



May 3, 2018

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

Commissioner’s Decision

Lower Mainland Fast Freight Inc., CTC Decision No. 15/2018 (Application for Reconsideration of CTC Decision No. 07/2018)

I. Nature of Application

1. Lower Mainland Fast Freight Inc. (“LMFF”) applies under Section 39 of the *Container Trucking Act* (the “Act”) for a reconsideration of CTC Decision No. 07/2018 (the “Original Decision”).

II. Introduction

2. On April 27th, 2018 LMFF filed an application for reconsideration with the Office of the British Columbia Container Trucking Commissioner (the “OBCCTC”). LMFF’s application for reconsideration can be summarized as follows:
 - a) The OBCCTC auditor did not, over the course of the audit, advise LMFF what could be included in the calculation of the hourly rate;
 - b) LMFF argues 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 work performed by its I/Os on behalf of other clients in order to calculate the correct rate. Further, LMFF contends that the OBCCTC should not undertake calculations on the assumption that “Port work” was done if there is no record of the work performed;
 - c) LMFF’s slow response to auditor requests was a result of human resource issues at the company and was not intentional; and
 - d) LMFF argues that “offsets” should be viewed as “any charges or costs deducted from an I/O which would reduce the rate.” LMFF contends that it is not attempting to reduce the rate, rather it seeks to “recover the overpayments” made above the rate of pay. In addition, LMFF cites the OBCCTC auditor’s use of fuel surcharge over payments to offset fuel surcharge underpayments when calculating LMFF’s flat hourly rate payment to I/Os as evidence that off-sets have previously been allowed.

3. In CTC Decision No. 07/2017 (the “Original Decision”) I found:

that between April 3, 2014 and May 31, 2017, LMFF failed to comply with the minimum rates required under the *Act* and *Regulation*. The audit findings indicate that over this period LMFF owed five I/Os adjustments totaling \$18,402.78. The adjustment payments were required because, in addition to some minor payroll entry errors, LMFF paid its I/Os \$45.00 per hour and did not pay a fuel surcharge. It [was] also...determined that LMFF paid its I/Os a combination of hourly rates and trip rates during the same pay period.

And proposed that a \$10,000.00 administrative fine be imposed.

4. In assessing the appropriate administrative penalty to be issued, I considered the following facts which I considered to be relevant:
- a. LMFF's failure to pay any fuel surcharge during the audit period and the fact this non-compliance continued for over three years;
 - b. LMFF's violation of its Container Trucking Services Licence;
 - c. LMFF's failure to comply with the Acting Commissioner's January 22, 2016 deadline;
 - d. LMFF refusal to pay the amounts owing without an order requiring it to do so; and
 - e. LMFF's failure to assist in the timely completion of the audit.
5. On April 5, 2018, I issued a Decision Notice reducing the proposed penalty and ordering LMFF to pay an reduced administrative penalty of \$5,000.00.
6. LMFF invites me to reconsider my decision to impose an administrative penalty. It argues that a \$5,000 penalty is an insurmountable amount to be paid for a company of its size.

III. Decision

7. The purpose of penalties under the *Act* and the factors which will be considered were outlined in *Smart Choice Transportation Ltd.* (CTC Decision No. 21/2016):

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. (Paras. 25-27)

8. In the Original Decision, I concluded that an administrative penalty of \$10,000.00 (reduced under Decision Notice to \$5,000.00) was necessary here to achieve the above described purposes and was arrived at after carefully assessing and considering the Smart Choice factors.

Clarification of hourly rate for I/Os

9. LMFF argues that its failure to pay the correct hourly rate to its I/Os was, in part, a result of the OBCCTC auditor's failure, over the course of the audit, to advise LMFF of what could be included in the calculation of the hourly rate. LMFF contends that "there has yet to be any clarification as to what is included in the hourly of \$51.28."
10. I do not accept LMFF's argument that its failure to comply was a result of the OBCCTC auditor's failure to inform LMFF of what is included in the hourly rate of \$51.28. As noted in Lower Mainland Fast Freight Inc. (CTC Decision No. 07/2018) – Decision Notice (the "Decision Notice"), licensees should not wait until they are audited by the OBCCTC before taking steps to ensure compliance and the onus to become and remain compliant rests **entirely with the Licensee.**¹
11. The Decision Notice also specified that the penalty proposed in the Original Decision was, in part, for LMFF's "failure to comply with the Acting Commissioner's January 22, 2016 deadline."² There is no indication that LMFF made attempts during or after January 2016 to review the regulated rates and seek confirmation of the composition of the hourly rates for I/Os. Had it done so, it would have noted that section 15 of the *Container Trucking Regulation* (the "*Regulation*") specified a minimum hourly rate for independent operators "inclusive of benefits". Benefits are

¹ Lower Mainland Fast Freight Inc. (CTC Decision No. 07/2018) – Decision Notice, p. 3.

² Lower Mainland Fast Freight Inc. (CTC Decision No. 07/2018) – Decision Notice, p. 3.

defined in the *Regulation* and do not include the fuel surcharge. Nevertheless, LMFF chose to pay its I/Os a flat hourly rate which was less than the regulated rate and did not pay a fuel surcharge.

12. In addition, on January 12, 2018, LMFF wrote to the OBCCTC auditor seeking clarification regarding what was included in the \$51.28 rate. On January 14, 2018 and through a series of subsequent emails, the OBCCTC auditor answered LMFF's questions and advised LMFF exactly what could and could not be included in its calculation of the hourly rate.

Onus of Compliance

13. LMFF also notes that its failure to pay the correct hourly rate was not the result of its I/Os and customer's failure to inform LMFF of the correct rate, rather it was a result of its I/Os and customer's failure to inform LMFF of the type of work being conducted. In other words, LMFF quoted an unregulated rate to its customers because it was not aware of the nature of the work being requested by its customers or undertaken by its I/Os. This argument does not persuade me to amend my decision to impose a penalty. As noted, the onus of compliance rests entirely with the licensee, not with I/Os or customers. It is a licensee's responsibility to account for the provisions of the *Act, Regulation* and Container Trucking Services Licence when conducting its business and this includes when the licensee is quoting rates to clients.
14. Regarding the argument that the OBCCTC auditor, in the absence of confirmation of the nature of the work being undertaken, should not have made calculations based on the assumption that the work was container trucking services, I note that in Forfar Enterprises Ltd. (CTC Decision No. 20/2016), the Commissioner ruled that the onus lies with the licensee to rebut presumptions regarding the definition of a container. I find, in this case, that the onus also lies with the licensee to rebut the presumption that container trucking services were not undertaken, particularly given LMFF's failure to keep records which identified the nature of the work performed.

Responsiveness of Licensee

15. LMFF says that its slow response to auditor requests was a result of human resource issues at the company and was not intentional. I do not dispute LMFF's intentions. However, it is the position of the OBCCTC that licensees are expected to give auditors their full and complete cooperation including meeting all deadlines, responding to all inquiries in a timely fashion, and providing all requested information. Licensees who fail to meet deadlines without reasonable excuse, or who fail to properly respond to audit inquiries in a timely way, can expect to be penalized. Human resources issues should be planned and accounted for when conducting business and will rarely be considered a reasonable excuse by the OBCCTC.

Setting off rate underpayments with rate overpayments

16. LMFF argues that "offsets" should be viewed as "any charges or costs deducted from an I/O which would reduce the rate." LMFF contends that it is not attempting to reduce the rate, rather it seeks to "recover the overpayments" made above the rate of pay.

17. The Decision Notice addresses LMFF's position. In referencing Sunlover Holdings Co. Ltd. (CTC Decision No. 10/2017), the issue of set-offs, whereby a company attempts to set-off underpayments with overpayments, was discussed and, as in previous decisions, I found that rate overpayments cannot be used to offset underpayments. The concept of offsets or setoffs is distinct and separate from the concept of charges or costs that can or cannot be deducted from the regulated rate.
18. LMFF also cites the OBCCTC auditor's use of fuel surcharge over-payments to offset fuel surcharge under-payments when calculating LMFF's flat hourly rate payment to I/Os as evidence that offsets have previously been allowed. On this basis, LMFF argues that it should have been permitted to set off its trip rate overpayments made to I/Os against its non-compliant hourly and fuel surcharge payments (despite the prohibition against paying a hybrid of trip and hourly rates).
19. The auditor did employ an offset calculation in the instance described above, but I note that the amount of the offset was minimal (\$331.50) and done in aid of a calculation being performed to ascertain the extent of LMFF's non-compliant behaviour. That the auditor employed a offset calculation in this instance does not negate the fact that LMFF was advised by the auditor that its trip rate overpayments could not be used to offset underpayments as per the Commissioner's direction.
20. In any event, the penalty is proposed is for the reasons articulated in the Original Decision, Decision Notice and in paragraphs 9-15 above and in no instance has a penalty been proposed on the basis of the offset issue raised by LMFF.
21. For these reasons, I confirm my decision to impose a \$5,000.00 administrative penalty and hereby dismiss Lower Mainland Fast Freight's application for reconsideration.

Dated at Vancouver, B.C., this 3rd day of May, 2018.



Michael Crawford, Commissioner