



July 16, 2019

A-Can Transport Ltd.
13160 English Place
Surrey, B.C. V3W 2X5

Commissioner's Decision

A-Can Transport Ltd. and MDW Express Transport Ltd. (CTC Decision No. 07/2019)

Introduction

1. A-Can Transport Ltd. ("A-Can") and MDW Express Transport Ltd. ("MDW") (together, "the Companies") are each separate licence holders 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. The Office of the BC Container Trucking Commissioner ("OBCCTC") received a complaint alleging that A-Can and MDW are the same company and that the Complainant had not been paid for all hours of container trucking services performed.
4. In December 2018, the Commissioner directed an auditor to audit A-Can and MDW's records to determine if each Companies' company drivers were being paid the minimum rates required under the *Container Trucking Regulation* (the "Regulation"). The auditor was directed to audit the months of July, October and November 2018 (together, the "Initial Audit Period") to determine compliance.

A-Can - Initial Audit Period

5. The auditor requested and obtained relevant records from A-Can and determined that during the Initial Audit Period, A-Can paid its company drivers rates consistent with the *Act* and *Regulation*.
6. The Complainant's records were not among the records supplied to the auditor by A-Can and therefore the auditor reviewed Gate Reports supplied by the Vancouver Fraser Port Authority ("VFPA") in order to ensure that A-Can had supplied all the requested driver records.
7. The auditor reviewed the Gate Reports and found that eight of the 16 truck tags assigned to A-Can under its Container Trucking Services Licence ("Licence") are driven by MDW employees (including the Complainant). A-Can confirmed to the auditor that these A-Can trucks and their associated A-Can truck tags are "subcontracted" to MDW.
8. The auditor also noted discrepancies between A-Can's records and the times logged on the Gate Reports. On several occasions the auditor found that A-Can trucks accessed VFPA container terminals before or after A-Can's records (driver truck logs and/or daily trip sheets) indicate the time the driver began or ended a shift. For example, in October 2018 the auditor found ten such instances representing over ten hours of work that was not accounted for in A-Can's records.
9. A-Can was asked to explain these discrepancies and, in a submission to the auditor on March 2, 2019, advised that the "discrepancy of hours paid to each driver is due to the [the driver's] submission of paperwork/workday log[s]."
10. A comparison of A-Can's driver records and the Gate Reports also revealed that drivers of three A-Can tagged trucks recorded in the VFPA Gate Reports could not be identified or correlated with A-Can's records. A-Can was asked to explain why these driver records had not been supplied to the OBCCTC. A-Can, in its March 2, 2019 submission, addressed only one of the three trucks noted by the auditor, stating that the regular driver of the truck was on vacation and therefore "random drivers" drove the truck in October 2018. A-Can has not explained why two other trucks were being driven by drivers whose records were not supplied to the OBCCTC.
11. The auditor concludes the report by noting that while A-Can was found to have paid compliant rates to the drivers whose records were reviewed by the auditor, the auditor is not satisfied that all company drivers at A-Can have been paid for all hours of container trucking services performed and, as such, A-Can is not in compliance with section 23 and 25 of the *Act* and section 14 of the *Regulation*.
12. A-Can was provided with a copy of the auditor's report on May 29, 2019. A-Can's response is quoted below in full:
 1. MDW is a sub contracting company working with A-Can Transport Ltd. MDW Company often uses their drivers to drive trucks that are under A-Can Transport Ltd. For better payroll and record keeping matters, we decided to have MDW take care of payment for said drivers bi-weekly for hours driven by each driver. Rest is paid out to A-Can Transport Ltd. by MDW Company. We had two previous audits. Both times, we submitted same kind paperwork/payroll.
 2. There have been no transfers of tags between the two said companies. Only the drivers drive

either company truck to better manage the schedule.

3. As you agree and acknowledge that there is no discrepancy of A-Can Transport Ltd. drivers' payroll. A-Can has paid out as per the driver's log book.
4. Going forward, A-Can Transport Ltd. want to assure you that we are in compliance with payroll, but if you feel there has been an error, we are willing to improve as per your suggestion.

MDW - Initial Audit Period

13. The auditor requested and obtained relevant records from MDW and determined that during the Initial Audit Period, MDW paid its company drivers rates consistent with the *Act* and *Regulation*.
14. However, the auditor reports that MDW made a one-time deduction of \$200.00 from one driver during the Initial Audit Period for failure to deliver a container to the correct location.
15. Additionally, the Complainant was found to be an employee of MDW and a review of his records indicated that the Complainant had been hired by MDW as a trainee and as per MDW policy had spent the first two weeks at MDW in training without pay. In addition, the auditor reports that the Complainant's final pay cheque at MDW was withheld pending confirmation that no fines have been levied by the VFPA against MDW as result of incidents which may have occurred while the Complainant was driving for MDW. The Complainant was found to be owed \$1,411.46 as a result of this withholding of final pay and unpaid training.
16. Minor payroll errors were also recorded by the auditor, who attributes what she characterizes as "minor discrepancies" to unintentional errors rather than to deliberate attempts by MDW to underpay its drivers. Eight drivers were found to be owed \$1,397.39 collectively.
17. MDW was advised of the audit's findings and the auditor confirms that MDW issued cheques to each driver (including the Complainant) in the total amount of \$3,008.85 on March 4, 2019. The Copies of cancelled cheques were sent to the auditor to confirm payment. The audit report concludes by noting that MDW's records had some flaws, but that significant improvement had been made in MDW's record keeping since the last audit.
18. MDW was provided with a copy of the auditor's report on May 29, 2019. MDW responded on June 11, 2019 stating that it not only had paid the money found to be owing but had installed GPS in its trucks and started dispatching drivers by text in an effort to ensure that its pay calculations are 100% accurate and that future driver log errors would not occur.
19. MDW states that it was not aware of the requirement to pay for training time and questioned why it was not allowed to deduct money from a driver's pay cheque for errors. MDW acknowledged that it held back a portion of the Complainant's final pay for 30 days to "protect itself against potential traffic light fines" and acknowledged that it is using A-Can trucks and their associated truck tags.

Decision

20. As described above, the circumstances of this audit are that:

- a. The Commissioner ordered an audit of A-Can and MDW's company drivers;
- b. The records provided by A-Can demonstrate that it pays rates consistent with the *Act and Regulation*;
- c. Eight trucks owned and tagged under A-Can's Licence are used by MDW and the drivers of these trucks are MDW employees, paid by MDW;
- d. A-Can's trip logs and time sheets record hours which are not consistent with Gate Reports potentially resulting in underpayment to A-Can drivers;
- e. Records supplied by A-Can for the purpose of the audit do not account for all drivers performing container trucking services using A-Can trucks; and
- f. MDW was found to be non-compliant during the Initial Audit Period when it deducted money from a driver's pay, failed to pay a driver for training and withheld a driver's paycheque for a period of time after the driver quit.

A-Can

21. I have considered A-Can's submissions provided on March 2, 2019 and June 10, 2019 and for the reasons set out below I am not persuaded that A-Can is in compliance with the *Act, Regulation* and its Licence.
22. A-Can states that MDW is a sub-contracting company working with A-Can and that MDW puts its own drivers on A-Can trucks. A-Can submits that the "rest is paid out to A-Can by MDW" but does not explain what "the rest" represents. A-Can and MDW clearly have an agreement whereby A-Can has given (or loaned, etc.) eight trucks and their associated truck tags to MDW. The drivers of these trucks are on MDW's payroll, but any other money generated by the activity of these trucks is dispersed to A-Can by MDW. A-Can characterizes this arrangement as sub-contracting.
23. I am not of the opinion that such an arrangement represents sub-contracting. In a traditional sub-contracting arrangement, business that MDW has secured but cannot service with its existing fleet and truck tag allotment would be serviced under agreement by A-Can's fleet (or a portion thereof) and A-Can's existing truck tag allotment. A-Can would in turn invoice MDW for the services provided and pay the A-Can drivers for their work. Here, the trucks (and associated truck tags) in question are driven by MDW employees for the purpose of meeting MDW's business needs and the drivers are paid by MDW.
24. Section 6.17 of the Licence states that a licensee may neither assign nor transfer the licence or the associated truck tags without the express consent of the Commissioner and, in this case, I find that A-Can and MDW's arrangement represents an unapproved transfer of truck tags because MDW controls the trucks and the associated truck tags as well as the drivers of the trucks and their pay.
25. A-Can argues that the discrepancy between its driver truck logs and/or daily trip sheets, payroll records and Gate Reports is a result of driver error and that A-Can pays its drivers based upon the driver log books. I do not accept A-Can's argument. It is unreasonable to assume that drivers would

regularly underrepresent the number of hours worked in their log books to their detriment.

26. In any event, the onus is on the licensee to ensure that drivers are correctly paid. This includes ensuring that the actual hours of container trucking services performed reflect the number of hours paid at the regulated rate. In Olympia Transportation (CTC Decision No. 02/2016), the Commissioner noted that licensees are required to “keep and maintain payroll records which properly report, and track hours worked...”. Licensees should not rely on their drivers to track their hours. A-Can is in breach of its s. 25 record keeping requirements.
27. It is also the responsibility of the licensee to provide the records requested by the OBCCTC. This includes providing records for all drivers who have performed container trucking services. In this case, A-Can has not explained why it did not supply the auditor with records of drivers who were clearly performing container trucking services in three A-Can trucks. The only explanation provided related to one truck which A-Can concedes was driven at the terminals while a regular driver was on vacation. This explanation is satisfactory, but it does not explain why the records for the other drivers were not provided.
28. For these reasons, I have concluded that an administrative fine against A-Can is appropriate. 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.
29. In this case, it has been determined that in the Initial Audit Period, A-Can violated sections 23 and 25 of the *Act* and section 6.17 of its Licence. Regarding the size of the proposed fine, I have decided that an administrative penalty of \$20,000.00 is appropriate in this case. A-Can paid the regulated rate to its drivers but it was not able to supply complete records that demonstrate the total number of hours its drivers performed container trucking services. Not paying drivers for all hours they perform container trucking services is rate undercutting which is a clear violation of the *Act* and antithetical to its purpose.
30. Regarding, A-Can’s unapproved truck tag transfer, in Roadstar Transport Company Ltd. (CTC Decision No. 01/2019) I stated that “section 6.17 of the Licence exists because the unapproved transfer of truck tags can result in their commodification and because it is difficult to hold licensees accountable for the remuneration and fair treatment of their drivers...” In this case, the correct licence holder has been held accountable but only after the OBCCTC audited two licence holders and determined that the truck tag transfer had occurred. This audit has demonstrated that A-Can has misrepresented the number of truck tags it requires under its Licence and it is possible that A-Can has benefitted financially from the truck tag transfer.
31. 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 A-Can Transport Ltd. in the amount of \$20,000.00;

- b. Should it wish to do so, A-Can 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 A-Can Transport Ltd. provides a written response in accordance with the above I will consider its response, and I will provide notice to A-Can 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.

MDW

32. I have considered MDW's submission provided on June 11, 2019 and I am not persuaded that MDW is in compliance with the *Act*, *Regulation* and its Licence. MDW concedes that it did not pay for training time, deducted money from a driver's pay cheque (a violation of section 24 of the *Act*) and held back money from a driver's final pay (a contravention of the OBCCTC's May 26, 2016, in which hold backs were addressed).
33. For these reasons, I have concluded that an administrative fine against MDW is appropriate. 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.
34. In this case, it has been determined that in the Initial Audit Period, MDW violated section 24 of the *Act* by deducting \$200 from an employee's pay and breached section 24(1) of the *Regulation* when it did not pay its driver within the prescribed timeframe. MDW's failure to pay for training time is also a violation of section 23 of the *Act* which makes clear that licensees cannot offer or pay any less than the section 22 rates when seeking to employ or retain a trucker. However, I note that the OBCCTC did not issue a Bulletin regarding compensation for training until June 20, 2019.
35. Regarding the size of the proposed fine, I have decided that an administrative penalty of \$5,000.00 is appropriate in this case. The size of this fine is intended to balance MDW's non-compliant behaviors with its historic and current payments of the legislated rates to its company drivers and the timing of the OBCCTC's clarification regarding trainee payment.
36. In the result and in accordance with section 34(2) of the *Act*, I hereby give notice as follows:
- d. I propose to impose an administrative fine against MDW Express Transport Ltd. in the amount of \$5,000.00;
 - e. Should it wish to do so, MDW Express 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;
 - f. If MDW Express Transport Ltd. provides a written response in accordance with the above I will consider its response, and I will provide notice to MDW Express 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.

Conclusion

37. The penalties in this decision differ because s. 6.17 of the Licence places the onus on the Licensee to seek the Commissioner's consent before assigning or transferring truck tags. In this case, A-Can transferred its truck tags as well as the responsibility for dispatching and paying the drivers associated with the tags, resulting in the very circumstances that s. 6.17 of the Licence seeks to avoid. While I recognize that MDW likely had a role to play in this transfer, and certainly benefitted from the transfer, the language of s. 6.17 is currently such that A-Can bears the responsibility for the violation. For this reason, A-Can's penalty is larger.

38. This decision will be delivered to the Companies and may be published on the Commissioner's website: (www.obcctc.ca).

Dated at Vancouver, B.C., this 16th day of July, 2019.



Michael Crawford, Commissioner