



February 28, 2017

Butterworth's Industries Inc.
103 – 19289 Langley Bypass
Surrey, BC V3S 6K1

Via Email: Curtis@butterworthstransport.com
Original to follow via mail

Attention: Jay Butterworth

Commissioner's Decision Butterworth's Industries Inc. (CTC Decision No. 04/2017)

Introduction

1. Butterworth's Industries Inc. ("Butterworth's") 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 ("CTS") are established by regulation, and a licensee must comply with those statutorily established rates.
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 Container Trucking Services Licence.
3. In the spring of 2016 the Office of the Commissioner received a complaint alleging that Butterworth's had failed to pay regulated rates to truckers for CTS work. The Commissioner directed an auditor to conduct an investigation into the allegations raised in the complaint.

Facts

Audit Findings

4. The auditor has completed the investigation and submitted her final report which reveals the following.
5. The auditor began the investigation by directing Butterworth's to produce relevant records for the periods May 1-31, 2014, October 1-31, 2015 and March 1-31, 2016 (the "Original Audit Periods"). The records were delivered to the auditor in a timely fashion.
6. Butterworth's only employs directly employed operators ("drivers") to perform container trucking services ("CTS"). It does not engage independent operators.
7. At the outset of the audit, Butterworth's informed the auditor that its drivers were engaged in both CTS and non-CTS work. However, Butterworth's records did not differentiate between CTS and non-CTS hours worked by its drivers.

8. Faced with Butterworth's inability to differentiate between CTS and non-CTS work, the auditor selected one month in each of 2014, 2015 and 2016, and directed Butterworth's to generate a detailed revenue report listing invoices for all trucking services performed. Butterworth's was then required to identify those invoices which were related to CTS work and those which were not. From this information the auditor calculated the percentage of Butterworth's trucking services revenue attributable to CTS work in each year. The auditor then applied this percentage to the total number of hours worked by each driver to estimate the number of hours each driver spent performing CTS work.
9. In light of Butterworth's deficient record keeping, I accept that this method of identifying CTS hours worked was necessary and reasonable in the circumstances. Butterworth's did not take issue with this approach.
10. It is worth noting at this point that Appendix D to Schedule 1 of the Container Trucking Services Licence requires:

"2. On the request of the Commissioner, a Licensee must provide the Commissioner with current information on a timely basis, related to the Licensee, Truckers conducting Container Trucking Services on behalf of the Licensee, and Approved Vehicles.

3. The Licensees must retain a record for each Trucker who performs Container Trucking Services for the Licensee of the following information:

.....

(f) hours worked and trips completed on each day by the Trucker performing Container Trucking Services on behalf of the Licensee;"

(emphasis added)

Butterworth's failure to keep proper records interfered with the auditor's ability to conduct the audit and required the auditor to adopt the above described methodology to identify the hours spent by its drivers performing CTS work. As will be seen, this failure to keep proper records and consequent interference with the audit process is not acceptable and has consequences.

11. In May of 2014 Butterworth's employed 4 drivers. By October of 2015 the number of drivers employed by Butterworth's had increased to 5. As well, and as noted above, these drivers spend portion of their time performing non-CTS work.
12. Relying on information from job application documents, the auditor identified which drivers had performed over 2340 hours of container trucking services on behalf of any licensee, and which drivers had not. Under section 13 of the *Regulation* drivers with more than 2340 hours of container trucking services on behalf of any licensee are entitled to a minimum hourly rate of \$26.28 per hour inclusive of benefits for CTS work. The minimum rate for drivers with less than 2340 hours is \$25.13 inclusive of benefits.
13. Butterworth's provides medical insurance benefits to some of its drivers. The hourly value of these benefits was calculated and taken into account in the auditor's calculations.

14. Applying the calculated number of CTS hours performed by each driver and using the payroll and benefit information provided by Butterworth's, the auditor determined that the hourly rates being paid by Butterworth's during the Original Audit Period fell below those required by the *Regulation*. The auditor calculated that the total adjustments owing to Butterworth's drivers during the Original Audit Periods to be \$4,322.72:

2014 - May	1,380.42
2015 - October	927.75
2016 - March	2,014.55
	\$ 4,322.72

15. Butterworth's advised the auditor that on June 26, 2016 it changed its payroll practices and that going forward from this date it was paying its drivers the statutorily required hourly rates for all CTS work. A spot audit conducted by the auditor for the pay period June 26 – July 9, 2016 confirmed that this change had in fact taken place. The spot audit further confirmed that going forward from this date, Butterworth's maintained records which properly identified the number of CTS hours worked each day by its drivers.
16. Having identified that Butterworth's was paying non-compliant hourly rates during the Original Audit Periods, the auditor expanded the scope of the audit and provided Butterworth's with a template to calculate the total adjustment payments owing to its drivers over an expanded period running from April 3rd, 2014 to June 25th, 2016. Using the auditor's template Butterworth's calculated that it owed its drivers a total of \$29,596.37.
17. The auditor reviewed and audited Butterworth's calculations to ensure that they accurately captured and recorded adjustment amounts owing to its drivers during the expanded audit period. Additionally, and as previously noted, the auditor confirmed that on June 26th, 2016 Butterworth's altered its payment practices to ensure that henceforth its drivers were paid in accordance with the *Act* and *Regulation*.
18. The auditor was satisfied that Butterworth's properly calculated the adjustment amounts owing to its drivers over the expanded audit period and that it is now paying its drivers in accordance with its obligations under the Container Trucking legislation.
19. Although Butterworth's did not dispute the adjustment amounts calculated to be owing, it did not initially pay the amounts.
20. On November 23rd 2016 the OBCCTC issued an order that Butterworth's pay the adjustment amounts calculated by the auditor to be owing (\$29,596.37). The order gave Butterworth's until December 2, 2016 to make the payments. The auditor confirms that Butterworth's complied with the terms of this order and paid the adjustment amounts owing.
21. In December of 2016, after Butterworth's complied with the terms of the OBCCTC's November 23,

2016 order, the auditor was contacted by two additional former Butterworth's drivers who alleged that they were also owed money by Butterworth's.

22. The auditor investigated the new claims and determined that while the new complainants had in fact worked for Butterworth's during the expanded audit period, the best evidence available supported Butterworth's position that these drivers had never performed container trucking services. At the same time, the new complainants were unable to provide any evidence to support their claims. In the result the auditor rejected these new claims.
23. I accept the auditor's findings and the methodology used to arrive at those findings.

Decision

24. As described above, the circumstances of this case are that Butterworth's:

- has undergone an audit following receipt of a complaint filed with the OBCCTC in the spring of 2016 alleging that it was not paying its company drivers the hourly rates required by Section 13 of the *Regulation*;
- failed to pay the minimum hourly rates required by Section 13 of the *Regulation* during the period between April 3rd, 2014 and June 25th, 2016.
- failed to bring itself into compliance by the January 22, 2016 deadline established by the former commissioner;
- did not pay the adjustment amounts calculated by the auditor to be owing until ordered to do so by the OBCCTC ;
- failed to keep the records required by its Container Trucking Services Licence, which interfered with the audit process;
- has changed its record keeping practices and is now properly recording the number of CTS hours worked by its drivers; and
- is now paying its drivers the minimum hourly rates required obligations by the *Act* and *Regulation*.

25. As Butterworth's has now paid the amounts owing under the *Act* and *Regulation* and has corrected its non-compliant payment and record keeping practices, I find there is no need for me to issue an order pursuant to Section 9 of the *Act* requiring Butterworth's to comply with the *Act*.

26. 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.

27. 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.

28. For the reasons which follow I find that it is appropriate to impose an administrative penalty.
29. Firstly, Butterworth's failed to bring itself into compliance by the January 22, 2016 deadline established by the former Acting Commissioner.
30. On November 16, 2015 the then Acting Commissioner communicated the following to the CTS 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.

31. On December 11, 2015 the Acting Commissioner followed up with a further communication wherein she informed the CTS 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 CTS 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.

32. 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 CTS 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.

33. I find that Butterworth's knew or should reasonably have known that its payment practices were non-compliant.
34. Secondly, Butterworth's violated the conditions of its licence by failing to keep proper records. More particularly, Butterworth's failed to keep a record of the number of CTS hours worked each day by its drivers. This failure interfered with the auditor's ability to conduct the audit and required the auditor to use a percentage of revenue approach to estimate the number of the hours spent by Butterworth's drivers performing CTS work.
35. In HAP Enterprises Ltd. (CTC Decision No. 17/2016) I emphasized the importance of proper record keeping:

"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." (para. 22)

36. Thirdly, while Butterworth's did not dispute the amount found to be owing it did not pay the adjustment amounts calculated by the auditor to be owing until after ordered to do so by the Deputy Commissioner.
37. I turn now to a consideration of the size of the penalty.
38. In Smart Choice Transportation Ltd. (CTC Decision No. 21/2016) I described the purpose of administrative penalties under the Act and set out a nonexhaustive list of factors which may be considered in assessing the appropriate size of any administrative penalty:
- 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.

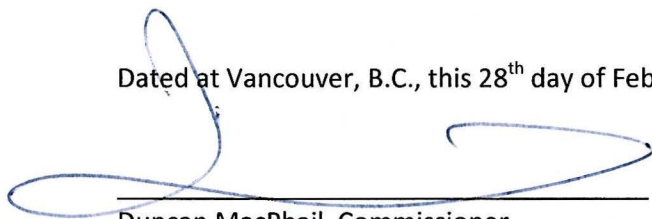
39. I have assessed the appropriate administrative penalty to be applied here taking into account the following relevant Smart Choice Transportation factors:
- a. Butterworth's failed to pay its drivers compliant rates for a period of over 2 years (April 3, 2014 – June 25, 2016), and made no effort to correct its behaviour despite clear directions from the former Acting Commission in late 2015 and early 2016.
 - b. Butterworth's non-compliant conduct harmed its drivers and enriched itself by delaying payment of in excess of \$29,000.00 properly due and owing to its drivers. Had a driver not filed a complaint, this non-compliant behavior may have gone undiscovered and unremedied.
 - c. Although it did not dispute the audit results, Butterworth's failed to pay the adjustment amounts calculated by the auditor to be owing until ordered to do so by the OBCCTC.
 - d. Contrary to the conditions of its license, Butterworth's failed to keep proper records which, for the reasons expressed above, is a serious violation of its obligations as a licensee.
 - e. Factors which mitigate Butterworth's conduct are as follows:
 - i. From June 26, 2016 forward it has been paying its drivers hourly rates which meet the requirements of the *Act and Regulation*;
 - ii. It has corrected its non-compliant record keeping practice.
40. Taking into account the above referenced factors, I find that, in order to ensure that drivers are properly paid in a timely way and to deter Butterworth's specifically and the industry generally from engaging in these types kind of behaviors, a penalty of \$9,000.00 is warranted. In my view a fine of \$9,000.00 is sufficiently large to meet the objective of deterring the types of non-compliant behaviors demonstrated here and delivers a clear warning to all licensees, including Butterworth's, that this type of conduct will not be tolerated. As stated on many occasions in the past, drivers are entitled to be properly paid the legislated rates in a timely way. Licensees who fail to meet this obligation can expect to be fined.
41. 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 Butterworth's in the amount of \$9,000.00 ;
 - b. Should it wish to do so, Butterworth's 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 Butterworth's provides a written response in accordance with the above I will consider its response, and I will provide notice to Butterworth's 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

42. In summary, Butterworth's violated the *Act*, the *Regulation* and its Container Trucking Services License by paying its company drivers non-complaint rates over a lengthy period of time. Additionally, Butterworth's violated the conditions of its licence by failing to keep proper records. Once again, licensees are reminded that a failure to keep proper records is a serious violation of their licence. Licensees who fail to heed this warning can expect to be penalized. For all of the reasons articulated above, I have proposed that an administrative penalty in the amount of \$9,000.00 be imposed.

43. This decision will be delivered to Butterworth's and published on the Commissioner's website (www.obcctc.ca).

Dated at Vancouver, B.C., this 28th day of February, 2017

A handwritten signature in blue ink, consisting of a large loop on the left and a smaller loop on the right, positioned above a horizontal line.

Duncan MacPhail, Commissioner