

April 5, 2018

Lower Mainland Fast Freight Inc.  
101 – 1500 Hartley Avenue  
Coquitlam, BC V3K 7A1

## **Lower Mainland Fast Freight Inc. (CTC Decision No. 07/2018) – Decision Notice**

### **A. Overview**

In Lower Mainland Fast Freight Inc. (CTC Decision No. 07/2018) (the “Original Decision”), I determined that Lower Mainland Fast Freight Inc. (“LMFF”) failed to pay its independent operators (“I/Os”) the correct minimum rate required under the *Container Trucking Act* (the “Act”) and *Container Trucking Regulation* (the “Regulation”). I also determined that LMFF paid its I/Os a combination of hourly rates and trip rates, contrary to Appendix A to Schedule 1, 1(g) of the Container Trucking Services Licence.

Through the audit process it was determined that the hourly rate paid by LMFF to its I/Os was less than \$50.13 or \$51.28 and that LMFF did not pay a fuel surcharge. The audit found that adjustments totaling \$18,402.78 were owed to five I/Os for the period April 3, 2014 and May 31, 2017.

In the Original Decision I concluded that this was an appropriate case to issue a penalty for the reasons set out in paragraphs 15-20 of the Original Decision. In that regard, I proposed to impose an administrative fine against LMFF in the amount of \$10,000.00. Consistent with s. 34(2) of the Act I advised LMFF that I would consider its written response to the proposed penalty if it was received within 7 days.

LMFF has provided a written response within the required time disputing the proposed penalty and providing arguments in support of its position.

### **B. LMFF’s Response**

LMFF argues that the proposed penalty should be reduced or not imposed. Its arguments can be summarized as follows:

- a. LMFF has not refused to pay the amounts owing to its I/Os.  
LMFF asserts that it did not pay its I/Os the amounts owing because it was waiting to see if the Commissioner issued a decision notice impacting the amount found to be owing in the audit.
- b. LMFF was cooperative during the audit.  
LMFF also says that it met all the auditor’s timelines during the audit with the exception of providing the collective agreement, the provision of which was delayed due to the size of the file.

- c. LMFF was non-compliant because it was not aware of the regulated rates.  
LMFF was under the impression that the rates it quoted were for “non-port work” and in 2014, LMFF had no information regarding the correct rate.
- d. LMFF wishes to offset underpayments of hourly rates using its overpayment on trip rates.  
LMFF argues that it should be allowed to use trip rate overpayments to offset underpayments when the drivers were paid hourly, resulting in a reduction of the amount found to be owing to its I/Os.

### C. Consideration of Company’s Response

- a. LMFF has not refused to pay the amounts owing to its I/Os.

LMFF argues that it did not pay its I/Os the amounts found to be owing by the auditor because it was waiting to see if the Commissioner issued a decision notice which impacted the amount found to be owing in the audit. Specifically, LMFF is seeking a ruling on a licensee’s ability to offset underpayments with overpayments found during the course of an audit.

Because LMFF did not pay the money found to be owing at the auditor’s request, in the Original Decision, I ordered LMFF to:

- a. pay forthwith, and in any event no later than March 21, 2018, the five I/Os owed \$18,402.78 for container trucking services performed between April 3, 2014 and May 31, 2017; and
- b. provide evidence to the auditor by no later than March 22, 2018 that each driver owed money under this order has been paid.

The auditor confirms that LMFF has, as of March 22, 2018, made best efforts to comply with the order. LMFF now argues that there is a distinction to be made between refusing to pay and withholding payment in the event the amount changes. LMFF’s decision to withhold payment was justified, argues LMFF, and therefore a penalty should not be imposed for failure to pay.

On February 20, 2018, LMFF was advised of the auditor’s findings and given the names of drivers and the amounts owed. On February 21, 2018, LMFF replied to the auditor asking the process for challenging the auditor’s findings. On the same day, the auditor replied and advised LMFF that they could write a submission to the Commissioner for consideration when reviewing the audit report. LMFF then called the Office of the BC Container Trucking Commissioner (“OBCCTC”) and followed up with an email on February 22, 2018 which summarized LMFF’s concerns/issues with the auditor’s findings. No formal submission was received by the auditor or the OBCCTC and on March 13, 2018 the Original Decision was issued.

If LMFF’s February 22, 2018 email to the OBCCTC is considered as a submission, then the points raised in their email were not addressed in a fulsome manner in the Original Decision and LMFF’s understanding that these points would be considered in advance of the imposition of any penalty makes sense. LMFF’s decision to withhold money pending my decision is justified from this perspective, which persuades me to reduce the quantum of the proposed penalty.

b. LMFF was cooperative during the audit.

LMFF argues that it met all auditor timelines save for the auditor's request to provide a copy of its collective agreement. In the Original Decision I noted that "LMFF was not entirely co-operative or helpful during the audit process."<sup>1</sup> This statement was based upon the auditor's report which indicated that LMFF was "slow in replying to...communications"<sup>2</sup> initiated by the auditor when attempting to collect the required records. In particular, the auditor identified issues which arose at the outset of the audit regarding the time it took LMFF to locate the requested records and LMFF's inability to provide additional pay stubs when requested as part of the auditor's spot audit. As such, I am not persuaded to change my conclusion that LMFF was not entirely co-operative or helpful during the audit process.

c. LMFF was non-compliant because it was not aware of the regulated rates.

LMFF argues that it was not paying the correct hourly rate to its I/Os for overload work because it was "under the impression this was non-port work" and that in 2014, LMFF had no information regarding the correct rate. Further, LMFF suggests that its failure to pay the correct hourly rate was a result of its I/Os and customer's failure to inform LMFF of the correct rate.

I do not accept LMFF's argument. As stated in Olympia Transportation Ltd. (CTC Decision No. 02/2016) and Seaville Transportation Logistics Ltd. (CTC Decision No. 12/06), "the onus to become and remain compliant with the requirements of the Act rest entirely with the Licensee. Licensees should not rely on Commission auditors to determine whether or not they are compliant, nor should they wait until a Commission audit process is undertaken before taking steps to ensure compliance." Not only was the onus to be compliant on LMFF, it is not acceptable that LMFF would have been relying on customers and drivers to advise them of the requirements of the Act and their licence, particularly when a former Acting Commissioner imposed a public, industry-wide January 22, 2016 deadline for compliance which should have represented an opportunity for LMFF to review the requirements of the Act and bring itself into compliance.

I also note that the penalty proposed in the Original Decision was for LMFF's non-compliance with regulated rates and fuel surcharges and failure to comply with the Acting Commissioner's January 22, 2016 deadline, as well as for violation of its Container Trucking Services Licence. In this case, it was found the LMFF was not only paying an incorrect hourly rate to its I/Os for overload work, it was also paying an hourly rate in violation of its licence, which prohibits the payment of a method of compensation that is a hybrid of per trip and hourly.

d. LMFF wishes to offset underpayments of hourly rates using its overpayment on trip rates.

LMFF argues that it should be allowed to use trip rate overpayments to offset underpayments when the drivers were paid hourly, resulting in a reduction of the amount owing to its I/Os.

In Sunlover Holdings Co. Ltd. (CTC Decision No. 10/2017), Sunlover argued that it overpaid its drivers by paying them for 30 minute lunch breaks to which they were not entitled and that therefore the lunch break overpayment should have been set-off against the monies found by the auditor to be owing for other reasons. The Commissioner dismissed Sunlover's argument and, in doing so, discussed his position regarding set-offs:

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<sup>1</sup> Lower Mainland Fast Freight Inc. (CTC Decision No. 07/2018), p. 2.

<sup>2</sup> Lower Mainland Fast Freight Inc. (CTC Decision No. 07/2018), p. 2.

...overpayments cannot be used as a set-off against wages owed by a licensee to its drivers. Section 13 of the *Regulation* creates a minimum hourly rate which must be paid to Company Drivers for each hour worked. This hourly wage obligation cannot be reduced by alleged overpayments in other areas.<sup>3</sup>

I agree with the previous Commissioner's position in this regard and I also note that section 24 of the *Act* states that a licensee must not solicit or receive, directly or indirectly, a financial set-off...from a trucker. I consider the use of trip rate overpayments to offset underpayments a "financial set-off" in this case.

#### D. Conclusion

Having carefully considered LMFF's submission, and for the reasons outlined above and in my Original Decision, I will not refrain from imposing a penalty. I have, however, decided to propose a reduced penalty of \$5,000.00 for the reasons set out in this Decision Notice.

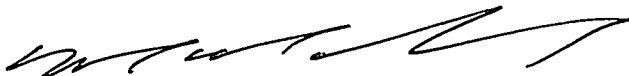
In the result, I hereby order Lower Mainland Fast Freight to pay an administrative fine in the amount of \$5,000.00. Section 35(2) of the *Act* requires that this fine be paid within 30 days of the issuance of this Notice. Payment should be made by delivering to the Office of the BC Container Trucking Commissioner a cheque in the amount of \$5,000.00 payable to the Minister of Finance.

Finally, I note that Lower Mainland Fast Freight may request a reconsideration of the Commissioner's Decision by filing a Notice of Reconsideration with the Commissioner not more than 30 days after the company's receipt of this Decision Notice. A Notice of Reconsideration must be:

- a. made in writing;
- b. identify the decision for which a reconsideration is requested;
- c. state why the decision should be changed;
- d. state the outcome requested;
- e. include the name, an address for delivery, and telephone number of the applicant and, if the applicant is represented by counsel, include the full name, address for delivery and telephone number of the applicant's counsel; and
- f. signed by the applicant or the applicant's counsel.

Despite the filing of a Notice of Reconsideration, the above order remains in effect until the reconsideration application is determined. This order will be published on the Commissioner's website.

Dated at Vancouver, B.C., this 5<sup>th</sup> day of April, 2018.



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Michael Crawford, Commissioner

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<sup>3</sup> Sunlover Holdings Co. Ltd. (CTC Decision No. 10/2017), p. 5.