



June 15, 2020

Damco Distribution Canada Inc.
8400 River Road,
Delta, BC V4G 1B5

Commissioner's Decision

Damco Distribution Canada Inc. (CTC Decision No. 07/2020)

Introduction

1. Damco Distribution Canada Inc. ("Damco") is a licensee 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 the Commissioner, and a licensee must comply with those 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 two separate complaints in January and June of 2019 alleging that Damco had not increased rates as required by the June 1, 2018 amendment to the rates mandated by the *Container Trucking Regulation* (the "Regulation").
4. On January 30, 2019, the Commissioner directed an auditor to audit Damco's records to determine if its independent operators ("I/Os") and company drivers were being paid the minimum rates required under the Regulation. The auditor was directed to audit the month of August 2018 (the "Initial Audit Period") to determine compliance.

Initial Audit Period

I/Os

5. The auditor requested and obtained relevant records from Damco and determined that during the Initial Audit Period, Damco did not pay its I/Os trip rates consistent with the Act and Regulation. Specifically, Damco did not increase its trips rates on June 1, 2018 as required.
6. Damco had, however, undertaken a self-assessment prior to the 2019 audit. In December 2018, Damco accrued \$50,000.00 and in January 2019, reviewed its records and concluded that twenty

(20) I/Os were owed \$56,740.46 collectively for the period between June 1, 2018 and December 31, 2018 as a result of its failure to increase trip rates on June 1, 2018. This money was paid to I/Os through January and February 2019.

Indirectly Employed Operators (IEOs)

7. In the initial information package submitted by Damco, a listing of nine (9) IEOs was provided. As such, the auditor requested payroll records for the IEOs to determine if they were also being paid the minimum rates required under the *Regulation*.
8. Damco provided the requested records and the auditor determined that during the Initial Audit Period, Damco had ensured that its I/O's IEOs were paid hourly rates consistent with the *Act* and *Regulation*.

Company Drivers

9. The auditor also determined that during the Initial Audit Period, Damco did not increase its hourly rate to align with the June 1, 2018 revised hourly rate for company drivers.
10. However, Damco advised that it had been aware of the required June 1, 2018 increase to the hourly rates and had been in discussion with its union (Retail Wholesale Union, Local 517) in the period following the June 1, 2018 increase to ensure that the benefits offered to employees, when added to their base hourly rate, exceeded the June 1, 2018 rate. Damco and its union had reviewed the benefits package and agreed that its benefits, when added to the base hourly rate, exceeded the regulated hourly rate (which is inclusive of benefits).
11. Damco made retroactive payments to seven (7) company drivers on September 1, 2018 in the amount of \$6,908.00 for money owing in the period between June 1, 2018 and August 31, 2018 because those drivers did not receive benefits from the company and therefore their base hourly rate required adjustment.
12. The auditor undertook an independent assessment of Damco's benefit scheme in order to determine whether each increased benefit received by Damco's company drivers was consistent with the *Regulation's* definition of "benefit" and constituted a legitimate component of their hourly rate.
13. Damco pays its company drivers the following benefits:
 - **Boot allowance:**
All drivers receive \$175 for the purchase of safety boots after they have accumulated 1750 hours worked. No receipts are required accepted for reimbursement and all drivers are entitled to a boot allowance.
 - **Safety bonus:**
Drivers are eligible for a \$0.50/hr Safe Driving Bonus should they not have a preventable accident during a pay period.

- **MSP:**
Damco pays 60% of eligible drivers' Medical Services Plan fees.
 - **Extended health:**
Damco pays 60% of eligible drivers' Extended Health Care Plan costs.
 - **Employer RRSP contribution:**
Damco provides matching RRSP contributions to all eligible employees who work no less than 32 hours per week.
 - **Sick benefits:**
Sick leave is granted on a monthly basis. If unused, employees may pay this into their RRSP, or have it cashed out. The entirety of sick leave balance is paid out at the end of employment.
14. The auditor reviewed each benefit and determined that the boot allowance and the safety bonus did not meet the definition of a benefit in the *Regulation*. Sick leave benefits, extended health insurance, MSP and employer RRSP contributions were determined to be benefits. I concur with the auditor's assessment. The boot allowance is a WCB requirement and therefore a business cost. The safety bonus is paid on a discretionary basis and therefore not a benefit. The remainder of the benefits meet the definition of "benefit" in the *Regulation*.
15. The value of these benefits was calculated for each driver and was added to Damco's hourly rate to determine the "adjusted hourly rate" (Damco's hourly rate plus value of benefits per hour).
16. The auditor then reviewed payroll records for each of Damco's twenty-one (21) company drivers in order to determine if Damco's adjusted hourly rate met or exceeded the regulated hourly rate. The seven (7) drivers who did not receive benefits were determined to have been paid correctly once the retroactive payments made by Damco were considered. Eleven (11) other drivers were determined to have received enough in benefits to increase their adjusted hourly rate above the regulated rate. The remaining three (3) drivers were found to be collectively owed \$655.26 during the Initial Audit Period after a reconciliation of Damco's retroactive payments with the auditor's adjusted hourly rate calculation.

Expanded Audit

17. Having established that Damco had not adjusted its hourly and trip rates immediately following the June 1, 2018 rate increase, the auditor expanded the scope of the audit to cover the period between January 1, 2016 and June 30, 2019 (the "Expanded Audit Period").

I/Os

18. The auditor reviewed Damco's records and the \$56,740.46 payout to its I/Os and found that Damco had simplified its calculation by applying a 2.6% increase to each trip paid. This calculation inflated the amount found to be owing to drivers between June 1, 2018 and December 31, 2018 as Damco paid drivers for chassis moves in addition to container moves and the 2.6% increase was applied to both payments during that time.
19. The auditor also determined that Damco failed to apply the fuel surcharge ("FSC") to its calculations; however, the inflated pay received by drivers equated to more than the FSC amount owing. The

errors in the pay calculations resulted in the drivers being paid \$1,378.85 collectively more than they were entitled to for August 2018.

20. Because Damco's retroactive pay to I/Os only covered the period June 1, 2018 to December 31, 2018, the auditor instructed Damco to calculate amounts owing for the period January 1, 2019 to June 30, 2019 as it had been determined that Damco had not adjusted its I/O pay rates despite making a retroactive payment to drivers.
21. In response, Damco argued that it did not owe its I/Os any further adjustments because its I/O remuneration exceeded the regulated rates due to an additional chassis payment that I/Os receive. To demonstrate that its drivers are paid more than the regulated trip rates, Damco provided calculations showing the total amount paid (trip rates, FSC, and chassis payments) per driver per pay period for January 1, 2019 to June 30, 2019. The calculations showed that, for the period between January 1 and June 30, 2019, Damco paid its twenty (20) I/Os collectively \$298,902.01 more than they would have been paid had they only received the regulated rates and FSC.
22. The auditor discussed Damco's submission with the OBCCTC and after consideration of Damco's submission, the OBCCTC directed the auditor to include Damco's additional chassis move payment when calculating trip rates paid to Damco I/Os. As a result, the auditor determined that Damco was in compliance for the period between June 1, 2018 and December 31, 2018.
23. The auditor also reviewed a sample of Damco's July 2019 payroll to determine whether Damco had corrected its payroll practices following the Commissioner's July 1, 2019 rate order. The auditor determined that Damco increased I/O trip rates in accordance with the order and stopped paying its I/Os chassis trip payments as of July 1, 2019, replacing the payment with the Positioning Movement Rate. Damco also issued a memo to all its I/Os on July 5, 2019, outlining the July 1, 2019 rate changes and providing an updated I/O rate table for their reference.

Company Drivers

24. On March 11, 2020, Damco was instructed to prepare outstanding pay calculations for the three (3) drivers found to be owed money during the Initial Audit Period. Calculations for each driver were based upon their date of hire to the time when Damco adjusted its payroll (one driver for the period January 1, 2016 to June 30, 2019 and the other two drivers for the period June 1, 2018 to June 30, 2019).
25. Damco prepared the outstanding pay calculations as required and determined that the three (3) drivers were collectively owed \$3,822.84 (inclusive of the money found to be owing during the Initial Audit Period) for the combined periods. The auditor reviewed and accepted Damco's calculations. The auditor confirms that Damco has paid the drivers the amount owing.
26. The auditor also reviewed pay records to confirm that the seven (7) drivers who did not receive benefits were paid correctly after September 1, 2018 and the other three (3) drivers who were found to be owed money during the Initial Audit Period were paid correctly after July 1, 2019. In both cases the auditor reviewed pay records and concluded that Damco has adjusted its pay practices and is in compliance.

27. The audit report concludes by noting that Damco has corrected and updated all company driver pay rates and paid company drivers all amounts outstanding. Damco is also in compliance with respect to its I/Os. Damco was helpful during the audit.
28. Damco was provided a copy of the auditor's report on May 19, 2020 for review and was provided an opportunity to respond. Damco responded by the required deadline noting that they had reviewed the report and concurred with its findings.

Decision

29. As described above, the circumstances of this case are that:
 1. On January 30, 2019 the Commissioner ordered an audit of Damco's I/Os and company drivers;
 2. Damco had not increased its I/O trip rates to align with the June 1, 2018 changes to the *Regulation*; however, Damco had subsequently, and before the audit, brought itself into compliance;
 3. Damco's IEOs are paid hourly rates consistent with the *Act* and *Regulation*;
 4. Seven (7) company drivers were found to be owed \$6,908.00 collectively for the period between June 1, 2018 and August 31, 2018, because they did not receive benefits from the company and therefore their base hourly rate required adjustment;
 5. Three (3) company drivers were found to be owed \$3,822.84 collectively for the period between January 2016 and June 30, 2019, after the auditor's reconciliation of Damco's retroactive payments with the auditor's adjusted hourly rate calculation;
 6. Damco was cooperative during the audit; and
 7. Damco has paid the amounts determined to be owing.
30. As Damco 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.
31. 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. 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.
32. In this case, it was determined that for all but a limited number of employees who elected to not receive benefits, Damco's rates exceeded the regulated rates even after the rates increased on June 1, 2018.
33. While Damco ought to have been aware of its employees who did not receive benefits and therefore were entitled to a rate increase, I do not consider this oversight to be egregious enough to warrant a penalty. In this case, the drivers were not seriously harmed (indeed Damco's drivers are well compensated), Damco was not enriched and Damco's historic compliance is such that a financial penalty for this oversight would not be appropriate.

34. I am concerned, however, about the length of time it took for Damco to perform self-assessments to confirm that it was in compliance with the rates following the June 1, 2018 rate increase. The company then made retroactive payments of outstanding amounts to company drivers who did not receive benefits and to I/Os. Damco proactively engaged its union with respect to its company drivers and performed calculations for its I/O drivers in an effort to ensure that it was in compliance, but this process was not completed until seven months after the rate increase.
35. Had this process begun after the start of the audit, Damco would be penalized. As it did not, I believe this audit is sufficient warning of the potential repercussions of not adjusting rates in a timely fashion after a rate change is announced.
36. By way of this decision, I stress the importance of licensees reviewing, and adjusting, if required, their rate structures when advised of pending changes to the Commissioner's rates.
37. This decision will be delivered to Damco Distribution Canada Inc. and may be published on the Commissioner's website (www.obcctc.ca).

Dated at Vancouver, B.C., this 15th day of June, 2020.



Michael Crawford, Commissioner