



January 10, 2018

Indian River Transport Ltd.
207-20353 64th Avenue
Langley, BC V2Y 1N5

Commissioner's Decision Indian River Transport Ltd. (CTC Decision No. 02/2018)

Introduction

1. Indian River Transport Ltd. ("Indian River") is a licence holder 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.
3. In June of 2017, the Commissioner directed an auditor to audit Indian River's records to determine if its Independent Operators ("I/O's") were being paid the minimum rates required under the Container Trucking Regulation (the "*Regulation*"). The auditor was directed to audit the periods November 1-30, 2014 and March 1-31, 2017 (together the "Initial Audit Period").

Initial Audit Period

4. The auditor requested, obtained and reviewed relevant records and determined that during the Initial Audit Period, Indian River paid its I/O's on-dock trip rates consistent with the *Act* and *Regulation*. The audit further revealed that in December 2015, Indian River completed a self-audit of the period April 3, 2014 - January 9, 2015 (the "voluntary self-audit") and, based on its review of the *Act* and *Regulation*, made voluntary adjustment payments totaling \$120,996.11 to 80 I/O's.
5. The auditor examined the payroll records submitted by the company for November 2014 as well as copies of cheques dated December 28, 2015 resulting from Indian River's voluntary self-audit. Indian River's voluntary self-audit resulted in the identification and adjustment of off-dock trip rate payments in 2014; however, the auditor found in assessing both sets of records that Indian River had erred in its voluntary self-audit and not paid its I/O's correct off-dock trip rates in November of 2014.

6. The auditor identified two issues which resulted in Indian River's non-compliance:
 1. As part of its voluntary self-audit, Indian River considered the \$50 short trip rate introduced in the December 2014 *Regulation*. Based on this rate, Indian River, which had been paying off-dock rates in 2014 based on its own matrix, retroactively reduced its 2014 short trip, off-dock rate remuneration; and
 2. Indian River also compared the regulated off-dock rate matrix with its own off-dock rate payments in 2014 and offset excess payments against underpayments (including reducing payments for short trips).
7. The Regulation sets minimum rates which must be paid. Overpayments cannot be used as a set-off against remuneration owed by a Licensee to its drivers. Therefore, the auditor concluded that during the Initial Audit Period, Indian River owed its I/O's adjustment payments totaling \$1,383.29.

Expanded Audit Period

8. Having established that Indian River had paid incorrect trip rates during the Initial Audit Period, the auditor expanded the scope of the audit to cover the periods from April 3, 2014 to October 31, 2014 and December 1, 2014 to January 9, 2015 (the date Indian River began paying correct on and off-dock rates). This is referred to as the "Expanded Audit Period."
9. Under the direction of the auditor, Indian River reviewed its records and concluded that 88 I/O's were owed \$160,296.23 (inclusive of the \$1,383.29 found owing by the auditor for November 2014 and in addition to the \$120,996.11 paid out in December 2015). The auditor confirmed Indian River's calculations and reports that Indian River has now paid out all the required adjustment amounts calculated to be owing (\$281,292.34) and provided copies of records confirming that the adjustment payments were in fact made as represented.
10. The audit report concludes by noting that Indian River has now brought itself into compliance with the *Act* for the period April 3, 2014 to December 31, 2017 and that, in the auditor's opinion, Indian River's non-compliance was a result of "Indian River's legitimate misunderstanding of the application of the *Regulation*." The auditor reports that Indian River was cooperative and helpful throughout the audit process.

Decision

11. I accept the findings of the auditor.
12. As described above, the circumstances of this case are that:
 - a. The Commissioner ordered an audit of Indian River's I/O's;
 - b. The audit process disclosed that Indian River paid its I/O's on-dock trip rates consistent with the *Act* and *Regulation*;
 - c. Between April 3, 2014 and January 9, 2015, Indian River failed to pay its I/O's the correct off-

- dock trip rates required under the *Act* and *Regulation*;
- d. Adjustments totaling \$160,296.23 were owed to 88 I/O's;
 - e. Indian River has accepted the audit results and has paid the amounts determined to be owing;
 - f. Indian River was co-operative and helpful during the audit process; and
 - g. Indian River is now substantially compliant with the legislation.
13. As Indian River has paid the amounts owing to its I/O's there is no need to issue an order pursuant to Section 9 of the *Act* requiring the company to pay its I/O's in compliance with the legislation.
14. 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.
15. 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.
16. The *Act* does not, however, require penalties to be imposed for non-compliance in all cases. Rather, the Commissioner is granted discretion to impose penalties in appropriate cases. In this case it has been determined that Indian River undertook a voluntary self-audit in December 2015 (well before the January 22nd 2016 deadline imposed by the former Acting Commissioner¹), covering the period between April 3, 2014 and January 9, 2015. Upon completion of its voluntary self-audit, Indian River made immediate adjustment payments to its drivers. Additionally, the audit confirmed that Indian River has paid compliant rates to its I/O's since January 9, 2015, kept proper records and was helpful and responsive during the audit process.
17. I do not consider Indian River's failure to correctly interpret the *Regulation* as a factor to be considered in assessing the requirement to impose a penalty in this case. It was not until May 26, 2016 that the then Commissioner issued a Bulletin advising the industry that the \$50 short trip rate was not retroactive and was only in effect between December 22, 2014 and May 13, 2015. Further, the position of the Commissioner regarding set-off calculations was not publically stated until May 4, 2017 in Sunlover Holdings Co. Ltd. (CTC Decision No. 10/2017). While Indian River could have reviewed its voluntary self-audit at these times and adjusted accordingly, I do not consider it a reasonable expectation that Indian River should have done so 17 months after its voluntary self-audit.

¹ For an explanation of the January 22nd 2016 deadline imposed by the former Acting Commissioner see Seaville Transportation Logistics Ltd. (CTC Decision No. 12/2016 at paragraphs 25-27).

18. In these circumstances, while I record the fact of Indian River's non-compliance with the *Act* by way of this decision, as well as Indian River's actions to bring itself into compliance, I decline to exercise my discretion to impose a penalty on Indian River in this case.
19. This decision will be delivered to the Companies and published on the Commissioner's website (www.obcctc.ca).

Dated at Vancouver, B.C., this 10th day of January, 2018.



Michael Crawford, Commissioner