



April 25, 2018

Orca Canadian Transport Ltd.  
12331 77A Avenue  
Surrey, BC V3W 2W9

## **Commissioner's Decision**

### **Orca Canadian Transport Ltd. (CTC Decision No. 13/2018)**

#### **Introduction**

1. Orca Canadian Transport Ltd. ("Orca") 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 Orca's records to determine if its independent owner operators ("I/Os") and company drivers were being paid the minimum rates required under the Container Trucking Regulation (the "Regulation"). The auditor was directed to audit the periods September 1-30, 2015 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 in September 2015, Orca's I/Os were paid by the trip and by the hour. In addition, Orca:
  - a. paid its I/Os the correct trip rates required under the Regulation but did not pay correct fuel surcharges to its I/Os when paying trip rates. Orca was found to be owing \$66.05;
  - b. did not pay its I/Os the correct hourly rates required under the Regulation. Specifically, when conducting work for Canadian Drayage Inc., Orca's I/Os were paid a flat hourly rate of \$54.06 inclusive of the fuel surcharge. The regulated hourly rate for I/Os is \$51.28 per hour. The applicable fuel surcharge for September 2015 was 8% which resulted in a \$55.38 per hour regulated rate. As a result, Orca was found to be owing \$1,703.32 to its I/Os in September 2015.

5. In March 2017, Orca paid the correct hourly and trip rates required under the *Regulation* to its I/Os but failed to pay the correct fuel surcharge on the trip rates. Orca was found to be owing \$734.95.
6. Orca did not employ a company driver in September 2015 and only employed one company driver in March 2017. That driver was paid the correct hourly rate required under the *Regulation*. In total, Orca was found to be owing \$2,504.32 during the Initial Audit Period.

#### **Expanded Audit Period**

7. Having established that Orca did not pay its I/Os the correct hourly rates and fuel surcharge during the Initial Audit Period, the auditor expanded the scope of the audit to cover the period from April 3, 2014 to September 30, 2017 (the "Expanded Audit Period").
8. Orca reviewed its records and performed calculations which were reviewed by the auditor, who concluded that Orca had incorrectly performed the calculations. As such, the auditor undertook calculations on Orca's behalf and concluded that nineteen drivers were owed \$10,230.21 collectively during the Expanded Audit Period.
9. The auditor also found that Orca's method of payment to its drivers was one whereby Orca paid advances and then at a later date paid the difference to the drivers. This payment method is a violation of the section 24 of the *Regulation* which requires that a licensee pay remuneration, wait time remuneration or fuel surcharge owed to an independent operator no later than 30 days after the end of the calendar month in which the independent operator performed the container trucking services for which the remuneration, wait time remuneration or fuel surcharge is owed.
10. Orca reviewed and confirmed the auditor's calculations and, following a spot audit of Orca's October 2017 records, the auditor confirms that Orca corrected its pay structure after September 31, 2017 and is now correctly calculating the fuel surcharge.
11. On April 28, 2018, Orca provided the auditor with copies of proof of payment forms for all nineteen drivers found to be owed money during the Expanded Audit Period. The audit report concludes by noting that Orca has brought itself into compliance with the *Act* for the period April 3, 2014 to September 30, 2017 and is in compliance with the *Act* for the period September 30, 2017 to present. The auditor reports that the audit was slowed by a two month vacation taken by the auditor's contact at Orca during the audit.

#### **Decision**

12. As described above, the circumstances of this case are that:
  - a. The Commissioner ordered an audit of Orca's I/Os and company driver;
  - b. During the Initial and Expanded Audit Periods, Orca failed to pay its I/Os the correct minimum rates and fuel surcharge required under the *Act* and *Regulation*;
  - c. Adjustments totaling \$10,230.21 were owed to nineteen drivers;
  - d. Orca paid its I/Os a combination of hourly rates and trip rates within the same pay period in contravention of Appendix A to Schedule 1 of its Container Trucking Services Licence;

- e. Orca contravened section 24 of the *Regulation* when it employed a payroll process which paid its drivers advances and then, at a later date, paid the difference owing;
  - f. Orca deterred the timely completion of the audit when the auditor's contact at Orca took a two month vacation during the audit; and
  - g. Orca has paid the amounts determined to be owing.
13. As Orca has paid the amounts owing to its drivers there is no need to issue an order pursuant to section 9 of the *Act* requiring the company to pay its drivers 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. In this case it has been determined that between April 3, 2014 and September 30, 2017, Orca failed to comply with the minimum rates and fuel surcharge payment required under the *Act* and *Regulation*. The audit findings indicate that over this period Orca owed nineteen drivers adjustments totaling \$10,230.21. The adjustment payments were required because Orca did not pay its I/Os the correct hourly rate (paid a rate inclusive of fuel surcharge) and incorrectly calculated the fuel surcharge owing to I/Os who were paid by the trip. Orca's payroll practices were found to be in violation of section 24 of the *Regulation*.
17. It has also been determined that Orca paid its I/Os a combination of hourly rates and trip rates during the same pay period. Appendix A to Schedule 1 1(g) of the Container Trucking Services Licence states that a licensee must not:
- "pay Truckers a method of Compensation that is a hybrid of per trip and hourly"
18. This prohibition was included in the Container Trucking Services Licence on the recommendation of Vince Ready and Corinn Bell, who, in their October 2015 report stated that:
- ...an important aspect of the Joint Action Plan, and one that we support, is that trucking companies be prohibited from moving drivers from an hourly model to a trip rate model, depending on the day and/or circumstances. We feel that it is important that drivers know whether they are employed with a company on a trip rate basis or an hourly rate basis and that such is clearly defined by the company at the outset of the relationship. We recommend that a prohibition respecting employing hybrid hourly/trip rate drivers remain an important feature of the sector going forward.

19. As a holder of a Container Trucking Services Licence, Orca is responsible to know its obligations under the *Act* and the Licence.
20. On December 11, 2015, the Acting Commissioner imposed a January 22, 2016 deadline for licence holders to bring themselves into compliance with the *Act* and *Regulation*. This audit demonstrates that Orca did not review the legislation at that time and attempt to correct is non-compliant behavior. Rather, Orca waited until it was audited to comply and only corrected its non-compliant payroll practices in September 2017 (16 months after the Acting Commissioner's deadline).
21. For these reasons, I have concluded that an administrative fine is appropriate here. Regarding the size of the proposed fine, I have decided that an administrative penalty of \$5,000.00 is appropriate in this case. The following factors were considered when proposing this penalty:
  1. Orca's failure to pay the correct rates and fuel surcharge between April 3, 2014 and September 30, 2017;
  2. Orca's violation of its Container Trucking Services Licence;
  3. Orca's failure to comply with the Acting Commissioner's January 22, 2016 deadline;
  4. Orca's violation of section 24 of the *Regulation*; and
  5. Orca's failure to assist in the timely completion of the audit.
22. In accordance with section 34(2) of the *Act*, I hereby give notice as follows:
  - a. I propose to impose an administrative fine against Orca Canadian Transport Ltd. in the amount of \$5,000.00;
  - b. Should it wish to do so, Orca Canadian Transport Ltd. 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 Orca Canadian Transport Ltd. provides a written response in accordance with the above I will consider its response and I will provide notice to Orca Canadian Transport Ltd. 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.
23. This decision will be delivered to Orca Canadian Transport Ltd. and published on the Commissioner's website: ([www.obcctc.ca](http://www.obcctc.ca)).

Dated at Vancouver, B.C., this 25<sup>th</sup> day of April, 2018.



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Michael Crawford, Commissioner