



May 13, 2019

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

Commissioner's Supplemental Decision Hutchison Cargo Terminal Inc. (CTC Decision No. 04/2019)

Introduction

1. In Hutchison Cargo Terminal Inc. (CTC Decision No. 27/2018) (the "Original Decision") it was determined that Hutchison Cargo Terminal Inc. ("Hutchison") failed to pay its drivers the correct hourly rate, trip rate and fuel surcharge required under the *Container Trucking Act* (the "Act") and *Container Trucking Regulation* (the "Regulation"). It was also determined that Hutchinson had misclassified two I/Os under its Licence, including one driver who was being paid as an I/O despite being a company driver. (Hutchison corrected the pay scheme for this driver on August 1, 2018.) Further, Hutchison was not able to supply records for the period between September 2014 and September 2017, thus impacting the audit calculations for all Hutchison drivers. Hutchison also missed repeated auditor deadlines to supply records and conduct calculations.
2. A penalty of \$20,000.00 was proposed in the Original Decision and, following a written response from Hutchison setting out why the proposed penalty should not be imposed, a Decision Notice was issued on December 4, 2018 (Hutchison Cargo Terminal Inc. (CTC Decision No. 27/2018 – Decision Notice) (the "Decision Notice") in which Hutchison was ordered to pay an administrative fine in the amount of \$20,000.00. Hutchison had 30 days from the issuance of the Decision Notice to pay the penalty. Hutchison did not pay the penalty within 30 days.
3. Following the issuance of the Original Decision, an Office of the BC Container Trucking Commissioner ("OBCCTC") auditor was contacted by a Hutchison driver who had been paid as an I/O (the "Complainant"). The Complainant advised that he would be able to provide records which could be used to calculate monies owed to him by Hutchison for the period between January 1, 2016 and August 31, 2018. Specifically, the Complainant used daily vehicle inspection reports to determine the hours he had worked each day. These hours were then multiplied by the applicable hourly rate to determine the amount he would have received had he been paid appropriately. The Complainant compared his take home amount to this amount and claimed that a total of \$28,931.15 was owing to him.
4. These calculations were reviewed by the OBCCTC auditor and, on January 28, 2019, Hutchison was sent a copy of the calculations for review and comment. Hutchison was also advised that the Decision Notice order (to pay the administrative fine) would be suspended until such time as Hutchison had provided a response to the Complainant's calculations.
5. Hutchison replied on February 11, 2019. It argued that there were inconsistencies between the

Complainant's recorded hours and Hutchison's records. In support of its argument, Hutchison provided calculations for the month of October 2017 which used port entry receipt records and container yard interchange records intended to demonstrate that the Complainant's version of the number of hours worked in October 2017 was incorrect.

6. The OBCCTC auditor reviewed Hutchison's calculations and, on February 14, 2019, I wrote to Hutchison and advised the following:

During this Office's audit process, Hutchison informed the auditor that no information was available to accurately calculate the number of hours worked by [the Complainant]. Hutchison has now utilized port entry receipt records and container yard interchange records to calculate what it says is more accurately owing to [the Complainant] for work in October 2017 which, Hutchison argues, demonstrates that [the Complainant] has supplied fraudulent records to the Office of the BC Container Trucking Commissioner.

Hutchison has not, however, demonstrated that [the Complainant's] records are fraudulent. As noted in Pro West Trucking (CTC Decision No. 06/2017) the hours for which a driver is to be compensated at the regulated hourly rates are not limited to the time a company driver spends actually transporting a container by a truck. Rather, "container trucking services" for the purposes of section 13 of the *Container Trucking Regulation* includes services directly relating, or ancillary to, the transportation of a container by a truck. This includes pre and post trip inspections, bob-tail and empty chassis moves and the movement of containers by a truck within a yard or facility.

In addition to explaining why the information used in Hutchinson's October 2017 calculations was not provided during the initial audit, I require Hutchison to provide evidence that its determination of time/hours worked by [the Complainant] is based upon records such as trip sheets/time sheets or log books which can demonstrate the total number of actual hours [the Complainant] performed container trucking services in October 2017 rather than drive time estimations and facility entry/exit times.

7. Hutchison was given seven days to reply. Hutchison replied within the allotted timeframe but did not explain why the information used in Hutchinson's October 2017 calculations was not provided during the initial audit. Nor was Hutchison able to demonstrate the total number of **actual** hours the Complainant performed container trucking services in October 2017. Rather, Hutchison claimed that the Complainant inflated his hours for the purpose of his calculation and provided documents in support of three arguments intended to demonstrate that the Complainant's calculations were incorrect:

1. Hutchison undertook a review of the trips performed by the Complainant in October 2017 and between January and August 2018. Hutchison allotted an average number of hours worked per trip then multiplied the number of trips performed by the average hours per trip. Using this estimation method, Hutchison argues that the Complainant inflated his hours.
2. Hutchison supplied a repairs and service invoice showing that the Complainant's truck was in the shop on one of the days that he claims to have worked 8 hours.

3. Hutchison claimed that the Complainant does not work after 1pm each day and supplied March 2019 port reservation records intended to demonstrate that the Complainant would likely have finished work earlier than he stated in his calculations.
8. Based upon this evidence, Hutchison asked that the Complainant's records be disregarded by the OBCCTC, the supplemental audit be set aside, and the Commissioner revert to the Original Decision.
9. The OBCCTC auditor reviewed Hutchison's reply and calculations, discussed them with the Complainant and submitted a supplemental audit report. In response to Hutchison's allegation, the Complainant argued that he had no reason to inflate his hours as he was being paid by the trip at the time he was preparing the daily vehicle inspection reports that he used to base his calculations on.
10. The Complainant also stated that he typically drops his truck off for repairs and maintenance on a Friday after he has completed his trips and the repairs are done over the weekend, so he can pick the truck up in time to work Monday morning. Therefore, his truck was not in the shop on the day Hutchison claimed he lied about hours worked. The OBCCTC auditor phoned the company that performed the repairs and the owner stated that the driver did drop off the truck late in the day on Friday, January 18, 2019 and the repairs were done the following day.
11. The auditor also submitted the following analysis comparing the Complainant's calculations with Hutchison's calculations on a random sample of days:

March 5, 2018

7:45am – left South Surrey Yard to CP Raul to pick up a loaded container at CP

8:15am – Arrive at CP Rail pick up container, drops container at Hutchison yard

11:00am – Reservation at Vanterm to pick up loaded container, drops that container and chassis in Delta, returns to yard

Auditor analysis:

Hutchison claims that after the last container was dropped in Delta that the Complainant would be finished work at 12:30ish. The Complainant's inspection report says he started at 7:45am so the Complainant and Hutchison agree on the start time. The Complainant says he finished his day at 3pm and Hutchison says it would have been closer to 12:30pm after his last trip was completed and he returned his truck to the yard.

August 7, 2018

8:00am – left South Surrey yard to Delta Port

9:00am – Reservation at Delta Port to pick up loaded container

10:00am – Arrive at BBY North location, live unload

10:45am – leave BBY north to TDK (Annacis Island) to return empty container

11:45 am – Arrive at TDK and drop empty container, returns to yard.

Auditor analysis:

Not exactly sure how long it would take him to drop container at TDK and return to yard in South Surrey but Hutchison says the Complainant would have been done around 12ish (that doesn't seem possible). The Complainant says he started work at 7am and worked till 3:15pm (3:15pm would be

longer than I would expect it would take to drop the container and return to yard).

August 13, 2018

7:00am – Leave South Surrey yard and headed to Vanterm

8:00am – Reservation at Vanterm to pick up loaded container, drops container in BBY North

10:30am – Reservation at Centerm to pick up loaded container

11:30am –South Surrey to drop container and return to yard

Auditor analysis:

The Complainant was dropping the container in South Surrey which is also where the yard is so I would not expect it to take him long to drop and return to yard. Hutchison says he would have finished around 11:30am (not realistic as the Complainant would have to return to yard after drop). The Complainant says he finished at 2:15pm (I don't see it taking that long).

12. Ultimately, the auditor's findings were inconclusive. The auditor notes that, while it is impossible to determine for certain how many hours of work would be required to perform 2-3 trips, it is reasonable to assume that due to the locations frequently visited by the Complainant, that his work days would have been less than the average 8 hours work day he claims to have worked. This conclusion is support by the analysis above which suggests that Hutchison underestimated times but that the Complainant also overstated hours.

Investigation

13. During the preparation of the auditor's supplemental report, the Complainant alleged that Hutchison had violated section 28 of the *Act* by asking the Complainant to advise the OBCCTC that the hours he reported were inaccurate.
14. Therefore, an OBCCTC investigator was instructed to interview the Complainant on March 14, 2019. In his statement, the Complainant alleged that Hutchison's president asked him on three occasions to withdraw his compensation claim with the OBCCTC and advise the Commissioner that he had lied in previous statements to the OBCCTC. The Complainant also alleged that Hutchison reduced his hours of work without explanation and was only offering night work (which the Complainant is unable to perform).
15. A copy of the investigation report was provided to Hutchison for response on April 17, 2019. Hutchison agrees that its president spoke with the Complainant and states that the Complainant admitted to the president that he provided inaccurate calculations of hours worked to the OBCCTC. Because the Complainant allegedly admitted to providing fraudulent calculations to the OBCCTC, Hutchison asked the Complainant why he was filing the claim. Hutchison states that the Complainant did not provide a response to this query. Hutchison also states that the president did not speak to the Complainant about these issues on three occasions as the Complainant suggests.
16. Hutchison provided evidence from its dispatcher that the Complainant had been receiving work consistent with the amount and type of work being provided to all Hutchison drivers and that on several occasions the Complainant had declined dispatch. Hutchison also demonstrated that the Complainant had, on occasion, not received work because the only available work was during afternoon hours when the Complainant was not available. It is Hutchison's position that, at no time,

did the president instruct Hutchison staff to reduce the Complainant's work load or change the nature of his dispatch.

Complaint #2

17. Following the submission of the auditor's supplemental report and during the period in which the OBCCTC was conducting its investigation into Hutchison's alleged violation of section 28 of the *Act*, the OBCCTC auditor was contacted by another Hutchison driver ("Complainant 2") who enquired as to why he had not received a cheque for back pay as a result of the OBCCTC's audit and noted that Hutchison's payroll was often delayed in violation of section 24 of the *Regulation*.
18. In response, the auditor queried Hutchison about Complainant 2's missing pay and about Hutchinson's payroll practices. Hutchison advised that Complainant 2 was not working for the company in either of the OBCCTC's two initial audit periods and was therefore overlooked when it came time to complete the outstanding pay calculations for the OBCCTC because Hutchison only conducted pay calculations for the drivers in the initial audit. Hutchison also recognized that its payroll processes had been delayed in violation of section 24 of the *Regulation*.
19. Hutchison was instructed to provide the necessary payroll records so that the auditor could calculate the amount outstanding to Complainant 2. Hutchison did so, and the auditor concluded that Complainant 2 was owed \$1,744.85 due to an incorrect fuel surcharge calculation. The auditor reports that Hutchison has corrected its fuel surcharge calculations and paid the money owed to Complainant 2. Hutchison also confirmed that, effective May 1, 2019, its payroll processes had been corrected to ensure compliance with the *Regulation*.

Decision

20. In the Original Decision it was determined that Hutchison failed to pay its drivers the correct hourly rate, trip rates and fuel surcharge required under the *Act* and *Regulation*, misclassified two I/Os under its Licence, did not supply records for the period between September 2014 and September 2017 and missed repeated auditor deadlines to supply records and conduct calculations. Hutchison was ordered to pay an administrative penalty of \$20,000.00. The order was suspended pending the outcome of a subsequent audit which was conducted in response to the submission of records by the Complainant.
21. The Complainant provided the OBCCTC with a set of records intended to demonstrate that \$28,931.15 is owed to him for the period between January 1, 2016 and August 31, 2018. Hutchison was given an opportunity to respond to the Complainant's calculations. In the absence of time sheets which accurately demonstrate the Complainant's hours performing container trucking services for Hutchison, both the Complainant and Hutchison have submitted a series of documents and arguments in support of their calculations. The OBCCTC auditor has reviewed these documents and has been unable to reach a definitive conclusion regarding the veracity of each party's arguments.
22. The Complainant bases his claim on an estimation of hours worked using daily vehicle inspection reports to tally start and finish times and argues that he had no reason to inflate his hours because he was being paid by the trip when he was preparing the daily vehicle inspection reports that he

used to base his calculations on. I accept that there would have been little reason to falsify daily inspection reports when being paid by the trip but that does not mean the reports are an accurate reflection of the hours worked.

23. Certainly, Hutchison has demonstrated through documents showing container transaction times that the Complainant did not always work full days and the Complainant's trip sheets indicate many days performing 2-3 trips which would not always take 8 or more hours to perform based upon the estimated distances involved in the sample trips reviewed and the Complainant's own restrictions on the hours he can work. On the other hand, Hutchison's claim that the driver was inflating hours on Friday, January 18, 2019 when he recorded that he was working rather than having his truck at a shop for repair can be dismissed on the basis of the auditor's findings that the truck was not in the shop at that time.
24. In addition, an allegation made by the Complainant against Hutchison was investigated by the OBCCTC. The Complainant alleges that Hutchison asked the Complainant to advise the OBCCTC that the hours he reported were inaccurate, reduced his hours of work without explanation and was only offering night work (which the Complainant is unable to perform). In response, Hutchison has provided a statement from its dispatcher with supporting documentation refuting the claim that Hutchison intentionally reduced or changed the Complainant's hours of work. Hutchison also states that the Complainant admitted that the hours on the daily reports used by the Complainant to calculate hours worked do not represent actual hours worked.
25. This case illustrates the importance and purpose of the record keeping requirements of the *Act* and Licence. The collection and retention of records for each trucker which accurately accounts for the hours worked or trips completed by each trucker performing container trucking services is vital to the effective enforcement of the legislative scheme. Licensees are required to keep such records and have been penalized for failure to do so. Drivers, while not required by law to keep similar records, are encouraged to keep separate records of hours worked or trips performed in the event a driver's remuneration is in dispute.
26. In this case, neither the licensee or Complainant kept records which could clearly identify the hours during which the Complainant performed container trucking services, and both are depending on ancillary records and estimations in their calculations. Neither parties' evidence or submissions are sufficient to conclude with certainty the number of hours the Complainant performed container trucking services during the period in question and each party presents a contrary set of facts and claims which cannot be substantiated. For this reason, I cannot agree with the Complainant's submission that he is owed \$28,931.15 for the period between January 1, 2016 and August 31, 2018.
27. Further, I do not find that Hutchison violated section 28 of the *Act*. While there is no question that Hutchison and the Complainant discussed the Complainant's calculations on more than one occasion, there is no evidence to suggest that Hutchison mistreated the Complainant because of his complaint. Records indicate that the Complainant continues to receive a reasonable amount of work based upon his availability and the requirements of Hutchison's business. Finally, I record that Hutchison has amended its payroll practices and brought itself into compliance with respect to Complaint #2.

28. In the Decision Notice, Hutchison was ordered to pay an administrative fine in the amount of \$20,000.00 for failure to pay its drivers the correct hourly rate, trip rates and fuel surcharge required under the *Act* and *Regulation* and for misclassification of two I/Os under its Licence. The administrative fine also addresses the fact that Hutchison was not able to supply records for the period between September 2014 and September 2017, thus impacting the audit calculations for all Hutchison drivers. Hutchison also missed repeated auditor deadlines to supply records and conduct calculations. Here, I reaffirm the findings of the Original Decision and once again stress that a licence holder's failure to produce records is not a strategy to be used to reduce the amount of money which may be found to be owing under an audit. I also note that Hutchison failed to pay the administrative fine ordered in the Decision Notice within the required time period. For this reason, I hereby order Hutchison Cargo Terminal Inc. to pay an administrative fine in the amount of \$30,000.00.
29. 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 \$30,000.00;
 - 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.
30. This decision will be delivered to Hutchison Cargo Terminal Inc. and may be published on the Commissioner's website (www.obcctc.ca) after Hutchison Cargo Terminal Inc.'s response period has closed.

Dated at Vancouver, B.C., this 13th day of May, 2019



Michael Crawford, Commissioner