



September 23, 2016

HAP Enterprises Ltd.
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Original via mail

Commissioner's Decision HAP Enterprises Ltd. (CTC Decision No. 17/2016)

Introduction

1. HAP Enterprises Ltd. ("HAP") 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 summer of 2015, following an earlier complaint, the then Commissioner directed that an audit of HAP be undertaken. The purpose of the audit was to determine if HAP was paying its directly employed operators ("company drivers") the minimum rates required under the Regulation. The audit period ran from April 1, 2014 to May 31st, 2015. During the investigation period, HAP employed 23 company drivers.
5. The originally appointed auditor requested, and by September 2nd, 2015 received, certain payroll records and other documentation from HAP. The audit was then temporarily put on hold when the auditor was directed to focus on other audit matters.

6. In the fall of 2015 a further complaint was filed with the Office of the Commissioner respecting the rates being paid to company drivers. In response to this new complaint, and pursuant to Appendix D to Schedule 1 of the Container Trucking Services Licence, the then Acting Commissioner directed HAP to provide a compliance letter for company drivers from a Certified Professional Accountant (“CPA”) for the periods between April 1, 2014 – April 30, 2014 and June 1, 2015 and June 30, 2015.
7. In January of 2016 the original audit was reassigned to a new auditor. The new auditor discovered that the records disclosed by HAP did not include driver timesheets pre-dating February of 2015. When the auditor made inquiries into the absence of timesheets, she was advised that HAP understood (incorrectly) that it was only required to keep timesheets for a period of 6 months. While further efforts to find the missing timesheets were unsuccessful, HAP was eventually able to locate log books which listed driver trips and hours worked each day.
8. In February of 2016, following receipt of a compliance letter from the CPA, the Acting Commissioner directed the auditor to conduct a spot audit to determine if the work performed by the CPA warranted an affirmative compliance letter. The auditor requested and received further payroll records and documentation from HAP.
9. In the spring of 2016, the auditor was directed to extend the scope of the audit to include the entire period from April 1, 2014 to April 30th, 2016. On September 14, 2016 the auditor submitted her final report to the OBCCTC.
10. The September 14, 2016 auditor’s report records the following:
 - a) Prior to December 22nd, 2014 HAP paid its company drivers on a trip rate basis. As noted in the May 27, 2016 Commissioner’s Bulletin posted on the OBCCTC website, the \$40 minimum trip rate for company drivers did not become effective until the *Regulation* came into force on December 22, 2014 (and was repealed May 13, 2015). As trip rates for company drivers were not regulated under the Container Trucking legislation prior to December 22nd, 2014, there is no finding of non-compliance for the period prior to December 22nd, 2014.
 - b) Although HAP represented that it continued to pay its company drivers on a per trip rate basis between December 22nd, 2014 and January 31st, 2015, it failed to provide adequate records sufficient to allow the auditor to determine how much the company drivers were being paid per trip. As a result, the auditor used the information provided to calculate what drivers were being paid per hour and compared this rate to the hourly minimums established by the *Regulation*. Using this approach, the auditor determined that the hourly rate being paid to company driver exceeded the minimum hourly rates required by the *Regulation*. The auditor concluded that with a minor exception the compensation being paid to company drivers during this period complied with the minimum requirements set forth in the *Regulation*.

- c) From February 1, 2015 to February 28th, 2015 HAP paid its company drivers on an hourly basis. Following a review of the records and discussions with HAP management the auditor concluded that during this period some company drivers were underpaid. In total the auditor concluded that the underpayments totaled \$2,527.40.
- d) From March 1, 2015 to April 30, 2015 HAP paid its company drivers on a trip rate basis. During this period that HAP engaged in trip splitting. As described by the auditor: "When a driver transported an empty container back to the yard they would only be paid \$20-\$25, then when the container was transported to the docks, typically the next morning, the driver would be paid the second payment of \$20-\$25". Trip splitting resulted in HAP underpaying its drivers by a total amount of \$25,555.00 during this period. HAP does not deny engaging in trip splitting. The OBCCTC considered the practice of trip splitting and determined it to be a contravention of the legislation, as confirmed in its March 21, 2016 bulletin published on the OBCCTC website.
- e) Beginning on May 1st, 2015, and continuing to date, HAP pays its company drivers on an hourly basis. The auditor conducted a spot audit examining a sampling of employees in the months of June 2015 and April 2016 to determine if the rates being paid complied with the requirements of the *Regulation*. Using this approach the auditor concluded that since May 1st, 2015 HAP has paid hourly rates which are substantially compliant with the legislated minimum hourly rate requirements.
11. Once audit calculations were completed, spreadsheets were provided to HAP for review and consideration. Following discussions with HAP management, it was concluded, and HAP accepted, that HAP owed its company drivers \$28,689.14¹. HAP immediately provided adjustment cheques to compensate its drivers.
12. On August 9th, 2016 the OBCCTC received complaints from some HAP drivers asserting that, when advised that cheques were available, they were also informed that in order to collect their cheques they needed to make a cash payment (the amount of the requested payment varied from driver to driver) to HAP. When contacted by the auditor, HAP did not deny requesting the cash payments, explaining that the payments were intended to reimburse HAP for what it perceived to be overpayments discovered during the audit process. HAP was immediately informed by the auditor that this practice was unacceptable and that any cash payments received to that point must be returned. HAP has provided copies of cheques to 4 of its drivers evidencing repayment of these cash payments.

¹ The total amount calculated to be owing by the auditor includes some small adjustments totalling less than \$650 which are not detailed in this decision.

13. I accept the auditor's findings.

Decision

14. As described above, the circumstances of this case are that:

- a) Following a complaint of rate non-compliance, the OBCCTC initiated an audit of HAP in the summer of 2015. The original audit period was April 1, 2014 to May 31, 2015. The audit was temporarily suspended in the fall of 2015 and later reassigned to a new auditor in January 2016.
- b) In the fall of 2015, the then Acting Commissioner received a further complaint and initiated an Appendix D audit covering the months of April 2014 and June 2015. A compliance letter was received in February of 2016 and the auditor was directed to do a spot audit to verify its conclusions.
- c) In the spring of 2016 the audit period was expanded to include the whole period from April 1, 2014 to April 30, 2016. A final audit report was produced in August 2016.
- d) HAP fully cooperated with the OBCCTC auditor. However, its record keeping was found to be deficient. In particular HAP was unable to produce timesheets pre-dating February 2015.
- e) HAP engaged in the practice of trip splitting, which resulted in an underpayment to its drivers totaling \$25,555.00.
- f) The auditor determined, and HAP has acknowledged, that on occasions between February 1st, 2015 and April 30, 2015 it failed to pay the rates required under the *Act*, and *Regulation*.
- g) Following a review of the spreadsheets prepared by the auditor, HAP conceded that it owed its company drivers \$28,689.14. HAP has now paid its drivers the outstanding amounts found to be owing.
- h) HAP initially attempted to collect overpayments it perceived to be owing from its drivers by demanding cash payments (equaling the amount of the perceived overpayment) in return for receipt of the company driver's adjustment cheque. When this practice was discovered, it was immediately brought to an end by the auditor.
- i) Since May 1st, 2015 HAP has been paying its company drivers the rates prescribed by the *Regulation*.
- j) HAP is now substantially compliant with its obligations under the *Act* and *Regulation*.

15. As HAP 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 rate requirements of the legislation.

16. 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.

17. 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.
18. This audit raises a number of concerns. Firstly, HAP's record keeping has been found to be deficient. The audit discloses that HAP has failed to keep proper payroll records and in particular has failed to maintain time sheets from before February 2015.
19. Paragraph 3 of Appendix D to Schedule 1 of the Container Trucking Services Licence (formerly Paragraph 3 of Appendix D to Schedule 1 of Licence "B") requires the following:
 3. *The Licensee must retain a record for each Trucker who performs Container Trucking Services for the Licensee of the following information:*
 - a) *The Trucker's name, date of birth, telephone number and residential address;*
 - b) *The date the Trucker first performed Container Trucking Services for the Licensee;*
 - c) *The rate of remuneration for the Trucker, whether hourly or per trip;*
 - d) *Fuel surcharges paid to the Trucker;*
 - e) *Payment of Wait Time Remuneration;*
 - f) *Hours worked and trips completed on each day by the Trucker on behalf of the Licensee;*
 - g) *Benefits, if any, paid to the Trucker;*
 - h) *Total Compensation, before taxes and any other deductions, paid to the Trucker; and*
 - i) *Any deductions made from the Trucker's Compensation, and the reason for the deduction.*
20. Additionally, Paragraph (g) of Schedule 2 to the Container Trucking Services Licence (formerly Paragraph (g) of Schedule to Licence "B") requires Licensees to maintain:

*"payroll records, as defined and required by Section 28 of the *Employment Standards Act*, RSBC 1996, c. 113".*
21. Amongst other requirements, Section 28(2)(c) of the *Employment Standards Act* requires that payroll records be, "retained by the employer for 2 years after the employment terminates."
22. The requirement to keep complete, accurate and up-to-date records is a fundamentally important obligation flowing from the legislation and the Container Trucking Services Licence (the "licence"). The maintenance of complete, accurate and up-to-date records by licensees is absolutely essential to the OBCCTC's fulfillment of its rate compliance mandate and its ability to properly perform audits in a timely and fulsome way. Failure to keep proper records, including those required under both Paragraph 3 of Appendix D to Schedule 1, and under Schedule 2 of the licence, directly interferes with the audit process, will not be tolerated, and will be regarded as a serious violation of licensees' obligations under the legislation and their licence.

23. Secondly the audit discloses that HAP was engaged in the practice of trip splitting. I acknowledge that HAP engaged in this practice prior to the OBCCTC's bulletin confirming that trip splitting is a contravention of the *Act* and *Regulation*, and HAP is no longer engaged in this practice. However, the practice was non-compliant with the legislation and resulted in drivers being underpaid for their services. .
24. Thirdly, as I have previously made clear, the purpose of the *Act* and the *Regulation* is to ensure that truckers are fairly compensated and paid in a timely way. Moreover, as pointed out in a number of previous decisions the onus to become and remain compliant rests with the licensees. Licensees are not permitted to wait until they are audited before bringing themselves into compliance. In this case the discovered underpayments to company drivers were not remedied for over a year. I accept, however, that not all of the delay is attributable to HAP, as there were some delays in the audit process unrelated to HAP.
25. Finally, I am concerned about HAP's attempt to claw back perceived overpayments by demanding cash in return for receiving the adjustment amounts calculated by the auditor. It should have been abundantly clear to HAP that this was unacceptable. I note that it corrected its error as soon as the auditor brought it to HAP's attention.
26. In the result I have concluded that this is an appropriate case to issue a penalty. The amount of penalty reflects the fact that, although the auditor found that HAP was generally co-operative with the audit process and auditor directions to bring itself into compliance, it was non-compliant in some respects, notably in regard to record-keeping, trip-splitting, and seeking cash payments from its drivers.
27. In accordance with Section 34(2) of the *Act*, I hereby give notice as follows:
 - a. I propose to impose an administrative fine against HAP in the amount of \$4,000.00;
 - b. Should it wish to do so, HAP 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 HAP 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.
28. Additionally I make the following order:
 - a) Pursuant to Section 9 of the *Act* I hereby order HAP to immediately bring itself into compliance with its obligation to keep and maintain complete, up-to-date and accurate records and more particularly to comply with its obligation to maintain those records identified at paragraph 3 of Appendix D to Schedule 1 and at Schedule 2 of its licence.

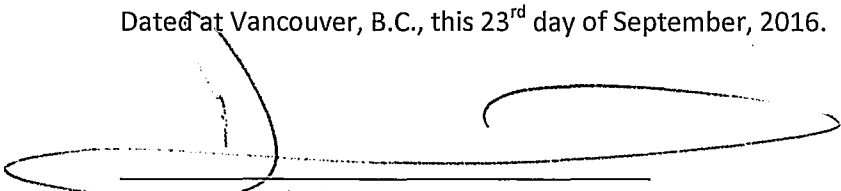
Conclusion

29. With the publication of this decision, I have once again taken 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. It should also be crystal clear that the maintenance of proper records as required by the licence is a fundamental obligation and that failure of a licensee to keep complete, accurate and up-to-date payroll and employment records for drivers will be regarded as significant non-compliance with the legislative scheme.

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

Dated at Vancouver, B.C., this 23rd day of September, 2016.



Duncan MacPhail, Commissioner