presume, absent clear proof to the contrary, that such benefit packages are intended to be an integral part of the drivers' overall compensation package and are intended to compensate drivers for all work performed, not just some isolated portion of that work. Not only is this a reasonable conclusion to reach, it is one which best ensures that drivers are paid a fair wage and is one which best advances the objectives and purposes of the *Act*.

41. I find that the auditor correctly applied the benefit premiums to all work performed by company drivers and not to just the CTS work as argued by Forfar. Not only is this interpretation consistent with the facts which present themselves here, it is consistent with a fair, liberal and purposeful interpretation of the legislation.

c. *Is the phone allowance provided by Forfar to its company drivers a “benefit” for the purpose of the Act and Regulation?*

¹ I note that in the auditor's report she determined that the payment of the medical benefit was discontinued in August of 2015.

42. Section 13 of the *Regulation* establishes the minimum rates which must be paid to company drivers. The required rate is inclusive of “benefits”.

43. Section 1.1 of the *Regulation* defines benefit;

“benefit” includes

(a) medical, disability, extended health, life, accidental death and dismemberment, dental or orthodontic insurance, and

(b) contributions to a pension plan or retirement fund,

but does not include

(c) wages or other remuneration calculated on the basis of work done or productivity, or

(d) the licensee's or employer's costs of doing business;

44. Forfar argues that the phone allowance is a benefit as defined in the *Regulation* and should therefore be included in the rate required by Section 13.

45. I do not accept Forfar's position.

46. The OBCCTC has consistently taken the view, that telephone allowances are not a benefit for the purposes of Section 13 of the *Regulation*. The definition of “benefit” found in the *Regulation* includes a list of very specific types of benefits such as medical, disability extended health, life, accidental death and dismemberment, dental or orthodontic insurance, and pension plan or retirement fund contributions. A phone allowance is very different than the types of benefits listed. Drivers use their cell phones in their daily work. The allowance compensates drivers for using their personal phones for work related purposes. Thus the telephone allowances are properly characterized as a business cost. The definition of “benefits” expressly excludes “the licensee’s or employer’s costs of doing business.” I conclude the telephone allowance is not a “benefit” for purposes of the legislation.

Auditors Conclusions

47. The auditor concludes the audit report with a finding that Forfar is out of compliance with the minimum rates of remuneration as required by the *Regulation* for some drivers in some pay periods in April and October 2015 (the periods covered in the audit). The auditor further reports that an adjustment of \$707.64 is owing to three of six company drivers for the periods under audit.

48. I accept the auditors conclusions which I find are consistent with my findings on the issues addressed above.

49. Finally, the auditor reports that Forfar has refused to pay the adjustments calculated to be owing and has thus far refused to conduct a self-audit or take any steps necessary to bring itself into compliance with the Act.

Decision

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

- a) In February of 2016 the OBCCTC initiated an audit of Forfar covering the months of April and October, 2015.
- b) Forfar raised a number of issues during the audit process and was given an opportunity to provide full written submissions addressing them.
- c) Forfar's issues are addressed in this decision, and in all cases the auditor's approach has been found to be consistent with the proper interpretation and application of the *Act* and *Regulation*.
- d) Forfar is out of compliance for the months under audit and undercompensated 3 of its company drivers by amounts totaling \$707.64 during these audited periods.
- e) Forfar has not paid the adjustments found to be owing.
- f) Forfar has not taken any steps to correct its non-compliance and continues its non-compliant behaviors.

51. As set out above, Forfar has not paid the amounts determined by the auditor to be owing under the legislation or corrected its non-compliant payment practices. In these circumstances, I hereby issue the following orders pursuant to Section 9 of the *Act*:

I hereby order Forfar to:

- a) immediately take all necessary steps to bring itself into compliance with the requirements of the *Act* and *Regulation* as interpreted in this decision. More specifically, Forfar must do the following:
 - i. undertake an internal audit of its payments to its drivers, applying the principles set forth in this decision, for the purpose of identifying and calculating unpaid amounts owing under the legislation to its company drivers for the period from April 3rd, 2014 to the date of this decision;
 - ii. provide to the auditor a spreadsheet of its calculations of adjustment amounts owing to its drivers further to this internal audit, and pay the amounts the auditor advises are owing on or before January 6, 2017.
 - iii. make any changes necessary to its payroll and administrative practices to ensure that it will be in compliance with the legislation from the date of this decision

- b) immediately pay the \$707.64 adjustment amount found to be owing by the auditor for the months of April and October, 2015.
 - c) meet with an auditor by no later than January 6th, 2017 and demonstrate to the auditor's satisfaction that it has taken all necessary steps to bring itself into compliance with the legislation and that it has properly calculated and paid all adjustment amounts owing to its company drivers arising from or relating to its past non-compliant practices.
52. 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.
53. 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.
54. In this case I have concluded that Forfar has engaged in a number of non-compliant practices which have resulted in a failure to pay its company drivers the full amount of compensation owing under the *Act* and *Regulation*. I have also provided directions identifying how and where Forfar has failed to comply with its obligations under the *Act* and *Regulation* and have ordered Forfar to correct its non-compliant practices and calculate the adjustments owing to its company drivers resulting from same and to pay those adjustments.
55. In addition I have ordered Forfar to report to an OBCCTC auditor by January 6th, 2017 for the purpose of demonstrating that it has taken all necessary steps to become compliant and that it has correctly calculated and paid the outstanding adjustment amounts owing to its drivers.
56. In these circumstances, it is premature to determine what if any administrative penalty is appropriate in this case. For this reason I reserve judgment on penalty until after the auditor has met with Forfar and the auditor has reported back to me on:
- a) The steps taken by Forfar to
 - i. bring itself into compliance,
 - ii. identify and calculate the monies owing to its drivers
 - b) The adjustment amounts owing by Forfar to its drivers for the period from April 3, 2014 to date;
 - c) Whether Forfar has paid the outstanding adjustment amounts owing;
 - d) Whether Forfar is now in substantial compliance with the legislation.

Conclusion

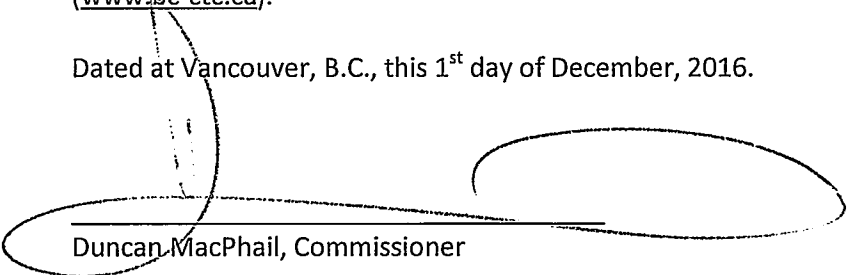
57. With the publication of this decision, I have addressed a number of important issues and ruled as follows:

- a) Containers which have a 4-letter code identifying them as containers furnished or approved by ocean carriers for the marine transportation of goods will be presumed to be containers for the purpose of the *Act* and *Regulation*. The onus rests with the licensee to rebut the presumption.
- b) Licensees are required to pay company drivers the minimum hourly rates set out in Section 13 of the *Regulation* for all container trucking services performed by the driver.
- c) Where a licensee pays monthly global medical benefit premiums on behalf of its company drivers, the presumption is that payment of these premiums applies to all work performed by the drivers, not just CTS driving work. The onus rests with the licensee to rebut the presumption.
- d) Telephone allowances are not a benefit under the *Regulation*.

58. Having ruled on these issues, I ordered Forfar to correct its non-compliant practices and to take all necessary steps to identify and calculate the monies owing to its drivers as a result of its failure to comply with the *Act* and *Regulation*; to pay its drivers the monies found to be owing; and to report to the auditor with regards to these matters by no later than January 6th, 2017. Upon receiving the auditor's report, I will make a decision on whether an administrative penalty is appropriate in the circumstances and if so, I will give notice of the amount of the proposed penalty.

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

Dated at Vancouver, B.C., this 1st day of December, 2016.



Duncan MacPhail, Commissioner