OFFICE OF THE
BRITISH COLUMBIA CONTAINER
TRUCKING COMMISSIONER

May 4, 2017

Sunlover Holding Co. Ltd.
Box 88592, RPO Newton
Surrey, BC V3W 0X1

Via email: Gurpreet@sunloverltd.com
Original to follow via mail

Attention: Mr. Gurpreet Shoker

Dear Sir:

Commissioner's Decision
Sunlover Holdings Co. Ltd (CTC Decision No.10/2017)

I. Introduction

1. Sunlover Holdings Co. Ltd. ("Sunlover") 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 26 of the *Act*, any person may make a complaint to the British Columbia Container Trucking Commissioner (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. The Commissioner may initiate an audit or investigation under Section 31 whether or not a complaint has been received.

II. Facts

3. In the summer of 2015 the Office of the Commissioner received a complaint that Sunlover was not paying its drivers in accordance with the *Act* and the *Regulation*. As a result, the then Commissioner directed that an audit investigation be conducted with respect to the complaint (the "Initial Audit"). The Initial Audit covered the period from April 3rd, 2014 to July 31, 2015 and was in relation to both directly employed drivers ("Company Drivers") and independent operators ("I/O's").

4. The Initial Audit revealed the following:

   a) Between April 3rd, 2014 and February 28th, 2015 Sunlover paid its I/O's On-Dock trip rates which complied with those required under the *Regulation.*

b) Between April 3rd, 2014 and February 28th, 2015 Sunlover failed to pay its I/O's Off-Dock trip rates which complied with the *Regulation.* As a result it was determined that Sunlover owed its I/O's a total of $30,138.35. Sunlover paid its I/O's the amounts found to be owing in the following fashion:

December 30, 2015 - $11,000.00
February 12, 2016 - $8,795.00
February 24, 2016 - $9,442.64
March 3, 2016 - $1,573.64

c) On March 1, 2015 Sunlover began paying its I/O's Off-Dock Trip rates which complied with the *Regulation.*

d) No discrepancies relating to the rates being paid by Sunlover to its Company Drivers were discovered at that time.

5. In the summer of 2016 the Commissioner received further rate compliance complaints pertaining to Sunlover. As a result the Commissioner expanded the audit (the "Expanded Audit") and assigned the audit to a new auditor.

Expanded Audit

Independent Operators

6. The Expanded Audit results confirm that since March 1st, 2015 Sunlover has been paying its I/O's On-Dock and Off-Dock trip rates which comply with the *Regulation.*

Company Drivers

7. The Expanded Audit disclosed that Sunlover paid its company drivers by the trip from April 3, 2014 to May 13, 2015, and by the hour from May 14, 2015 onward. As trip rates for company drivers were not regulated prior to December 22, 2014, the audit concerned wage payments to Company Drivers from December 22, 2014 onward.

8. The auditor found that, between December 22nd, 2014 and July 31st, 2016, Sunlover failed to pay its Company Drivers the minimum rates required under the *Regulation.* The auditor calculated the underpayment as totaling $45,796.95. The underpayment, which thus far Sunlover has refused to pay, was caused by Sunlover's inclusion of vacation pay in the wage rates being paid.

9. When this error was pointed out, Sunlover did not dispute that vacation pay needed to be in addition to the minimum wage rate required by the legislation. The auditor was satisfied Sunlover began correctly calculating wages and vacation pay effective August 1, 2016.

10. However, Sunlover takes the position that it should not be required to pay the amount determined by the auditor to be owing. It says that the amount calculated to be owing due to the inclusion of vacation pay in the rate payable, ($45,796.95) should be reduced or offset by what Sunlover characterizes as an "overpayments" to its drivers. These overpayments are said to be: payment of driver lunch breaks.

11. Sunlover also submits that the auditor has included non-container trucking services hours in her calculations. It argues that these hours should not be considered.

III. Analysis

12. In *TMS Management Services Ltd.* (CTC Decision Nos. 6/2016, and 8/2016) I determined that the minimum rates required under the *Act* and *Regulation* do not include vacation pay. By letter dated October 7th, 2016 counsel for Sunlover conceded that vacation pay is excluded from the minimum rate payable under the legislation. Accordingly, there is no dispute that Sunlover owes its drivers a total of $45,796.45 for underpayment of wages, due to its vacation pay error, for the period December 22, 2014 – July 31, 2016.

13. Sunlover was given an opportunity to file a written submission fully outlining its positions and arguments. By letter dated April 5th, 2017 the Deputy Commissioner invited Sunlover to, "...make a submission to the Commissioner on any issues it wished to raise resulting from the audit."

14. On April 20, 2017 Sunlover filed a one page submission with the Commissioner outlining its positions and arguments. It argues that it does not owe its Company Drivers any further compensation.

15. In support of its position Sunlover advances two arguments:

    a) ***Lunch Break Set Off Argument***

    Sunlover argues that it overpaid its drivers by paying them for 30 minute lunch breaks. Relying on a document signed by Company Drivers at the time of their hire, Sunlover argues that its Company Drivers are not entitled to be paid for their lunch breaks. It asserts that this overpayment should be set-off against the monies found by the auditor to be owing.

    Sunlover also argues that the auditor who conducted the Initial Audit did not raise the vacation pay issue and that had he done so, Sunlover may well have become more vigilant in ensuring that its Company Drivers were not paid for lunch breaks.

b) Container Trucking Services rates do not apply to empty chassis movements made by Company Drivers.

Sunlover argues that the auditor's Company Driver calculations mistakenly included empty chassis and in-facility moves. It asserts that these moves should be removed from the auditor's calculations.

16. For the reasons which follow I have rejected both of these arguments.

a) Lunch Break Set Off Argument

17. I find that the Lunch Break Set Off Argument is not made out.

18. Firstly, even if I accept that Sunlover's Company Drivers agreed that they are not entitled to be paid for 30 minute lunch breaks, it must still be established that its drivers actually took lunch breaks for which they were paid. In my view, a period of time can only be considered a "lunch break" if at the time the driver was not working. Otherwise, the time spent eating lunch in the truck while driving, waiting in line, or ensuring the security of the vehicle and its contents should be considered work time for which wages are owed. For a similar view, see *Southside Delivery Services Ltd.*, BC EST #D533/99, [1999] B.C.E.S.T.D. 539, a decision of the BC Employment Standards Tribunal.

19. As part of her investigation into this issue, the auditor responsible for the Extended Audit contacted a number of drivers and asked whether they took lunch breaks. Most drivers advised that they ate lunch while driving or sitting in line at the port. Sunlover provided no records or other evidence to dispute this claim.

20. In my view, drivers who eat while driving or while in line at the port are working, are not on a break, and are entitled to be paid for their work. It is not enough that the drivers have agreed that they are entitled to take an unpaid lunch break. Drivers must actually take the break before a licensee is entitled to deduct the time. Here, when given an opportunity to do so, Sunlover was unable to prove that any of its drivers actually took time away from work to eat their lunch.

21. Secondly, in my view, the fact that the drivers actually got paid with no deduction for an unpaid lunch break supports the inference that they did not actually take a proper lunch break away from their truck and from work responsiblities. I find it is unlikely that Sunlover would have paid its drivers for time not worked. Had Sunlover believed its drivers were habitually taking proper lunch breaks, it would have ensured that its drivers recorded those breaks and would not have paid wages for that time not spent working.

22. Thirdly, I reject the notion that the original auditor is somehow responsible for the way Sunlover conducted its business. I do not accept that Sunlover decided to pay its drivers for lunch breaks because it believed that it was entitled to include vacation pay in the calculation of a compliant rate hourly rate. There is no sensible or rational nexus between a decision to include vacation pay in the hourly rate and a decision to pay drivers for their lunch breaks. Moreover, the fact that the Initial Audit did not uncover the vacation pay error does not excuse Sunlover from its obligation to pay compliant rates. As I have said on numerous occasions, the onus to become and remain compliant rests with the Licensee. Licensees should not rely on Commission auditors to determine if they are or are not compliant. See for example *Olympia Transportation Ltd.* (CTC Decision No. 02/2016).

23. Finally, even if I accepted Sunlover's argument that it overpaid its drivers by paying for "unpaid" lunch breaks (which I do not), such overpayments cannot be used as a set-off against wages owed by a licensee to its drivers. Section 13 of the *Regulation* creates a minimum hourly rate which must be paid to Company Drivers for each hour worked. This hourly wage obligation cannot be reduced by alleged overpayments in other areas. Set-offs such as that argued here are not permitted.

24. For all of these reasons I reject Sunlover's argument that there exists some amount of overpayment for unpaid lunch breaks which should be set off against the amount owing to its Company Drivers for failure to pay compliant rates.

b) Container Trucking Services rates do not apply to empty chassis or within facility movements made by Company Drivers Argument

25. In a recent decision, *Pro West Trucking Ltd.* (CTC Decision No. 06/2017) I rejected the argument that rates payable to Company Drivers under Section 13 of the *Regulation* do not extend to empty chassis or within facility moves. In that decision I explained the rational for my interpretation of the legislation and concluded:

> "The application of Section 13 hourly rates is not limited to just the time a company driver spends actually transporting a container by a truck. Rather, "container trucking services" for purposes of Section 13 also includes services directly relating to or ancillary to, the transportation of a container by a truck, such as:
>
> - Pre and Post trip inspections
> - The relocation or movement of empty chassis which have been used or will be used to move a container as defined in the *Regulation* (a "container") ;
> - "Bob Tail" moves to or from marine terminals or container facilities in the lower mainland;
> - The movement of containers by truck within a yard or facility.

> Section 13 requires licensees to pay company drivers the regulated rates for all such "container trucking services". (At Paragraph 64)

26. Sunlover advances the same argument as that before me in *Pro West*, and for the same reasons as articulated in *Pro West* I reject the argument. I find that the Section 13 minimum hourly rates apply to both empty chassis moves by Company Drivers and to the movement of containers by truck within a yard or facility by Company Drivers. In the result, I accept the auditor's calculations.

27. I note as well that on January 30th, 2017 Deputy Commissioner Crawford wrote to Sunlover advising as follows:

> "If you wish to have the number of hours worked by your drivers reversed for the purpose of your audit, on the grounds that not all work performed by Sunlover drivers attract a regulated rate, then you are asked to provide to the auditor a document which identifies each driver, the total hours worked by each driver; the hours worked performing services by each driver which you believe do not attract a rate; and an explanation of what type of work was performed during each period in question."

Despite being given this opportunity, Sunlover failed or declined to provide any of the information requested in the Deputy Commissioner's letter. In these circumstances, there is no basis to conclude the auditor's calculations were inaccurate or based on hours not spent providing container trucking services.

28. Accordingly, I reject Sunlover's arguments and accept the auditor's conclusion that Sunlover owes its Company Drivers adjustment amounts totaling $45,796.95. To date Sunlover has not paid the amounts found to be owing.

29. During the Expanded Audit process, Sunlover raised unsubstantiated arguments which unnecessarily prolonged the audit. When the auditor sought information from Sunlover further to those arguments, such as the specifics of the unregulated work it alleged its drivers performed, Sunlover did not follow through and provide the information. The delay to the audit process caused by having to consider and address Sunlover's unsubstantiated arguments was prejudicial to its Company Drivers, as it extended the time they are harmed by Sunlover's failure to pay the monies owing to them under the *Act* and *Regulation.*

IV. Decision

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

    a. Sunlover provided records as requested by the auditor;

b. The Initial Audit determined that, for the period April 3, 2014 to February 28th, 2015, Sunlover paid compliant On-Dock rates but failed to pay compliant Off-Dock trip rates to its I/O's. As a result, it owed its I/O's adjustment amounts totaling $30,138.35. Sunlover eventually paid that amount to its I/O's; however, the payments were made over time, and most of the amounts owed to I/O's were not paid until after the January 22nd, 2016 deadline imposed by the former Acting Commissioner.[1]
c. Since February 28th, 2015, Sunlover has paid its I/O's rates which comply with the On-Dock and Off-Dock rates set forth in the *Regulation.*
d. The Expanded Audit determined that Sunlover was not in compliance with respect to the compensation payable to its Company Drivers for the period from December 22nd, 2014 to July 31st, 2016. Sunlover's failure to pay compliant rates during this period resulted from its inclusion of vacation pay in the rates being paid. As a result, Sunlover owed its Company Drivers adjustment amounts totaling $45,796.95.
e. Sunlover corrected its vacation payroll method error on August 1st, 2016.
f. Sunlover delayed the audit process by not accepting some of the auditor's interpretations and by raising unsubstantiated arguments for why it should not have to pay wages owing to its Company Drivers.
g. To date, Sunlover has not paid its Company Drivers the adjustments determined to be owing by the auditor.

31. As Sunlover has not paid the full amount determined to be owing under the legislation, I hereby issue the following orders pursuant to Section 9 of the *Act*:

Pursuant to Section 9 of the *Act*, I hereby order Sunlover to:

a) immediately take all necessary steps to bring itself into compliance with the requirements of the *Act* and *Regulation* as interpreted in this decision.

b) immediately pay its Company Drivers the $45,796.95 adjustment amount found by the auditor to be owing to its Company Drivers,

c) meet with an auditor by no later than the 9th day of June, 2017 and demonstrate to the auditor's satisfaction that it has taken all necessary steps to bring itself into compliance with the legislation and that it has paid the adjustment amount owing to its Company Drivers.

32. 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.

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[1] On December 11th, 2015 former Acting Commissioner Bell informed the Industry that those licensees who failed to bring themselves into compliance by January 22nd, 2016 faced a high risk of having a penalty imposed. For a fuller explanation of the January 22nd 2016 deadline imposed by the former Action commissioner see *Seaville Transportation Logistics Ltd.*, CTC No. 12/2016 at paragraphs 25 – 27.

33. 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. 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.

34. 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. These can include where a licensee does not cooperate fully with an audit or investigation; does not comply with orders or directions given by the Commissioner or the auditor; delays unreasonably in paying amounts found to be owing; or engages in any form of fraudulent, deceptive, dishonest or bad faith behavior with respect to compliance with the legislation.

35. In the present case, I find it is appropriate to impose a penalty on Sunlover for its non-compliance. The audit discloses that over an extended period of time Sunlover failed to pay compliant rates to its Company Drivers and to its I/O's. The audit disclosed that Company Drivers and I/O's were owed a combined additional compensation totaling almost $76.000.00. Although Sunlover paid the $30,138.35[2] found to be owing to its I/O's, there remains an outstanding adjustment amount of $45,796.30 still owing to its Company Drivers.

36. In *Smart Choice Transportation Ltd.* CTC Decision No. 21/2016, I outlined the purpose of the penalties under the *Act* and the factors that would be considered when assessing the appropriate administrative penalty to be imposed:

> 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;

[2] The majority of which was paid after the January 22, 2016 deadline imposed by the former Acting Commissioner.

- 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)

37. I have assessed the appropriate administrative penalty to be applied here taking into account the following facts which I find are relevant to the *Smart Choice Transportation* factors:

a) Sunlover failed to pay compliant rates to both its Company Drivers and to its I/O's for an extended period of time. Were it not for the complaints and the audit, it is likely that these non-compliant practices would not have been discovered, its drivers would not have been paid what they were entitled to under the Container Trucking Legislation, and Sunlover would have been unjustly enriched.
b) The audit process disclosed that Sunlover owed $30,138.35 to its I/O's and $45,796.95 to its Company Drivers. These are significant sums. I take into account, however, that Sunlover voluntarily paid the $30,138.35 found to be owing to I/O's, although most of the money owing to its I/O's was not paid until a few months after the January 22nd, 2016 deadline imposed by the former Acting Commissioner.
c) While Sunlover has voluntarily paid part of the monies found to be owing, it still owes its Company Drivers a further $45,796.95. To date, it has refused to pay the amount determined by the audit to be owing.
d) Sunlover unnecessarily delayed the audit process by advancing arguments which were little more than audit driven attempts to find any off-set or argument to avoid or reduce its statutory obligation to pay the rates required under the *Act* and *Regulation*. These arguments lacked specifics and had little chance of success. As a result, payments to company drivers have been unnecessarily delayed.

38. Taking these factors into consideration, I find an administrative penalty of $7,000.00 is appropriate here. In my view the penalty is sufficiently large to meet the objective of deterring Sunlover from engaging in similar types of non-compliant behavior in the future while not being punitive. It also delivers a strong warning to licensees that drivers must be paid the legislated rates in a timely way. The size of the penalty also recognizes that Sunlover paid a portion of the adjustment amounts found to be owing, albeit for the most part after the January 22nd, 2016 deadline imposed by the former Acting Commissioner. Finally the penalty responds to Sunlover's attempts to advance arguments which had little chance of success and which unreasonably delayed the audit process.

39. I take this opportunity to remind Sunlover specifically and the drayage community more generally of my comments in *TMS Transportation Management Services Ltd.* (CTC Decision No. 06/2016):

> "I would add that companies are entitled and indeed invited by the auditor to review the auditor's calculation, and they may engage in discussions with the auditor about the auditor's audit findings. However, once the auditor has

considered a company's arguments and advised that the auditor still considers the company to be non-compliant and owing money to its drivers, a company that fails to comply with the auditor's direction to make the requested pay adjustments takes the risk I may not accept the auditor was incorrect, as happened in this case. In that case, as here, a penalty for non-compliance is highly likely to result. Among other things, the penalty ensures that companies do not dispute the auditor's findings merely to prolong or complicate the audit process to delay or deny payment of monies owing to their drivers. It must be remembered that a fundamental reason and purpose for the *Act* and *Regulation* is to ensure drivers are paid wages owing in a timely manner. Additionally it is consistent with this purpose that, when a deadline is given for payment of retroactive wages owing, companies who voluntarily comply with that deadline are not penalized whereas companies who choose not to comply are highly likely to face a penalty as a consequence." (paragraph 35)

40. In the result, and in accordance with Section 34(2) of the *Act*, I hereby give notice as follows:

i. I propose to impose an administrative penalty against Sunlover in the amount of $7,000.00;
ii. Should it wish to do so, Sunlover has 7 days from receipt of this notice to provide a written response to me setting out why the proposed penalty should not be imposed;
iii. If Sunlover provides a written response in accordance with the above, I will consider it and advise Sunlover whether I will refrain from imposing any or all of the penalty.

41. Additionally I confirm that I have made the following order pursuant to Section 9 of the *Act*:

Pursuant to Section 9 of the *Act*, I hereby order Sunlover to:

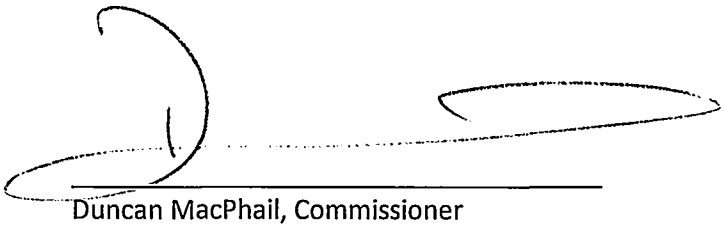
a) immediately take all necessary steps to bring itself into compliance with the requirements of the *Act* and *Regulation* as interpreted in this decision.

b) immediately pay its Company Drivers the $45,796.95 adjustment amount found by the auditor to be owing to its Company Drivers,

c) meet with an auditor by no later than the 9th day of June, 2017 and demonstrate to the auditor's satisfaction that it has taken all necessary steps to bring itself into compliance with the legislation and that it has paid all adjustment amounts owing to its Company Drivers.

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

Dated at Vancouver, B.C., this 4th day of May, 2017.



Duncan MacPhail, Commissioner