



July 7, 2016

Seaville Transport Logistics Ltd.
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Via email: jas.khela@seavilletransport.com
Original via courier

Commissioner's Decision

Seaville Transportation Logistics Ltd. (CTC Decision No. 12/2016)

Introduction

1. Seaville Transportation Logistics Ltd. ("Seaville") 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 *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. Under Section 26 of the Act, any person may make a complaint to the Commissioner that a licensee has contravened a provision of the Act. Under Section 29, the Commissioner reviews such complaints and, under Section 31, may conduct an audit or investigation to ensure compliance with the Act, the *Container Trucking Regulation* (the "Regulation") or a licence.
3. Under Appendix D to Schedule 1 of the Container Trucking Services Licence the Commissioner may direct a licensee to provide a compliance letter from a Certified Professional Accountant.

Facts

4. In the fall of 2015 and again in February of 2016 complaints were filed with the Office of the Commissioner respecting the rates being paid to directly employed operators ("company drivers").
5. In response to the initial complaint the then Acting Commissioner directed Seaville to provide a compliance letter for company drivers from a Certified General accountant for the periods between April 1, 2014 – April 30, 2014 and June 1, 2015 and June 30, 2015.
6. On February 17, 2016 the Office of the British Columbia Container Trucking Commissioner ("OBCCTC") received a compliance letter from a Certified Professional Accountant.
7. Following receipt of the compliance letter and receipt of the second complaint the then Acting Commissioner directed an OBCCTC auditor to conduct a spot audit to determine if the work

performed by the Certified Professional Accountant warranted an affirmative compliance letter. The auditor requested and received payroll records and documentation from Seaville.

8. In addition the auditor also received an considered internal calculations voluntarily prepared by Seaville for the period from April 3rd, 2014 to July 11, 2015 identifying monies owing to its drivers for this period.

April 3, 2014 to July 10, 2015

9. From the records provided including Seaville's own internal calculations the auditor determined that between April 3, 2014 and July 10, 2015 Seaville was not paying many of its company drivers the minimum rate required by the *Act* and *Regulation*. More particularly, during this period all company drivers were being paid at an hourly rate of \$25.13 per hour regardless of whether or not they had performed 2,340 or more hours of container trucking services and were therefore entitled to receive the higher hourly rate of \$26.28 prescribed by section 13(1)(b) of the *Regulation*. Seaville's own internal calculations identified which drivers were entitled to the higher rate and the adjustments amounts they were owed.
10. Seaville calculated that it owed adjustments totaling \$38,991.39 and on March 22nd, 2016, 2 months after the January 22nd deadline imposed by the former Acting Commissioner, made the calculated adjustment payments to its drivers.
11. The auditor reviewed Seaville's calculations, payroll records and cancelled cheques and concluded that, while Seaville did not initially pay all of its drivers the rates required under the *Act* and *Regulation*, it subsequently paid adjustments thereby bringing itself into retroactively into substantial compliance for this period.
12. By July 11, 2015, Seaville had adjusted its pay rates to pay the higher wage rate from that day forward. Seaville therefore was, or reasonably should have been, aware that for the period from April 3, 2014 to July 10, 2015 many of its drivers had not been paid the hourly rate required by the *Regulation*. Despite this knowledge, Seaville waited until March of 2016 to rectify this underpayment. I also find that Seaville was, or reasonably should have been, well aware of the January 22nd 2016 deadline for compliance imposed by the former Acting Commissioner, yet did not comply with it.
13. When the auditor raised this issue with Mr. Khela, part owner of Seaville, he offered two explanations:
 - a. that he was waiting to see what industry was going to do and had not heard of any other companies paying out retroactive pay at the time; and
 - b. that in January of 2016 he was advised by the OBCCTC Registrar that he was not required to make retroactive payments until the audit was completed.
14. I have carefully considered this matter and do not accept that the Registrar advised Mr. Khela that he could wait until after the audit before making retroactive payments. I find that it is highly unlikely and not believable that the Registrar would provide advice to a licensee which directly contradicts the clear and frequently published expectation of the OBCCTC that all licensees pay the

retroactive pay owing to drivers immediately, and that the industry will be in full compliance of retroactive pay owing by January 22, 2016 at the latest.

15. Further, I find that, even if Mr. Khela misunderstood what the Registrar said to him, or even if I accept for purposes of this decision Mr. Khela's claim as to what the Registrar allegedly told him, this would not excuse his failure to pay in accordance with the written notices issued by the then Commissioner. A reasonable licensee would be guided by those clear and unequivocal written notices and would not rely on verbal communications, even from the Registrar, to the contrary. At the very least, a reasonable licensee would confirm such advice in writing before relying on it. Seaville provides no such confirmation, and for the reasons given I reject this explanation.
16. With respect to Seaville's first explanation, waiting to see what industry was going to do is not an excuse for failing to meet the January 22nd deadline. I note that many licensees were already bringing themselves into compliance before this deadline. Even if that were not the case, however, a licensee cannot point to the failure of others to comply as an excuse or explanation for their own non-compliance. All licensees must comply, and many, if not most, of them were doing so before the January 22, 2016 deadline.

July 11, 2015 to Date

17. During the audit investigation Seaville informed the auditor that on July 11, 2015 it began to pay drivers with 2,340 or more hours of container trucking services the higher hourly rate of \$26.28 prescribed by section 13(1)(b) of the *Regulation*.
18. As the initial audit periods reviewed by the auditor did not extend beyond July 10, 2015 the auditor did further investigation and testing to determine if Seaville has in fact substantially complied with the legislative rate requirements since July 11, 2015. As a result of this additional work the auditor is satisfied that since July 11, 2015 Seaville has been paying the required rates and is in substantial compliance with the legislated rate requirements.
19. In summary the audit report demonstrates that the adjustments calculated and paid by Seaville in March of 2016 fully compensate its company drivers for the retroactive amounts owing for the period April 3, 2014 to July 10, 2015 and that since July 11, 2015 Seaville has been paying its company drivers the rates required under the *Act and Regulation*.
20. I accept the auditor's findings.

Decision

21. As described above, the circumstances of this case are that:
 - a) the OBCCTC received complaints asserting that Seaville was not paying the rates required under the legislation.
 - b) the then Acting Commissioner ordered an Appendix D audit and subsequently a further spot audit;
 - c) Seaville fully cooperated with the OBCCTC auditor;

- d) Seaville acknowledged that for the period from April 3, 2014 to July 10, 2015 it did not pay many of its drivers the minimum rate required by the legislation;
- e) since July 11, 2015 Seaville has been paying its drivers the rates prescribed by the *Regulation*;
- f) Seaville failed to bring itself into compliance by the January 22, 2016 deadline established by the former acting commissioner;
- g) Seaville did eventually rectify its shortfalls by calculating and paying adjustment payments in late March of 2016. The adjustment payments totaled \$38,991.39;
- h) Seaville is now substantially compliant with its obligations under the *Act* and *Regulation*.

22. As Seaville has paid the amounts owing under the legislation and corrected its non-compliant payment practices, I find there is no need to issue an order pursuant to Section 9 of the *Act* requiring the company to comply with the legislation.

23. 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.

24. 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.

25. On November 16, 2015 the then Acting Commissioner communicated the following to the TLS community:

As previously stated, licence holders who voluntarily bring themselves into compliance in a timely way to the satisfaction of the Commissioner are far less likely to incur penalties for non-compliance than those who fail to do so. Please see section 34 of the *Act*, which sets out the penalties that can be imposed for the failure to comply.

26. On December 11, 2015 the Acting Commissioner followed up with a further communication wherein she informed the TLS community that:

On the issue of retroactive pay, we once again ask for immediate voluntary compliance of that legislation. While we have not yet exercised our discretion as Commissioners to impose penalties for non-compliance for retroactive pay to date, we are putting the industry on notice that the Office expects all retroactive pay owing to drivers can be fully paid by licence holders prior to Friday, January 22, 2016 at the very latest. Companies that come into compliance between now and January 22, 2016 may still be subject to penalties pursuant to the *Act*. Each case will be assessed on a case by case basis and the reasons for non-compliance will be

assessed on that basis. It will not be acceptable for a TLS licence holder to simply wait until January 21, 2016 to come into compliance.

It is expected that all companies pay the retroactive pay owing to drivers immediately, and that the industry will be in full compliance of retroactive pay owing by January 22, 2016 at the latest. After January 22, 2016, the imposition of a penalty pursuant to s. 34 of the *Act* will be highly likely for any company found in non-compliance with the retroactive provisions of the legislation.

27. On January 20, 2016 the then OBCCTC issued a further communication to the industry reinforcing its expectation that all licensees be in full compliance of retroactive owing by January 22, 2016:

1. Retroactive Pay

The Office of the BC Container Trucking Commission (“OBCCTC”) issued a memo on December 11, 2015 indicating that all companies should come into compliance with respect to retroactive pay on or before January 22, 2016. That date is this Friday. We thank the many stakeholders who have already complied and provided verification of these efforts to the OBCCTC. For those TLS licence holders who have not yet come into voluntary compliance, please be advised that when such non-compliance is identified by the OBCCTC, penalties pursuant to Section 34 of the Container Trucking Act (the “*Act*”) are likely to result after the abovementioned date.

28. Seaville has known, or reasonably should have known, since July of 2015 that it underpaid many of its drivers for the period from April 3, 2014, to July 10, 2015. Despite this knowledge it chose not to rectify the situation, choosing instead to see what others in the industry were going to do.
29. Seaville was also well aware, or reasonably should have been aware, of the OBCCTC’s January 22nd, 2016 deadline for compliance and former Acting Commissioner Bell’s clear warning that failure to come into compliance by that date would likely result in penalties. Despite this knowledge it chose to wait until late March before taking steps to rectify its non-compliance.
30. Seaville points to the ongoing audit process as an excuse for not meeting the deadline. As I made clear in Olympia Transportation (CTC Decision No. 02/2016):

“...the onus to become and remain compliant with the requirements of the *Act* rest entirely with the Licence. 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.”

31. Despite knowing for the better part of a year that it was non-compliant for the period preceding July 11, 2015, Seaville ignored the former Acting Commissioner’s clear deadline and warnings and waited until well into the audit process before taking steps to remedy its non-compliance. I find as well that Seaville has not offered a reasonable explanation for its failure to bring itself into compliance on or before the January 22nd, 2016 compliance deadline imposed by the former Acting Commissioner. In the result, taking into account all of the facts present in this case I have decided that this is an appropriate case to issue a penalty. In accordance with Section 34(2) of the *Act*, I hereby give notice as follows:

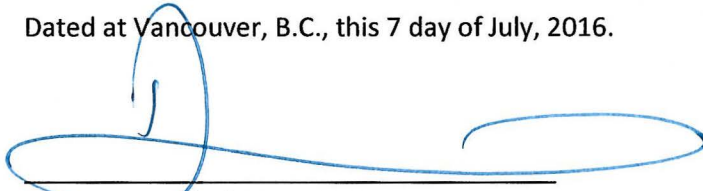
- a. I propose to impose an administrative fine against Seaville in the amount of \$5,000.00;
- b. Should it wish to do so, Seaville has 7 days from receipt of this notice to provide the Commissioner with a written response setting out why the proposed penalty should not be imposed;
- c. If Seaville provides a written response in accordance with the above I will consider its response, and I will provide notice to TMS 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

32. With the publication of this decision, I once again take the opportunity to reinforce the principle that the onus to become and remain compliant with the requirements of the *Act* and the *Regulation* rests with the licensee. I also make clear that there will be consequences for failing to meet the January 22nd, 2016 compliance deadline imposed by my predecessor. That deadline was imposed to further the purposes of the legislation, which include ensuring the timely payment of required wages to drivers in order to foster industry stability and provide fairness for both companies and drivers in the drayage sector.

This decision will be delivered to Seaville and published on the Commissioner's website (www.bc-ctc.ca).

Dated at Vancouver, B.C., this 7 day of July, 2016.



Duncan MacPhail, Commissioner