OFFICE OF THE
BRITISH COLUMBIA CONTAINER
TRUCKING COMMISSIONER

November 17, 2017

Raja Road Rail Services Ltd.
Trans BC Freightways Ltd.
400 Ewen Avenue
New Westminster, BC V3M 5B2

Raja Road Rail Services Ltd. & Trans BC Freightways Ltd. (CTC Decision No. 27/2017) – Decision Notice

A. Overview

In Raja Road Rail Services Ltd. & Trans BC Freightways Ltd. (CTC Decision No. 27/2017 (the "Original Decision"), I determined that Raja Road Rail Services Ltd. and Trans BC Freightways Ltd. (together, "the Companies") failed to pay five of its company drivers the correct minimum rate required under the *Container Trucking Act* (the "*Act*") and *Container Trucking Regulation* (the "*Regulation*").

Through the audit process it was determined that the Companies paid newly-hired drivers a rate of $25,13 per hour on hire without adequately determining if those drivers were entitled to the higher rate of $26.28 per hour as a result of completing more than 2340 hours of container trucking services for any licensee. The audit found that adjustments totaling $1442.71 were owed to five company drivers.

In the Original Decision I concluded that this was an appropriate case to issue a penalty for the reasons set out in paragraphs 16-19 of the Original Decision. In that regard, I proposed to impose an administrative fine against the Companies in the amount of $500.00. Consistent with s. 34(2) of the *Act* I advised the Companies that I would consider its written response to the proposed penalty if it was received within 7 days.

The Companies have provided a written response within the required time disputing the proposed penalty and providing arguments in support of its position.

B. The Companies' Response

The Companies advance the following arguments in support of their position that the proposed penalty should not be imposed. The arguments can be summarized as follows:

a. The drivers have not been paid incorrectly.
The Companies argue that their drivers were paid an hourly rate of $25.13 on hire because the Companies "did not have any verifiable information" of the drivers' prior experience providing container trucking services for other licence holders.

b. The proposed penalty is disproportionate to the amount found to be owing by the Companies.
The Companies argue that because neither the Companies nor the auditor could prove that its drivers were owed an hourly rate of $26.28 and that the amount found to be owing was small ($1,442.71) this was not an appropriate case to propose a penalty.

c. The Companies did not deliberately intend to defraud its drivers or violate the *Act* and *Regulation*.

C. Consideration of Companies' Response

a. The drivers have not been paid incorrectly.

The Companies argue in their submission that they did not have any "verifiable information" of their drivers' prior experience and that "to the best of their knowledge" their drivers were paid the correct rate.

On September 8th, 2017, the OBCCTC auditor wrote to the Companies, reiterating the position of the OBCCTC established in TMS Transportation Management (CTC Decision No. 06/2016):

> If a company provides evidence satisfactory to the Commissioner's auditor that a company driver has worked less than 2,340 hours for any licensee, audits are done at the $25.13/hour rate for that driver. Otherwise, audits are done to the $26.28/hour rate.

The Companies were advised that the auditor would consider any evidence the Companies' wished to submit, noting that "copies of employment applications may be helpful in establishing prior experience." If evidence was not provided, the auditor advised that all drivers in the audit would have their rate calculated at $26.28 per hour.

On October 2nd, 2017, the Companies provided the auditor with job application forms intended to demonstrate that some of the drivers had worked less than 2,340 hours for any licensee. Upon review, the auditor concluded that the information contained in the job applications satisfactorily demonstrated that five drivers (of the 10 under audit) could be calculated at $25.13. The Companies were not able to provide evidence for the remaining drivers and as such, they were audited at the higher hourly rate.

In this case, the evidence does not support the Companies' position that it did not possess verifiable information regarding driver work history. Indeed, the Companies were ultimately able to supply the auditor with information for a number of drivers. Further, it is not the purview of the Companies to determine the veracity of the evidence provided, rather, Decision No. 06/2016 clearly establishes that it is the purview of the OBCCTC auditor to verify the satisfactoriness of evidence. In this case, the auditor was able to determine that the evidence provided was satisfactory.

The Companies also argue that the drivers were paid the correct rate to the best of their knowledge. Specifically, in a September 8th, 2017 letter to the auditor, the Companies argued the following:

> While we do our due diligence in getting as much information from a driver at the time of application in regards to previous employment and experience in the industry, we can only go by what has been disclosed to us. If they do not disclose their container driving experience that we can verify, we have no way of knowing how long they have been in the industry...

I do not support the claim that a driver's failure to disclose information to a licensee, if that is in fact what occurred, relieves a licensee from their obligation to be compliant with the requirements of the *Act*. In Olympia Transportation (CTC Decision No. 02/2016) and Seaville Transportation Logistics Ltd. (CTC Decision No. 12/2016), the Commissioner has established that:

> The onus to become and remain compliant with the requirements of the *Act* rest entirely with the Licensee. 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.

In circumstances where a licensee pays its drivers hourly rates, the onus is on the Licensee to undertake best efforts to confirm a new-hire's work history for the purpose of compensating the driver the correct hourly rate under the *Act*. It is not unreasonable to expect that a licensee has canvassed a driver's work history upon application; indeed it is generally an accepted hiring practice that employers seek a resume or some accounting of an applicant's prior work history before hire. There is also no reason to assume that upon request, a prospective hire would conceal information about their previous work history for the purpose of ensuring they were paid a *lower* hourly rate.

For these reasons, I am not persuaded to change my conclusion that the Companies failed to pay five of its company drivers the correct minimum rate required under the *Act* and *Regulation*.

b. The proposed penalty is disproportionate to the amount found to be owing by the Companies.

The amount of the proposed fine ($500.00) was determined after applying the relevant penalty quantum factors articulated by Commissioner MacPhail in Smart Choice Transportation Ltd. (CTC Decision No. 21/2016):

1. The seriousness of the respondent's conduct;
2. The harm suffered by drivers as a result of the respondent's conduct;
3. The damage done to the integrity of Container Trucking Industry;
4. The extent to which the Licensee was enriched;
5. Factors that mitigate the respondent's conduct;
6. The respondent's past conduct;
7. The need to demonstrate the consequences of inappropriate conduct to those who enjoy the benefits of having a Container Trucking Services Licence;
8. The need to deter those Licensees from engaging in inappropriate conduct, and
9. Orders made by the Commission in similar circumstances in the past.

While the second factor noted above does compel me to consider the harm suffered by drivers as a result of the respondent's conduct, none contemplate the application of a penalty formula which ties the size of the penalty to the amount of money found to be owing to drivers. Further, the quantum of the amount found to be owing under an audit should not necessarily have a bearing on the size of the proposed penalty; however, I am aware that previous decisions have weighed the size of the non-compliance against the size of the proposed penalty.

For these reasons, I do not find that a $500.00 penalty – the lowest proposed to date – is disproportionate to the amount found to be owing by the Companies. Rather, I consider a fine of $500.00 to be a reasonable sum for the purpose of ensuring that the Companies receive an appropriate deterrent message.

c. The Companies did not deliberately intend to defraud its drivers or violate the *Act* and *Regulation*.

It is at the Commissioner's (or his or her delegate's) discretion to impose penalties under the *Act* for non-compliance including the imposition of an administrative fine. In this case, I am satisfied that a contravention occurred and that the level of the fine is appropriate in the context of the facts.

D. Conclusion

Having considered all of the factors and the submissions advanced by the Companies, I am not persuaded to reduce or refrain from imposing the proposed administrative penalty.

In the result, I hereby order Raja Road Rail Services Ltd. and Trans BC Freightways Ltd. to pay an administrative fine in the amount of $500.00. Section 35(2) of the *Container Trucking Act* requires that this fine be paid within 30 days of the issuance of this Notice. Payment should be made by delivering to the Office of the BC Container Trucking Commissioner ("OBCCTC") a cheque in the amount of $500.00 payable to the Minister of Finance.

Finally, I note that the Companies may request a reconsideration of the Commissioner's Decision by filing a Notice of Reconsideration with the Commissioner not more than 30 days after the Companies' receipt of this Decision Notice. A Notice of Reconsideration must be:

a. made in writing;
b. identify the decision for which a reconsideration is requested;
c. state why the decision should be changed;
d. state the outcome requested;
e. include the name, an address for delivery, and telephone number of the applicant and, if the applicant is represented by counsel, include the full name, address for delivery and telephone number of the applicant's counsel; and
f. signed by the applicant or the applicant's counsel.

Despite the filing of a Notice of Reconsideration, the above order remains in effect until the reconsideration application is determined. This Order will be published on the Commissioner's website.

Dated at Vancouver, B.C., this 17 day of November, 2017.

Michael Crawford, Deputy Commissioner