



May 8<sup>th</sup>, 2016

White Hawk Transport Ltd.  
13082 74 Ave  
Surrey, BC V3W 2S2

## **Commissioner's Decision**

### **White Hawk Transport Ltd. (CTC Decision No. 11/2017)**

#### **Introduction**

1. White Hawk Transport Ltd. ("White Hawk") 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. (I note the Commissioner has authority under Section 31 to conduct such audits and investigations whether or not the Commissioner has received a complaint).

#### **Facts**

##### *Initial Audit*

3. In the spring of 2016 the Commissioner received a complaint via the Confidence Line that White Hawk was not paying its drivers in accordance with the *Act* and the *Regulation*. As a result an audit investigation was initiated with respect to the complaint.
4. On April 7<sup>th</sup>, 2016 White Hawk was advised of the complaint and directed to produce all relevant records and documents pertaining to truckers who performed container trucking services during the periods October 1 – 31, 2015 and January 1 – 31, 2016 (together the "Initial Audit Period").
5. White Hawk records disclosed that in October of 2015 White Hawk employed 5 directly employed operators ("drivers"). In January of 2016 White Hawk employed 4 drivers. White Hawk does not engage independent operators.
6. White Hawk drivers perform both Container Trucking Services ("CTS") work and non-CTS work. The records produced by White Hawk did not differentiate between CTS and non-CTS work.

7. The auditor determined that during the Initial Audit Period White Hawk was not paying its drivers the minimum hourly rate required under Section 13 of the *Regulation*. In October of 2015 all drivers were being paid a rate of \$25.13 per hour regardless of the number of hours they had worked performing “container trucking services on behalf of any licensee”. Under Section 13 of the *Regulation* drivers who have “performed 2,340 or more hours of container trucking services on behalf of any licensee” are entitled to a minimum hourly rate of \$26.28.
8. In January of 2016 White Hawk was paying its drivers \$25.13 and \$26.00 per hour (28 cents per hour below the required minimum).
9. The auditor determined that all but 2 of White Hawks drivers were entitled to receive an hourly rate of \$26.28 during the Initial Audit Period.
10. The auditor calculated that White Hawk underpaid its drivers during the Initial Audit Period by amounts totaling \$1,255.60.

*Expanded Audit*

11. Have determined that White Hawk was paying non-compliant rates during the Initial Audit Period the auditor expanded the audit to cover the entire period between November 1, 2014<sup>1</sup> and November 1, 2016<sup>2</sup> (the “Expanded Audit Period”).
12. The auditor directed White Hawk to review its records and, applying the proper hourly rates required under the *Regulation*, to calculate the adjustment amounts owing to its drivers for the Expanded Audit Period.
13. After many missed deadlines, White Hawk provided its calculations to the auditor on October 21, 2016. The auditor reviewed the calculations and was not satisfied that they were done correctly. More particularly the auditor was not satisfied that the White Hawk’s calculations accounted for all hours worked as recorded on driver time sheets.
14. When advised of the auditor’s concerns White Hawk argued that many of the hours recorded on the driver time sheets were not hours worked performing CTS work. However, when requested by the auditor to provide records supporting this claim, White Hawk was unable to do so. As noted previously, White Hawk’s records did not differentiate between CTS work and non-CTS work.
15. In light of White Hawks inability to differentiate between CTS hours worked and non-CTS hours worked the auditor sought and obtained relevant records for the Expanded Audit Period and calculated adjustment amounts owing to drivers for this period based on the total number of hours recorded on the timesheets as worked<sup>3</sup>. The auditor calculated that White Hawk owed its drivers

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<sup>1</sup> The date on which White Hawk began performing CTS work.

<sup>2</sup> The auditor conducted a spot audit and is satisfied that since November 1, 2016 White Hawk has paid its drivers the hourly rates required under the *Regulation*.

<sup>3</sup> Because White Hawk records did not differentiate between CTS hours worked and non-CTS hours worked the auditors calculations assumed that all recorded hours worked were CTS hours.

adjustment amounts (inclusive of the amounts owing for the Initial Audit Period) totaling \$16,469.79. On January 27, 2017 the auditor provided her calculations to White Hawk.

16. After receiving the auditor's calculations White Hawk initiated a conference call with the auditor to discuss the results. During this call White Hawk again argued that many of the hours recorded as worked were not CTS hours. However, as previously recorded, White Hawk was unable to provide any records or offer up any other evidence differentiating between CTS and non-CTS hours worked. Ultimately White Hawk abandoned its position and agreed to pay the adjustment amounts calculated as owing.
17. The auditor confirms that White Hawk has now paid the adjustment payments (totaling \$16,469.79). 12 drivers have received adjustment cheques.
18. The auditor goes on to report that, beginning on November 1, 2016 White Hawk changed its record keeping practices and effective that date is now properly recording hours worked performing CTS work.
19. The auditor concludes that she is satisfied that White Hawk is now paying its drivers the minimum hourly rates required under the *Regulation*.
20. In summary, the auditor's report demonstrates that:
  - a. During the Extended Audit Period White Hawk failed to pay hourly rates which conformed to the rates required under the *Regulation* and that as a result it owed 12 drivers adjustment payments totaling \$16,469.79.
  - b. White Hawk has now paid the adjustment amounts calculated to be owing to its drivers during the Expanded Audit Period and thereby brought itself into compliance for this Period.
  - c. Since November 1, 2016 White Hawk has paid its drivers compliant hourly rates;
  - d. White Hawk has now corrected its record keeping practices and is properly recording hours worked by its drivers performing CTS work.

#### Other Concerns

21. In addition to the auditor's conclusion that White Hawk was paying rates which did not meet the requirements of the *Regulation*, the audit raises additional concerns regarding White Hawk's conduct during the audit process and its record keeping practices.
22. Firstly, the auditor reports that during the audit process White Hawk failed to meet deadlines on a number of occasions and often failed to either respond to the auditor's emails or to provide the information requested. Such behaviour violates White Hawk's obligations under the terms and conditions of its licence. In particular I make reference to Appendix D to Schedule 1 of the Container Trucking Services Licence which requires the following:
  2. On the request of the Commissioner, a Licensee must provide the Commissioner with current information **on a timely basis**, related to the Licensee, Truckers conducting Container Trucking Services on behalf of the Licensees, and Approved

Vehicles. (Emphasis Added)

23. Licensees who are subject to an audit investigation are expected to give auditors their full and complete cooperation including meeting all deadlines, responding to all inquiries in a timely fashion, and providing all requested information. Licensees who fail to meet deadlines without a reasonable excuse, or who fail to properly respond to audit inquiries in a timely way, can expect to be penalized.
24. Secondly, under the terms of its licence White Hawk was required to keep and retain a record for each driver performing Container Trucking Services of:

(f) hours worked and trips completed on each day by the Trucker performing Container Trucking Services on behalf of the Licensee;<sup>4</sup>

As noted above, and in contravention of its Container Trucking Services Licence, White Hawk failed to keep such records until November 1, 2016.

25. As I have stated on many occasions in the past:

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.<sup>5</sup>

**Decision**

26. As White Hawk has paid the amount owing under the *Act* and corrected its non-compliant payment and record keeping practices, I find there is no need for me to issue an order pursuant to Section 9 of the *Act* requiring White Hawk to comply with the *Act*.
27. 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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<sup>4</sup> Paragraph 3(f) of Appendix D to Schedule 1 of the Container Trucking Services License.

<sup>5</sup> *HAP Enterprises Ltd.* (CTC Decision No. 17/2016): at para. 22.

28. 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.
29. The *Act* does not, however, require penalties to be imposed for non-compliance in all cases. Rather, the Commissioner is granted a discretion to impose penalties in appropriate cases. There are many circumstances in which discretion to impose a penalty or penalties is likely to be exercised. These include, but are not limited to, where a licensee:
- does not cooperate fully with an audit or investigation;
  - does not comply with orders or directions given by the Commissioner (or a delegate of the Commissioner, including an auditor);
  - engages in meritless dispute of, or delays in paying, amounts found to be owing;
  - engages in any form of fraudulent, deceptive, dishonest or bad faith behavior with respect to compliance with the requirements of the *Act*, the *Regulation* or a licence.
30. In this case, while White Hawk has now brought itself into compliance, the audit investigation results make it clear that between November 1, 2014 and November 1, 2016 White Hawk continually failed to pay the minimum hourly rates required under the *Regulation*. Additionally, the audit shows that White Hawk failed to properly cooperate with the auditor. More specifically the auditor reports that White Hawk often failed to either respond to emails or to provide the information requested and often missed audit deadlines. Such behavior is entirely unacceptable. As well, the audit record demonstrates that prior to November 1, 2016 White Hawk violated the terms of its licence by failing to keep proper records. In these circumstances I find that this is an appropriate case to impose a penalty on White Hawk.
31. In *Smart Choice Transportation Ltd.* (CTC Decision No. 21/2016), I outlined the purpose of the penalties under the *Act* and the factors which will 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;
- 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)

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

- a. White Hawk's failure to pay compliant hourly rates over an extended period of time, which caused financial harm to its drivers.
- b. Had a complaint not been filed with the Commissioner it is entirely possible that White Hawk's failure to pay compliant rates could have gone undiscovered, in which case White Hawk would have become significantly and unjustly enriched.
- c. White Hawk violated its licence by failing to keep proper records. As stated in previous decisions I regard such a failure to be a serious violation of a licensee's obligations under the legislation and the terms of its licence.
- d. White Hawk failed to fully cooperate with the auditor during the investigation. It missed numerous deadlines, and often failed to respond to the auditor's emails or to provide the information requested. This serious misconduct caused the audit to be prolonged and ultimately delayed the payment of monies owing to White Hawk's drivers.
- e. Finally, in my view an administrative penalty is necessary here to deter White Hawk from engaging in this kind of inappropriate and non-compliant conduct and to send a clear message to Licensees in general that such conduct is unacceptable and will not be tolerated.

33. Considering the above, I find that an administrative penalty of \$6,200.00 is appropriate here.

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

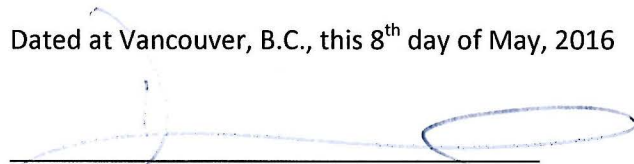
- i. I propose to impose an administrative penalty against White Hawk in the amount of \$6,200.00;

- ii. Should it wish to do so, White Hawk 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 White Hawk provides a written response in accordance with the above, I will consider it and advise White Hawk whether I will refrain from imposing any or all of the penalty.

### Conclusion

35. In summary, the audit revealed that White Hawk owed a total of \$16,469.79 to 12 drivers for the period November 1, 2014 to November 1, 2016, which it paid only after the audit was performed and the auditor calculated that it owed this amount to its drivers. White Hawk failed to cooperate in the audit process by missing several deadlines and by failing to adequately respond in a timely way to auditor email requests. Finally White Hawk failed to keep proper records until November 1, 2016. In the result, and for the reasons outlined above, I have proposed that a \$6,200.00 fine be imposed on White Hawk for its non-compliance with the Act and with the record-keeping requirements of its Container Trucking Licence.
36. By this decision licensees are reminded of the importance of maintaining proper records and of their obligation to fully cooperate in a timely way with OBCCTC auditors. Licensees who fail to fulfill these obligations are in violation of their Container Trucking Licence and the Act and can expect to be penalized.
37. This decision will be delivered to White Hawk and published on the Commissioner's website ([www.obcctc.ca](http://www.obcctc.ca)).

Dated at Vancouver, B.C., this 8<sup>th</sup> day of May, 2016



Duncan MacPhail, Commissioner