



February 6, 2017

MDW Express Transport Ltd.
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Original via mail

Commissioner's Decision

MDW Express Transport Ltd. (CTC Decision No. 01/2017)

A. INTRODUCTION

1. MDW Express Transport Ltd. ("MDW") 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. In the summer of 2015, the Office of the British Columbia Container Trucking Commissioner (the "OBCCTC") received 3 complaints alleging that MDW was not paying its directly employed operators ("company drivers") the minimum rates of remuneration required under the *Container Trucking Act*, (the "Act") and the *Container Trucking Regulation* (the "*Regulation*"). The OBCCTC directed that an audit of MDW be undertaken. The purpose of the audit was to determine if MDW was paying its company drivers the minimum rates required under the *Regulation*.
4. The auditor initially audited the period from May 1, 2015 to June 30, 2015 (the "Initial Audit Period"). As a result of the auditor's finding during this period, the audit was expanded to include the periods between December 22nd, 2014 and April 30, 2015 and between July 1, 2015 and Sept. 16, 2016 (the "Expanded Audit Period").

B. APPLICABLE RATES

5. The *Act* and *Regulation* came into effect December 22, 2014. The legislation initially required that company drivers be paid one of the following minimum rates:
- If paid on a trip rate basis, a minimum per trip rate of \$40 per trip (effective from the date of the legislation, December 22, 2014).
 - If paid on an hourly basis, the minimum hourly rates prescribed by Section 13 of the *Regulation* (retroactive to April 3, 2014).

Under the Container Trucking Services Licence, Licensees are prohibited from paying drivers by a “method of Compensation that is a hybrid of per trip and hourly”.¹

On May 14th, 2015, the *Regulation* was amended to repeal the \$40 trip rate. As a result, on and after May 14, 2015, company drivers are entitled to be paid the minimum rates established under Section 13 of the *Regulation*.

C. AUDIT CHALLENGES AND POOR RECORD KEEPING

6. The auditor reported that MDW’s inaccurate, inconsistent and incomplete record keeping made this audit extremely difficult. For example:
- a) The hours worked recorded by drivers in their daily trip sheets often could not be reconciled with pay statements and driver logs.
 - b) Pre and post trip inspect times recorded in driver logs were inconsistent with driver start and finish times.
 - c) MDW occasionally paid discretionary bonuses to its drivers without separating out and identifying the amount of the bonus payment for payroll purposes.
 - d) Port of Metro Vancouver Gate Activity Reports record access times to terminals which were inconsistent with MDW truck logs and trip sheets.
 - e) 3 drivers were improperly characterized as subcontractors for payroll purposes and paid on a monthly basis.
 - f) At least one of the complainants alleges that his daily trip sheets have been altered to reflect fewer hours.
 - g) Drivers have been directed by MDW to amend trip sheets, an allegation which is not disputed by MDW management. MDW responds that such directions were given when MDW believed that drivers has inflated their hours of work or recorded a start time earlier than their scheduled start time. MDW disputes any allegation that drivers were required to record fewer hours than those actually worked or that the trip sheets prepared by drivers were altered by MDW management.
 - h) Despite the May 14, 2015 amendment to the *Regulation* repealing the \$40 trip rate, MDW continued to pay flat rates to its company drivers for container moves until October 16, 2015. The flat rates paid after May 14, 2015 did not comply with the minimum hourly rates prescribed by Section 13 of the *Regulation*.

7. MDW claims that historically company drivers were often inattentive to their records and often

¹ Appendix A To Schedule 1 of the Container Trucking Services Licence, Paragraph 1 (g)

make incorrect entries.

8. One of the complainants alleged that MDW changed his records to pay him for fewer hours than he actually worked.
9. In addition to carefully reviewing all of the records, the auditor interviewed 5 MDW drivers. The drivers' responses to her questions were varied and inconsistent. Some drivers expressed satisfaction with their treatment and their compensation. Others felt that they had been underpaid. One claimed that his records were altered. The auditor concluded that she could not verify the allegation that MDW had purposely altered driver records to record fewer hours than those actually worked. Having reviewed the file, I accept the auditor's conclusion in that regard.
10. Although fraudulent bookkeeping is not established, the audit report establishes that MDW failed to maintain complete, accurate and proper records, and that MDW's record keeping was sloppy and inconsistent at best. MDW's record keeping practices fell well short of what was required under its Container Trucking Services Licence.

D. AUDIT RESULTS

11. Despite MDW's poor record keeping, the auditor was ultimately able to determine the amounts of compensation paid to each of MDW's company drivers and to calculate the compensation company drivers were entitled to under the *Act* and *Regulation*. The auditor's conclusions are recorded immediately below.

May 1, 2015 to June 30, 2015 (Initial Audit Period)

12. During this audit period, 10 company drivers provided container trucking services to MDW. The auditor report records that for this period company drivers were owed a further combined total of \$1,444.11 in adjustment payments. The underpayments for this period largely attributable to the following:
 - a) Between May 1, 2015 and May 13, 2015 some trips attracted a flat rate of only \$25 per hour, well below the \$40 trip rate required by the *Regulation* at the time. When the auditor investigated these trips, she discovered that MDW engaged in trip splitting. As communicated in a March 21, 2016 Bulletin, the OBCCTC considers the practice of trip splitting to be a contravention of the Act and the Regulations.
 - b) Between May 14, 2015 and June 30, 2015, the conversion of the flat rates actually paid to company drivers to the compensation amounts required under Section 13 of the *Regulation* using the legislated minimum per hour compensation rates required under the *Regulation* resulted in wages owing.

December 22nd, 2014 - May 1, 2015 and July 1, 2015 to September 16, 2016 (The Expanded Audit Period)

13. In order to complete the audit process the auditor expanded the audit to include the periods from December 14, 2014 to May 1, 2015 and July 1, 2015 to September 16, 2016. The auditor directed MDW to conduct a self-audit for these periods and to provide their results to the auditor for review. Through this process the auditor determined the following:
- a) Between December 22nd, 2014 and May 13, 2015, MDW paid trip rates for container moves of \$25, \$45, \$50 or \$55 per container. During this period, 12 drivers were owed adjustment totaling \$2,745.00 to raise the \$25 payments to the \$40 minimum trip rate. This adjustment resulted from the payment of a "trip splitting" trip rate of \$25 for some container moves.
 - b) Between July 1, 2015 and September 16, 2016 the auditor calculated that the compensation paid to company drivers did not always meet or exceed the compensation to which they were entitled to under the *Act* and *Regulation*. The auditor concluded that 11 company drivers were owed adjustment amounts which combined totaled \$3,060.25.
14. In total the auditor concluded that company drivers were owed adjustment payments totaling \$5,160.25 over the Expanded Audit Period.

E. PAYMENT OF ADJUSTMENTS

15. The auditor reports that MDW has accepted the audit results and eventually made the adjustment payments of \$6,604.36 owing to its company drivers. The auditor further reports that some of these payments were somewhat delayed. In particular, the auditor noted that she wrote to MDW on September 2, 2016 asking them to pay outstanding adjustment amounts indicated in an attached audit summary, and MDW indicated to her that it would do so. However, in late November 2016 the auditor became aware that adjustment amounts owing had not been paid. When she contacted MDW on November 28, 2016, the company stated all the cheques were mailed the day before. The auditor confirmed that all adjustment amount cheques were eventually paid.

F. IMPROVED RECORD-KEEPING

16. The auditor reports that MDW acknowledged that its record keeping practices were deficient and that it advised the auditor that it had improved its payroll and record keeping practices in the following ways:
- a) Drivers now call the office at the beginning of every shift and the start times are noted on a spreadsheet maintained by each driver.
 - b) Drivers now call the office at the end of each job and either receives dispatch instructions for their next job, or are advised that their work day has ended. The shift end time is then recorded on the driver's spreadsheet.
 - c) Drivers now hand in their driver sheets (daily trip sheets and truck logs) on a weekly basis

and start and finish times are compared to the times recorded on the driver spreadsheets. Discrepancies are promptly discussed and issues regarding start and finish times are resolved.

- d) Compensation is now calculated based on the number of hours actually worked applying the minimum hourly rates required under the *Regulation*.
- e) All discretionary payments (bonuses) are now recorded separately on driver pay statements as “bonus” payments.
- f) Unpaid meal breaks are now only deducted if drivers have in fact taken an unpaid break free from work to eat their meal.

17. The changes which MDW claims to have introduced have not yet been audited.

18. I accept the auditor’s findings.

G. DECISION AND ORDERS

19. As recorded above the audit discloses, and I find, that MDW engaged in the following violations of the *Act*, the *Regulation* and MDW’s Licence:

- a) For the period covered by the audit, MDW’s record keeping practices were clearly deficient. Its records have been found to be incomplete, inconsistent and often inaccurate. The audit report clearly demonstrates that MDW failed to fulfil its record keeping obligations and commitments as required by its Licence. More specifically I find that MDW has violated Paragraph 3 of Appendix D to Schedule 1 (formerly Paragraph 3 of Appendix D to Schedule 1 of Licence “B”) of its Licence and Paragraph (g) of Schedule 2 to its Licence.
- b) Between December 22nd, 2014 and May 14, 2015 MDW engaged in the practice of trip splitting, which is not consistent with the requirements of the legislation.
- c) MDW engaged 3 employees on a “subcontract” basis and contrary to Section 24(1) failed to pay these individuals on a semi-monthly basis no later than 8 days after the end of a pay period.
- d) As detailed above, MDW failed to pay its company drivers for all hours worked during the periods audited and failed to pay its company drivers the minimum rates required under the *Act* and *Regulation*. Over the audit period (December 22, 2014 – September 16, 2016) it underpaid its drivers by a total of \$6,604.36. Adjustment payments were not made until late in 2016.
- e) Contrary to Section 13 of the *Regulation* MDW continued to calculate compensation for its drivers using a flat rate following the repeal of the \$40 trip rate on May 13, 2015.

20. In light these findings I hereby make the following orders pursuant to Section 9 of the *Act*:

I hereby order MDW to:

- a) immediately correct its deficient record keeping practices and bring itself into compliance with paragraph 3, of Appendix D to Schedule 1, and paragraph (g) of Schedule 2 of its Licence including:
 - i. introducing, keeping and maintaining payroll records which properly report and track hours worked, rates of remuneration for drivers, trips completed each day by drivers on your behalf, total compensation before taxes and any other deductions are paid, and any deduction made from the drivers compensation and the reason for the deduction;
- b) comply with the minimum rate requirements set out in the *Act* and *Regulation* and in particular, without limiting the generality of the foregoing, to pay its company drivers the minimum rates established by Section 13 of the *Regulation*;
- c) comply with Section 24 (1) of the *Regulation* which requires company drivers be paid semi-monthly and no later than 8 days after the end of a pay period.
- d) meet with an auditor by no later than March 6, 2017 and demonstrate to the auditor's satisfaction that it has taken all necessary steps to bring itself into compliance with the *Act* and *Regulation*.

H. PENALTY

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. This audit establishes the following:
 - a) MDW's record keeping was seriously deficient. The audit record discloses a pattern of inconsistent, inaccurate, and incomplete record keeping. As stated in HAP Enterprises Ltd. (CTC Decision No. 17/2016):

“The requirement to keep complete, accurate and up-to-date records is a

fundamentally important obligation flowing from the legislation and the Container Trucking Services Licence (the “licence”). The maintenance of complete, accurate and up-to-date records by licensees is absolutely essential to the OBCCTC’s fulfillment of its rate compliance mandate and its ability to properly perform audits in a timely and fulsome way. Failure to keep proper records, including those required under both Paragraph 3 of Appendix D to Schedule 1, and under Schedule 2 of the licence, directly interferes with the audit process, will not be tolerated, and will be regarded as a serious violation of licensees’ obligations under the legislation and their licence.” (at paragraph 22).

MDW’s deficient record keeping practices have seriously impeded the audit process and prolonged the audit process for many months.

- b) MDW engaged in the prohibited practice of trip splitting which resulted in its drivers being underpaid for container trucking services provided.
- c) MDW payroll and record keeping practices have made it difficult for the auditor to determine the full amount of compensation entitlement owing to its company drivers.
- d) MDW failed to comply with the minimum compensation requirements under the *Act* and *Regulation*.
- e) While ultimately paying the adjustment payments found by the auditor to be owing, MDW delayed payment.

In the circumstances, I further find that MDW knew or should reasonably have known that its compensation and record keeping practices were non-compliant.

24. These circumstances lead me to the conclusion that it is appropriate to impose an administrative penalty for the non-compliant behavior evident in this case. I turn now to a consideration of the appropriate amount of the penalty.

25. In Smart Choice Transportation Ltd. (CTC Decision No. 21/2016 I outlined the purpose of administrative penalties under the *Act* and the factors that would be considered when assessing the appropriate administrative penalty to be imposed:

“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.

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.

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."

26. Applying these factors, to the extent they are relevant to the circumstances in this case, I have assessed the appropriate administrative penalty to be applied taking into account the following:

- a) The seriousness and extent of MDW's deficient record keeping practices and the adverse impact of those deficient practices on company drivers and the audit process.
- b) The need to reinforce the fundamental importance of keeping complete, accurate and up-to-date records.
- c) MDW's failure to recognize and adhere to the minimum compensation requirements established under the Container Trucking Legislation.
- d) The fact that MDW's non-compliant behaviours harmed its drivers and enriched itself.
- e) The need to deter other licensees from engaging in similar non-compliant conduct.

27. I have concluded that MDW has engaged in misconduct of a serious nature. Of particular concern is MDW's failure to fulfill the record keeping obligations which are a condition of its Licence. Taking into account all of the above referenced circumstances, and in order to discourage the unacceptable record keeping practices evident here, and to recognize that MDW's drivers were not

properly compensated in a timely way, I find a penalty of \$9,500.00 is warranted. In my view a fine of \$9,500.00 is sufficiently large to meet the objective of deterring the type of serious misconduct demonstrated here and delivers a clear warning to all licensees including MDW that this type of conduct will not be tolerated. As I have stated on many occasions, the *Act* is beneficial legislation designed to ensure that drivers are fairly compensated in a timely way. Drivers are entitled to expect that they will be properly paid the legislated minimum rates. Licensees who fail to meet this obligation, either directly through deliberate action or indirectly through deficient record keeping, can expect to be fined.

28. In the result I have concluded that this is an appropriate case to issue a penalty of \$9,500.00. The amount of penalty reflects the seriousness of the misconduct and the need to deter MDW and other licensees from engaging in similar behaviours.
29. In accordance with Section 34(2) of the *Act*, I hereby give notice as follows:
- a. I propose to impose an administrative fine against MDW in the amount of \$9,500.00;
 - b. Should it wish to do so, MDW 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 MDW 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.
30. Additionally I confirm that I have made the following orders:

I hereby order MDW to:

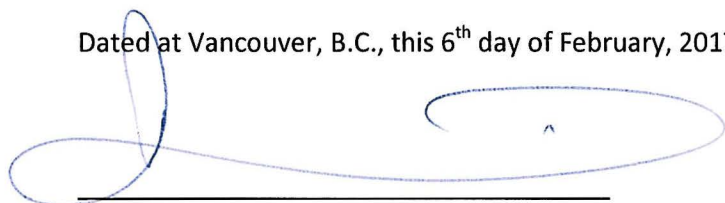
- a) correct its deficient record keeping practices and bring itself into compliance with paragraph 3, of Appendix D to Schedule 1, and paragraph (g) of Schedule 2 of its Licence including:
 - i. introducing, keeping and maintaining payroll records which properly report and track hours worked, rates of remuneration for drivers, trips completed each day by drivers on your behalf, total compensation before taxes and any other deductions are paid, and any deduction made from the drivers compensation and the reason for the deduction;
- b) to comply with the minimum rate requirements set out in the *Act* and *Regulation* and in particular, without limiting the generality of the foregoing, to pay its company drivers the minimum rates established by Section 13 of the *Regulation*;
- c) to comply with Section 24 (1) of the *Regulation* which requires company drivers be paid semi-monthly and no later than 8 days after the end of a pay period.
- d) meet with an auditor by no later than March 6, 2017 and demonstrate to the auditor's satisfaction that it has taken all necessary steps to bring itself into compliance with the *Act* and *Regulation*.

I. CONCLUSION

31. With the publication of this decision, I have once again taken the opportunity to reinforce the obligation to keep proper records and to comply with the rate requirements set out in the Container Trucking Legislation. Licensees who fail to pay the legislated minimum rates of pay due to deficient record keeping can expect to receive large administrative penalties.

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

Dated at Vancouver, B.C., this 6th day of February, 2017.



Duncan MacPhail, Commissioner