November 19, 2018

Hutchison Cargo Terminal Inc.
195-4851 Miller Road
Richmond, BC V7B 1K7

Commissioner's Decision
Hutchison Cargo Terminal Inc. (CTC Decision No. 27/2018)

Introduction

1. Hutchison Cargo Terminal Inc. ("Hutchison") is a licence holder 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.

3. In July of 2017, the Commissioner directed an auditor to audit Hutchison's records to determine if its company drivers and independent operators ("I/Os") were being paid the minimum rates required under the *Container Trucking Regulation* (the "*Regulation*"). The auditor was directed to audit the periods November 1-30, 2014 and March 1-31, 2017 (together the "Initial Audit Period").

Initial Audit Period

4. The auditor requested and reviewed relevant records and determined that during the Initial Audit Period, Hutchison employed one company driver and sponsored four I/Os. In the Initial Audit Period, Hutchison did not pay its company driver the minimum hourly rate required under the *Regulation*. It was also determined that Hutchison did not pay its I/Os the correct trip rates required under the *Regulation* during the Initial Audit Period and did not pay the fuel surcharge in March 2017.

5. The auditor also found that two of the four I/Os sponsored by Hutchison during the Initial Audit Period had deductions taken off their pay. When asked for an explanation of the deductions, Hutchison advised the auditor that the drivers were actually company drivers being paid as I/Os. The deductions, it was explained, were made in order to align the driver's trip rate payments to an hourly rate. The auditor spoke with one of the two I/Os in question who corroborated Hutchison's statement that he was in fact a company driver. As a result, the auditor elected to treat the two misclassified I/Os as hourly rate drivers for the purpose of the audit. In these circumstances the auditor's choice makes sense because Hutchison was deducting operating costs (ex. fuel) from the pay of these two drivers.

Expanded Audit Period

6. Having established that Hutchison did not pay its one listed company driver the correct hourly rate during the Initial Audit Period, did not pay two of its sponsored I/Os the correct trip rates and fuel surcharge during the Initial Audit Period, and misclassified its other two I/Os, the auditor expanded the scope of the audit to cover the period from April 3, 2014 to September 30, 2017 (later extended to July 31, 2018) (the "Expanded Audit Period").

7. The auditor directed Hutchison to review its records during the Expanded Audit Period and calculate the amounts owing to all of its drivers. Hutchison reviewed its records and provided the auditor with its calculations, although it did so after the deadline established by the auditor. The auditor reviewed Hutchison's calculations and found that they were insufficient because they did not include all periods and the amounts did not match payroll records. Hutchison was required to redo the calculations and provide them to the auditor by no later than December 5, 2017. Hutchison did not resubmit the calculations by December 5, 2017. On March 7, 2018 the audit was reassigned to another auditor.

8. Hutchison did not resubmit its calculations until July 29, 2018. The auditor, after reviewing the calculations and speaking several times (to several people) at Hutchison, determined that approximately two years of I/O records were missing (September 2014 to September 2017) resulting in incorrect calculations.

9. Hutchison changed presidents after October 2017 (the date upon which an auditor first directed Hutchison to calculate the amounts owing to its drivers for the Expanded Audit Period). When the auditor asked Hutchison why two years of records were missing, Hutchison's new president advised that between the time the audit was initiated in July 2017 and June 2018, the payroll records were removed from storage and could not be located.

10. Hutchison and the auditor were ultimately able to determine that:

- Between April 3, 2014 and October 31, 2017, one company driver was owed $7,790.94. The auditor confirms that Hutchison began paying this driver the correct hourly rate on November 1, 2017;
- Hourly records for one of the misclassified I/Os were only available for the period between August 1, 2017 and July 31, 2018. During this period, this driver was found to be owed $466.67. The auditor confirms that Hutchison began paying this driver the correct hourly rate on November 1, 2017;
- Two I/Os were found to be owed $11,456.23 collectively for the Initial Audit Period and the periods between April 3, 2014 and August 31, 2014 and September 1, 2017 and August 1, 2018. The auditor confirms that Hutchison began paying the correct trip rates and fuel surcharge on August 1, 2018.
- The other misclassified I/O was paid by the trip (with deductions) until Hutchison began paying him the correct hourly rate on August 1, 2018. The auditor was not able to calculate the amount of money owed to this driver because, in addition to the missing records, Hutchison did not track the number of hours the driver worked between April 3, 2014 and July 31, 2018.

11. Hutchison has now paid out those adjustment amounts which were able to be calculated and provided copies of records confirming that the adjustment payments were in fact made as represented.

12. The audit report concludes by noting that effective August 1, 2018, Hutchison has corrected its pay structure and is paying the regulated rates.

Decision

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

a. the Commissioner ordered an audit of Hutchison's company drivers and I/Os;
b. Hutchison failed to pay one company driver the correct hourly rate required under the *Act* and *Regulation* and an adjustment totaling $7,790.94 was owed to the driver;
c. Hutchison failed to pay two I/Os the correct trip rates and fuel surcharge required under the *Act* and *Regulation* and adjustments totaling $11,456.23 were owed to these I/Os;
d. Hutchison misclassified two I/Os and failed to pay one misclassified I/O the correct hourly rate required under the *Act* and *Regulation* and an adjustment totaling $466.67 was owed to that driver;

e. Hutchison was not able to supply records for the period between September 2014 and September 2017 impacting the audit calculations for all Hutchison drivers including the other misclassified I/O;
f. Hutchison missed repeated auditor deadlines to supply records and conduct calculations;
g. Hutchison has accepted the audit results and has paid the amounts which the auditor was able to determine were owed; and
h. Hutchison is now substantially compliant with the legislation.

14. As Hutchison has paid the amounts which the auditor was able to determine were owed and has corrected its payroll practices, there is no need to issue an order pursuant to section 9 of the *Act* requiring the company to pay its drivers in compliance with the legislation.

15. 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.

16. 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.

17. In this case it has been determined that Hutchison failed to comply with the minimum remuneration requirements under the *Act* and *Regulation.* The audit findings indicate that Hutchison owed two company drivers and two I/Os a combined total of $19,713.84 as a result of it failure to pay its company drivers the correct hourly rates and its I/Os the correct trip rates and a fuel surcharge. This amount does not represent the total amount owed by Hutchison to its drivers. The full amount owed by Hutchison is incalculable because Hutchison violated section 25 of the *Act* and Appendix D to Schedule 1 of its Container Trucking Services Licence as it was unable to provide records for each trucker who performed container trucking services on its behalf.

18. As recorded above, Hutchison has conceded its non-compliant behaviors and its failure to pay the required rates. Hutchison is now paying compliant rates and has paid out those adjustments which were able to be calculated by the auditor.

19. Nevertheless, as a holder of a Container Trucking Services Licence, Hutchison is responsible to know its obligations under the *Act* and to pay its drivers compliant rates and keep the required records. This audit makes clear that Hutchison failed to fulfill this obligation. For these reasons, I have concluded that an administrative fine is appropriate here.

20. Regarding the size of the proposed fine, I have decided that an administrative penalty of $20,000.00 is appropriate in this case.

21. In Smart Choice Transportation Ltd. (CTC Decision No. 21/2016), it was noted that "the amount of any financial penalty must be sufficiently large to meet the objective of deterring non-compliance." The significant size of this penalty, particularly given the size of the licensee, reflects the impact of Hutchison's failure to provide records. This failure has resulted in incalculable financial harm to Hutchison's drivers and left unknown the extent to which Hutchison was enriched by its failure to produce records.

22. Further, Hutchison was responsible to know its record keeping requirements under the Container Trucking Services Licence. A licensee's requirement to keep and maintain proper records under Appendix D to Schedule 1 of the Container Trucking Services Licence was addressed in Olympia Transportation (CTC Decision No. 02/2016), MDW Express Transport Ltd. (CTC Decision No. 01/2017), and an August 10, 2016 OBCCTC Record Keeping Requirements Bulletin.

23. It is also possible that Hutchison's failure to produce records was not a result of a failure to understand its record keeping requirements. It is possible that Hutchison's records went missing as a result of actions undertaken by a previous president at Hutchison following receipt of an auditor's initial conclusions. Therefore, the purpose of this fine is also one of general deterrence. It is intended to send a message to licence holders that failure to produce records is not a strategy to be used to mitigate against the amount of money which may be found to be owing under an audit.

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

    a. I propose to impose an administrative fine against Hutchison Cargo Terminal Inc. in the amount of $20,000.00;
    b. Should it wish to do so, Hutchison Cargo Terminal Inc. 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 Hutchison Cargo Terminal Inc. provides a written response in accordance with the above I will consider its response and I will provide notice to Hutchison Cargo Terminal Inc. 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.

25. This decision will be delivered to Hutchison Cargo Terminal Inc. and published on the Commissioner's website (www.obcctc.ca).

Dated at Vancouver, B.C., this 19th day November, 2018.

Michael Crawford, Commissioner