



February 20, 2019

Dentons Canada LLP
20th Floor, 250 Howe Street
Vancouver, BC, Canada
V6C 3R8

Canadian National Transportation Ltd.
17569 104th Avenue
Surrey, BC V4N 3M4

Commissioner's Decision
Canadian National Transportations Ltd. (CTC Decision No. 02/2019)

Introduction

1. Canadian National Transportations Ltd. ("CNTL") 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 January of 2017, the Commissioner directed an auditor to undertake a random audit of CNTL's records to determine if its 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 April 1-30, 2014 and October 1-31, 2016 (together the "Initial Audit Period").

Initial Audit Period

4. CNTL employed one hundred and three (103) I/Os in April 2014 and one hundred and one (101) I/Os in March 2016. Due to the number of sponsored I/Os at CNTL in each of the months of the Initial Audit Period, records for fifteen drivers in each month of the Initial Audit Period were selected for review.
5. The auditor requested and reviewed relevant records and determined that CNTL utilized a pay structure, established by national collective agreement with Unifor 4000, which is a substantially different structure from the rate structure in the *Regulation*.

6. As such, the auditor engaged with CNTL to determine the type of work performed by I/Os at CNTL (in order to determine if that work attracted a regulated rate) and then reviewed CNTL's payment structure and its submissions regarding its payment structure to determine if CNTL remunerates its drivers in a way which meets or exceeds the rates prescribed in the *Regulation*.

CNTL Trucking Services

7. CNTL performs on and off-dock trucking services comprised of the following movements:
- **Retail Containers** – 53-foot containers come into the CN Vancouver Intermodal Terminal (17560 104th Ave.) on rail, are off-loaded and delivered locally by truck. These containers are CN owned and each has container numbers that start with CNRU. This represents the majority of CNTL's work.
 - **Import Containers** – Containers that arrive by ship and have not been loaded direct to rail at a terminal are trucked to the CN Vancouver Intermodal Terminal (17560 104th Ave.) and loaded onto rail.
 - **Export Containers (Refrigerated)** – Refrigerated containers that arrive on rail at the CN Vancouver Intermodal Terminal (17560 104th Ave.), are off-loaded and delivered to a port container terminal. These containers are not owned by CN and are intended for the marine transportation of goods.
 - **Empty Marine Containers** – Marine containers that travel on rail to the CN Vancouver Intermodal Terminal (17560 104th Ave.) and are then emptied and delivered by truck to a private container storage yard.
 - **CN Transload Export Containers** – Lumber and pulp arrive on rail at the CN Vancouver Intermodal Terminal (17560 104th Ave.). The lumber and pulp are transferred from the rail cars to marine containers that are then trucked to port terminals.
 - **Empty Chassis** – Any trips that involve the movement of an empty chassis. These moves are recorded by CNTL as "CNRZ" on the Statement of Account (Move Details) Reports.
 - **Bob-Tail** – Any trips that involve the movement of a truck with no chassis attached.

CNTL Trucking Rates

8. Under the CNTL/Unifor 4000 collective agreement, CNTL pays its I/Os on a per trip basis using its own, zone-based, trip rate table. I/Os are paid for each trip performed. A trip includes the movement of containers as well as bob-tail and empty chassis moves.
9. In addition, CNTL pays its I/Os an average fuel subsidy of 21% and makes wait time payments to its I/Os for each trip. These payments equate to one hour and fifteen minutes of wait time payment when a driver is at a port terminal and one hour and fifteen minutes of wait time payment when a driver is at the CN Vancouver Intermodal Terminal.

CNTL's Initial Submission Regarding its Remuneration Structure

10. It is CNTL's position that when wait time payments, fuel subsidies and empty chassis/bob tail move payments are added to its trip rates, the total amount often exceeds the regulated rates. CNTL also takes the position that when its payment structure is compared with the regulated rates in this manner, its drivers are often paid more than the regulated rates and therefore a comparison should be made which offsets average per trip underpayments with per trip overpayments.
11. CNTL also argues that when comparing its remuneration structure with the regulated rates, trips to and from the CN Vancouver Intermodal Terminal, at 17560 104th Ave., should price in the regulated "Surrey North" zone and not in the regulated "Port Kells" zone as per the Commissioner's July 4, 2016 Bulletin which places the CN Vancouver Intermodal Terminal in the "Port Kells" zone.

OBCCTC Audit Calculation Procedure

12. The OBCCTC auditor discussed the type of work performed by I/Os at CNTL and raised CNTL's submissions on this with the OBCCTC prior to conducting calculations for the Initial Audit Period.
13. After consideration of CNTL's submissions on the types of work performed, the OBCCTC directed the auditor to conduct the initial audit calculations in the following manner:
 - The movement of retail containers was not to be considered container trucking services for the purpose of the audit as it represents the movement of containers which are not furnished or approved by an ocean carrier for the marine transportation of goods;
 - The movement of empty overseas containers was not considered to be container trucking services for the purpose of the audit because it was determined that these moves were associated with a movement of a container by rail and therefore were not off-dock moves directly related to regulated on-dock moves;
 - Import container movements and export refrigerated container movements were considered container trucking services for the purpose of the audit as they are on-dock movements;
 - Empty chassis and bob-tail trip payments were added to CNTL's trip rate payment when they could be associated with a container trucking services move;
 - CNTL wait time payments were also calculated as part of CNTL's trip rate as CNTL pays its drivers after 15 minutes at all locations, as opposed to the wait time payments made by port terminals to licensees which only pay drivers wait time at port terminals after 90 minutes and do not provide any wait time payment for the CN Terminal;
 - CNTL's average fuel subsidy was also added to CNTL's trip rate. The fuel surcharge payment requirement was included in CNTL's base rate calculation because the fuel surcharge that CNTL pays is higher than the regulated fuel surcharge and was being applied by CNTL to a base rate which is substantially different from the regulated trip rate;
 - After the bob-tail/empty chassis payments, wait time payments and fuel payments were added to CNTL's trip rate, this amount was then compared to the combined, regulated fuel surcharge and trip rate to determine instances of underpayment or overpayment;

- For the purpose of comparing trip rates, the CN Vancouver Intermodal Terminal facility at 17560 104th Ave was determined to be located in the regulated “Port Kells” zone; and
- Underpayments were not offset with overpayments when conducting the calculations.

14. The reasons for the Commissioner’s decision to uphold the July 4, 2016 Bulletin regarding the location of the CN Vancouver Intermodal Terminal were outlined in a letter to CNTL which is repeated, in part, below:

The July 4, 2016 Bulletin was issued in response to questions which were raised about the correct rate to be quoted for trucking services provided to and from the CNTL facility. In response to these queries, the former Commissioner examined the rate table/zone descriptions in order to determine whether the CNTL facility was located in the South Surrey or the Port Kells zone under the *Regulation*. The North Surrey zone, as detailed in the *Regulation*, is substantially farther away from the CNTL facility than either the South Surrey or Port Kells zones and therefore not a logical zone in which to designate the CNTL facility.

Before making a decision to designate the facility in the Port Kells zone, the Commissioner considered other factors including:

- Historic audits undertaken by previous auditing programs that utilized Port Kells as the CNTL facility zone;
- Historical treatment of the CNTL facility as being in the Port Kells zone (including in the Joint Action Plan 2014); and
- The on-dock trip rates under the *Regulation* which reflect the distance and time to drive between the CNTL facility and container terminals. It was determined that applying a North or South Surrey trip rate would result in an unreasonable decrease in the rate which would not reflect the cost in time and distance travelled to provide container trucking services between CNTL’s facility and major container terminals.

For these reasons a determination that the CNTL facility should be designated as being in the Port Kells zone was made and I am not inclined to revisit that decision.

Further, I note that each licensed company that provides container trucking services to and from CNTL’s facility has had those moves audited on the basis that the moves originated or concluded in the Port Kells zone. This has included all moves which occurred between April 3, 2014 and present. I do not intend to treat CNTL differently.

Initial Audit Period Findings

15. The auditor determined that during the Initial Audit Period, CNTL paid, in some instances, rates which were equal to or greater than the regulated trip rates and in other instances did not pay rates equal to or greater than the regulated trip rates. As the auditor did not use overpayments to offset underpayments, the auditor concluded that CNTL did not always pay its I/Os the regulated trip rates during the Initial Audit Period.

16. Having concluded that CNTL did not always pay its I/Os the regulated trip rates during the Initial Audit Period, the auditor expanded the scope of the audit to cover the period from April 3, 2014 to June 2, 2018 (the "Expanded Audit Period").
17. The auditor directed CNTL to review its records during the Expanded Audit Period and calculate the amounts owing to all of its drivers based on the auditor's calculation method used in the Initial Audit Period audit.

CNTL's Further Submission Regarding its Remuneration Structure

18. CNTL provided calculations to the auditor for review. The auditor reviewed CNTL's calculations and determined that CNTL utilized the Port Kells zone rate when conducting its calculations as per the Commissioner's directions but did not perform its calculations in a manner which was generally consistent with the auditor's methodology.
19. During the Initial Audit Period audit, each container trip undertaken by a CNTL driver was reviewed by the OBCCTC auditor to determine if bob-tail or empty chassis trips were performed before or after the trip in question. If a bob-tail or empty chassis trip did take place, the auditor then added CNTL's bob-tail or empty chassis trip rate to its container trip rate (which also includes a wait time payment and fuel surcharge payment) and then compared that total to the regulated rate plus the regulated fuel surcharge percentage.
20. In its calculations provided to the auditor, CNTL elected to combine each payment made to a driver (this includes the trip rates, bob-tail and empty chassis rates and wait time payments). CNTL then added each payment to reach a total payment for the year, and then added an additional 21% fuel surcharge payment. This total amount was compared to what a driver should have been paid under the *Regulation* (the sum of the regulated rate payment for a trip performed plus the regulated 2% fuel surcharge).
21. Based on this approach, CNTL calculated that it overpaid its drivers in each year reviewed, for a total overpayment of \$2,273,183.88 during the Expanded Audit Period. CNTL reached this conclusion because there is no specific regulated rate for bob-tail and empty chassis moves but CNTL had been paying for those moves where they occurred. As a result, CNTL calculated that it overpaid in each instance where it paid for bob-tail and empty chassis moves. These overpayments were then offset by CNTL against the instances where a base trip rate plus wait time payment was made that did not meet or exceed the regulated trip rate.

Decision

22. As described above, the circumstances of this audit are that:

- a. The Commissioner ordered an audit of CNTL's I/Os;
- b. CNTL utilizes a pay structure that is substantially different in structure from the rate structure in the *Regulation*;
- c. CNTL's pay structure was reviewed to determine if CNTL remunerates its drivers in a way which meets or exceeds the rates prescribed in the *Regulation*;
- d. The auditor reviewed CNTL's records and determined that CNTL did not always pay its I/Os the regulated trip rates during the Initial Audit Period; and
- e. CNTL conducted its calculations in accordance with OBCCTC direction regarding the Port Kells zone.

23. CNTL is a licence holder, and 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 of the *Act* for those container trucking services. Therefore, each licence holder's payment structure is measured against the *Regulation* to ensure compliance through audits which apply a "meet or exceeds" test. To rule that CNTL's compensation meets or exceeds the regulated rates, I must agree with CNTL's calculations and allow CNTL to offset underpayments with overpayments.

24. In this case, the audit method dictates whether overpayments or underpayments occurred. When each of CNTL's payments (wait time, fuel and bob-tail/empty chassis) are combined and then compared to the regulated trip rate, there are instances of overpayment and underpayment. CNTL's position is that, if this approach is to be followed, instances of underpayment should be offset by bob-tail and empty chassis payments that should be considered overpayments because the *Regulation* does not require a bob-tail and empty chassis payment. Fundamental to CNTL's argument is the principle that its compensation meets or exceeds the regulated rates because CNTL, under its collective agreement, makes extra payments that are not required under the *Regulation*.

25. Generally speaking, licence holders have not been permitted to off-set underpayments with overpayments where the underpayments and overpayments were each clearly identifiable and comparable to the regulated rates.¹ In this case, the vastly different nature of CNTL's rate structure as compared to the regulated rate structure makes direct comparisons to the regulated rates difficult.

26. As set out above, CNTL compensates its drivers under a different model. It compensates for wait-time and the regulated fuel surcharge differently. I also note that there is no specific bob-tail and empty chassis rate in the *Regulation*, and while it is commonly accepted within the industry that the regulated trip rates are blended to include a price for bob-tail and empty chassis moves, the exact percentage of the regulated trip rate which accounts for bob-tail and empty chassis moves is not clear. Given the difficulty in comparing the regulated blended rates with CNTL's unblended rates, and in recognition that there is no clearly articulated bob-tail and empty chassis rate in the *Regulation*, I am inclined to accept that CNTL's compensation meets or exceeds the regulated rates

¹ See Lower Mainland Fast Freight Inc. (CTC Decision No. 07/2018) – Decision Notice

and fuel surcharge. This finding is also consistent with the remedial purpose of the legislative scheme, which I describe below.

27. One of the underlying purposes of the *Act and Regulation* is to stabilize the drayage industry in British Columbia. More specifically, the legislative goals are to prevent trucking companies from underpaying drivers. Undercutting of drivers' rates of pay, along with other reprehensible and wide-spread activity by trucking companies (the historical mistreatment of drivers, including but not limited to harassment, threats and intimidation, and forced under-the-table re-payment of driver remuneration back to trucking companies), is what led to unrest in the industry and then ultimately to driver initiated work stoppages at the ports, which crippled the drayage industry multiple times in British Columbia. This situation gave rise to the current legislative and licencing scheme, which has resulted in no work stoppages since its inception in 2014.
28. CNTL operates under a national rather than provincial collective agreement which was in place when the *Act and Regulation* were introduced. CNTL and its drivers were not involved in the work stoppages that led to the introduction of the legislative scheme, and have never indicated that the historical issues which gave rise to any work stoppages were a factor for them. To date, CNTL truckers have never made complaints to the OBCCTC regarding their remuneration, and Unifor 4000 has, on behalf of its members, indicated its satisfaction with the current compensation under the CNTL collective agreement.
29. On the basis of the facts noted above, I accept CNTL's method of calculation in this instance and find that CNTL's overall compensation meets or exceeds the regulated rates. However, I must caution that this decision should only be viewed within the context of this audit and the unique factors and circumstances which were considered in reaching this decision. CNTL drivers are remunerated under a national collective agreement which is the only one of its kind amongst licence holders. Further, I find that the remedial goals and substance of the legislation are globally fulfilled on the unique facts in this case.
30. I re-iterate that this is a unique case. The container trucking industry should not necessarily use these findings as a model or basis for any future collective agreement negotiations or pay structures, as my conclusions here are confined to the reasons noted above and to the specific facts in this case.
31. This decision will be delivered to Canadian National Transportations Ltd. and published on the Commissioner's website (www.obcctc.ca).

Dated at Vancouver, B.C., this 20th day February 2019.



Michael Crawford, Commissioner