



December 5, 2016

Smart Choice Transport Ltd.
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Original to follow via mail

Commissioner's Decision Smart Choice Transportation Ltd. (CTC Decision No. 21/2016)

Introduction

1. Smart Choice Transport Ltd. ("Smart Choice") 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 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 August 3, 2016 the Office of the British Columbia Container Trucking Commissioner received an anonymous complaint alleging that Smart Choice was paying less than the required minimum rates of remuneration required under the Act to directly employed operators ("company drivers"). The Commissioner directed an auditor to conduct an investigation into the allegations raised in the complaint.

Facts

Complaint Audit Period

5. The auditor began the investigation by directing Smart Choice to produce all relevant records for the period running from April 28, 2016 to July 27th, 2016 (the "Complaint Audit Period"). Smart Choice complied with this request in a timely way and provided requested documents including daily trip

sheets, records from an electronic clock indicating hours worked, pay statements and cancelled pay cheques. In addition, and at the same time Smart Choice's office manager informed the auditor that:

- a. Smart Choice company drivers move TLS containers as well as performing non-TLS reefer van work. Prior to the regulated rates for TLS work, drivers were paid \$21.00 per hour. Once the *Act* came into effect, rates for TLS work were increased to \$26.28 per hour and rates for non-TLS work were increased to average \$24.00 per hour.
- b. Smart Choice was having difficulties separating TLS work from reefer van work in order to apply the appropriate rates of pay. In order to resolve this issue Smart Choice and its drivers agreed that a container move averaged 3 hours round-trip (1.5 hours per leg). As a result, the pay structure was set to pay an average of \$24.00 per hour for all non-TLS work and 1.5 hours (\$26.28 x 1.5) per leg for each container move.

For ease of reference I will refer to the above described method of recording container trucking services (CTS) hours as the "defined hours method".

6. During the Complaint Audit Period, Smart Choice operated 7 tagged trucks to perform container trucking services using 15 company drivers¹. As well, and as noted above, these company drivers spent part of their time performing non-container trucking services reefer van work. The auditor reviewed the records and was able to identify the number of hours actually worked by company drivers performing CTS work.
7. The records confirmed that container trucking services hours of work were being recorded and company drivers were being paid using the defined hours method. More specifically, using this method each company driver was credited with 1.5 hours work for each leg of a trip (regardless of the actual hours worked) and paid for each credited hour at a rate of \$26.28 per hour. This method of payment resulted in company drivers not being paid the minimum rate required under the *Regulation* for all CTS hours actually worked.
8. Based on the actual hours recorded as TLS work on the drivers' trip sheets, the auditor calculated the drivers had been underpaid due to the defined hours method by a total of \$6,311.79 for the Complaint Audit Period. The auditor sent her calculations to Smart Choice for review on September 9, 2016. Smart Choice accepted the auditor's calculations and issued adjustment cheques dated September 15, 2016 to the drivers in the amounts calculated by the auditor.
9. Section 13 of the *Regulation* requires that company drivers be paid the required minimum hourly rate for all CTS hours worked. Any Licensee who pays its company drivers using a payroll system which does not record the CTS hours actually worked is non-compliant with the *Act* and the *Regulation*.
10. Using a payroll system which records CTS hours worked as a function of the number of CTS trips completed by a driver is also a violation of the Container Trucking Services Licence, which prohibits paying drivers, "by a method of Compensation that is a hybrid of per trip and hourly".

¹ Smart Choice also employs a number of drivers who never perform Container Trucking Services work.

11. Licensees cannot avoid their obligation to pay the hourly rates required by the *Act* and *Regulation* or their obligations under the Container Trucking Services licence by entering into agreements with drivers which permit payment of non-compliant rates. It follows that any agreement by company drivers to accept the defined hours method of calculating hours is unenforceable and cannot be relied upon to prevent company drivers from receiving the full protection of the *Act* and *Regulation*.
12. I find that the defined hours method used by Smart Choice to record CTS hours, and to pay its drivers for CTS work, miscalculates the CTS hours actually worked, thereby resulting in company drivers being undercompensated. Such a method of recording hours is inconsistent with the *Act*, the *Regulation* and Smart Choice's Licence.

Medical Benefits and Bonus

13. Through the audit process the auditor discovered that, in addition to receiving an hourly wage, company drivers also received an employer paid for medical insurance benefit, and bonuses. When this information was brought to the attention of the auditor, it was accounted for in the auditor's calculations. As a result, the auditor re-calculated that company drivers were underpaid by \$5,332.16 during the Complaint Audit Period. I accept that this is the correct amount.

Expanded Audit

14. Having discovered through the audit of the Complaint Audit Period occasioned by the August 3, 2016 complaint that Smart Choice was paying company drivers using a non-compliant method of recording hours worked, the Auditor expanded the audit to examine the months predating the Complaint Audit Period (April 3, 2014 – April 27th, 2016) and the period which followed (July 28th to August 13, 2016.).
15. I note that Smart Choice was subject to an earlier OBCCTC audit (the "Previous Audit") covering the period between April 3, 2014 and November 30th, 2015 (the "Previous Audit Period"). At that time the auditor concluded that Smart Choice had underpaid its company drivers during the Previous Audit Period by \$55,175.00. Smart Choice duly paid that amount, resulting in a finding in an earlier decision that Smart Choice had brought itself into compliance with the legislation. However, when the auditor audited Smart Choice as part of the Previous Audit process, she was unaware that Smart Choice was using the non-compliant defined hours method for recording CTS hours work. I find this was information which the auditor could not reasonably have known through the Previous Audit. This new information came to light during the Complaint Audit as a result of disclosure by Smart Choice's office manager that the company was using defined hours method. The disclosure occurred after the August 3, 2016 complaint that Smart Choice was still not paying drivers in compliance with the legislation.
16. With the recent discovery that Smart Choice was using a non-compliant defined hours method to record the number of CTS hours worked by its company drivers, the previous calculation of the amount Smart Choice must pay to bring itself into compliance with the legislation for the Previous

Audit Period is no longer accurate. It must be recalculated in light of this new information. .

17. The Expanded Audit, which captures CTS hours actually worked, reviewed the entire period from April 3, 2014 to August 13, 2016. It revealed the following:
 - a. For the Previous Audit period (April 3, 2014 to November 30, 2015) Smart Choice owed its company drivers a further \$29,094.39 (in addition to the \$55,175.00 already paid).
 - b. For the period from December 1, 2015 to April 27th, 2016 Smart Choice owed its company drivers \$3,594.39 in unpaid wages.
 - c. For the Complaint Audit Period (April 28, 2016 to July 28, 2016) Smart Choice owed its company drivers \$5,028.37 in unpaid wages.
 - d. For the period from July 29th, 2016 to August 13, Smart Choice owed its company drivers \$570.43 in unpaid wages.

In summary, the auditor found, and I accept, that in addition to the \$55,175.00 found to be owing in the Previous Audit, Smart Choice has also underpaid its company drivers by a further \$38,673.07.

18. The Auditor reported that Smart Choice paid the additional adjustment amounts calculated to be owing to its company drivers and by doing so has brought itself into substantial compliance (as it relates to company drivers) for the entire Expanded Audit Period.
19. The auditor also reported that, as a result of the audit process, Smart Choice has made the necessary changes to its payroll system to ensure that hours are being properly recorded and that company drivers are now being paid in a fashion which complies with the requirements set out in the *Act* and *Regulation*.
20. Finally, the auditor reported that Smart Choice was fully co-operative during the audit process and provided good records for audit purposes.

Decision

21. In summary, the circumstances of this case are as follows:
 - As a result of a complaint filed on August 3, 2016, Smart Choice has undergone a second audit.
 - In the audit process, Smart Choice revealed that it has been using a method of recording hours of work (the defined hours method) which misstated the hours actually worked by company drivers.
 - The misstating of hours of work due to the defined hours method was not known and could not reasonably have been identified during the Previous Audit. As a result, the calculation of underpayment in the Previous Audit was incorrect and had to be recalculated in this audit.
 - In addition to the \$55,175.00 found to be owing to company drivers in the Previous Audit (which amount was paid by Smart Choice by January 15, 2016), the auditor found Smart Choice owed its company drivers an additional \$38,673.06.
 - Smart Choice accepted the results of the second audit and paid the additional amounts found to be owing in a timely way.
 - Throughout the audit, Smart Choice fully co-operated with the auditor and provided good

records.

- Smart Choice has now made the necessary changes to its payroll system to ensure that hours are being properly recorded and that company drivers are now being paid in a fashion which complies with the requirements found in the Act and Regulation.
22. As Smart Choice has paid the amount owing under the *Act* and corrected its non-compliant payment practices, I find there is no need for me to issue an order pursuant to Section 9 of the *Act* requiring Smart Choice to comply with the *Act*.
 23. 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.
 24. 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.
 25. The administrative penalties made available under Section 34 of the *Act* and Section 28 of the *Regulation* are designed to encourage compliance with the *Act* and *Regulation*. Penalties are intended to have a general and specific deterrence purpose – that is, to protect drivers and to discourage non-compliance with the legislation.
 26. To ensure that licensees receive the appropriate deterrent message, the amount of any financial penalty must be sufficiently large to meet the objective of deterring non-compliance. The large financial penalties available under the *Act* and *Regulation* demonstrate an intention to ensure that administrative fines are not seen by licensees as merely another cost of doing business or part of the licensing costs.
 27. In keeping with the above described purpose of the legislation, the factors which will be considered when assessing the appropriate administrative penalty include the following:
 - The seriousness of the respondent's conduct;
 - The harm suffered by drivers as a result of the respondent's conduct;
 - The damage done to the integrity of Container Trucking Industry;
 - The extent to which the Licensee was enriched;
 - Factors that mitigate the respondent's conduct;
 - The respondent's past conduct;
 - The need to demonstrate the consequences of inappropriate conduct to those who enjoy the benefits of having a Container Trucking Services Licence;
 - The need to deter those Licensees from engaging in inappropriate conduct, and

- Orders made by the Commission in similar circumstances in the past.

This list is not intended to be exhaustive.

28. With these factors in mind, I have assessed the appropriate administrative penalty to be applied here taking into account the following circumstances.
29. For payroll purposes Smart Choice was using a method of recording hours worked by company drivers which misstated the hours they actually worked. The misstatement of hours worked for payroll purposes, and the use of a method of compensation which is a hybrid of per trip and hourly is a serious violation of the *Act*, the *Regulation*, and Smart Choice's Container Trucking Services Licence. Any administrative penalty imposed here must be sufficiently large to deter Licensees, including Smart Choice, from engaging in this type of inappropriate conduct.
30. The non-compliant defined hours method of recording hours of work used by Smart Choice continued for over 2 years from April of 2014 until it was discovered in August of this year. It resulted in company drivers being significantly underpaid. Left undetected, Smart Choice would have been unjustly enriched by the not insignificant amount of \$38,673.06.
31. The use of the defined hours pay method to record hours of work also resulted in a portion of the retroactive pay owed to company drivers not being paid by the January 22nd, 2016 deadline imposed by the former Acting Commissioner.
32. Additionally, this is not the first occasion that Smart Choice where has been found to have engaged in non-compliant behavior. (See CTC Decision No. 3/2016.)
33. The following mitigating factors must be also considered in assessing penalty. Firstly I accept Smart Choice's explanation that it adopted the non-compliant defined hours method of recording hours as a way to distinguish between CTS hours worked and non-CTS hours worked and that it did not embark on this method of calculating hours for the purpose of intentionally deceiving or defrauding its drivers. Secondly I acknowledge that Smart Choice fully cooperated with the auditor, immediately paid the adjustment amounts found to be owing, and corrected its non-compliant payroll practices.
34. Considering all of the above referenced circumstances, I have concluded that this is an appropriate case to impose an administrative fine in the amount of \$ 8,000.00. In my view, this fine is sufficiently large to meet the objective of deterring this type of serious non-compliant conduct, while at the same time recognizing and balancing the mitigating factors which arise. The fine responds to a serious form of misconduct, the misrepresentation of hours worked for payroll purposes, and is intended to serve as a warning to all licensees that this type of conduct cannot and will not be tolerated. To be clear, in the absence of the mitigating factors referenced above, had I concluded that the non-compliant method of calculating hours was a scheme to intentionally defraud and deceive company drivers, the size of the fine would have been substantially higher. As I have stated on many previous occasions, drivers are entitled to be properly paid the legislated rates in a timely way. This entitlement requires that licensees take all necessary steps to ensure that hours of work are properly and accurately recorded and paid. Anything less will not be tolerated.

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

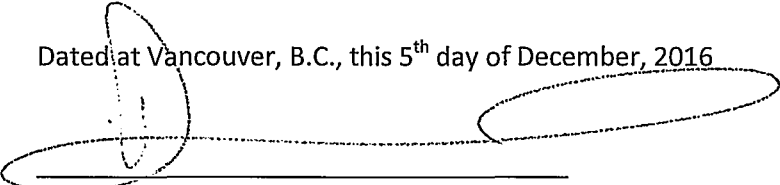
- a. I propose to impose an administrative fine against Smart Choice in the amount of \$8,000.00 ;
- b. Should it wish to do so, Smart Choice has 7 days from receipt of this notice to provide the Commissioner with a written response setting out why the proposed penalty should not be imposed;
- c. If Smart Choice provides a written response in accordance with the above I will consider its response, and I will provide notice to Smart Choice 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

36. In summary, Smart Choice has been found to have violated the *Act*, the *Regulation* and its Container Trucking Services Licence by using a method of recording hours of work which misstates and improperly records the hours of work worked by its company drivers. As a result its company drivers were underpaid over a long period of time dating back to April of 2014. The auditor, with the assistance of Smart Choice, has calculated the outstanding amounts owing and Smart Choice has taken reasonable steps to make adjustment payments in a timely way. I note as well Smart Choice's cooperation with the auditor and the fact that it has taken appropriate steps to remedy the offending practice. Were it not for the mitigating factors present here, I would have proposed a penalty considerably higher than the proposed penalty of \$8,000.00 for the non-compliance with the legislation and Licence in this case.

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

Dated at Vancouver, B.C., this 5th day of December, 2016



Duncan MacPhail, Commissioner