



November 19, 2019

Gulzar Transport Inc.
Unit # 7 – 8760 River Road
Delta, BC V4B 1B5

Jet Speed Transport Inc.
Unit # 7 – 8760 River Road
Delta, BC V4B 1B5

Commissioner's Decision

Gulzar Transport Inc. and Jet Speed Transport Inc. (CTC Decision No. 12/2019)

Introduction

1. Gulzar Transport Inc. ("Gulzar") and Jet Speed Transport Inc. ("Jet Speed") (together, "the Companies") are each separate licence holders within the meaning of the *Container Trucking Act* (the "Act"). Gulzar has 45 truck tags allocated to its licence which are assigned under its licence to trucks driven by either independent operators ("I/O") or directly employed operators ("company drivers"). Jet Speed has 23 truck tags allocated to its licence which are assigned under its licence to trucks driven by company drivers. Drivers at the Companies work interchangeably for both companies and are paid by both companies. The Companies perform container trucking services and non-container trucking services.
2. Under sections 22 and 23 of the *Act*, minimum rates that licensees must pay to truckers who provide container trucking services are established by the Commissioner, and a licensee must comply with those 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.

3. 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.
4. On July 18, 2018, the Commissioner directed an auditor to audit Gulzar's records to determine if its I/Os and company drivers were being paid the minimum rates required under the *Container Trucking Regulation* (the "*Regulation*"). On August 2, 2018, the Commissioner also directed an auditor to audit Jet Speed's records to determine if its company drivers were being paid the minimum rates required under the *Regulation*.

5. The auditor was directed to audit the Companies' June 2018 payroll records (the "Initial Audit Period") to ensure that the Companies had changed their pay structures following an increase to the legislated rates which occurred in June 2018.

Initial Audit Period

6. The auditor requested and obtained driver pay statements, cancelled cheques, pay stubs and driver logbooks which appeared to demonstrate that during the Initial Audit Period, the Companies paid their company drivers hourly rates consistent with the *Regulation*. Specifically, the records indicated that Gulzar employed 46 company drivers in June 2018 who were paid hourly rates apparently consistent with the *Regulation* and Jet Speed employed 19 company drivers in June 2018 who were also paid hourly rates that appeared to be consistent with the *Regulation*. Gulzar also sponsored one I/O in June 2018 whose records were also reviewed and who was paid trip rates consistent with the *Regulation*.

Record Seizure

7. To confirm the Companies' compliance, the auditor contacted drivers on the list of company drivers that Gulzar had provided as part of the initial audit record request. One driver who spoke to the auditor informed the auditor that he was not a company driver as indicated by Gulzar under his licence. He said that instead he was an I/O who owned his own truck and was paid by the trip, not by the hour as indicated by Gulzar in the records provided to the Office of the BC Container Trucking Commissioner ("OBCCTC"). The driver (the "Complainant") provided the auditor with numerous payroll records and documentation to support his claim.
8. The records provided by the Complainant to the auditor showed evidence of a "three-pay cheque system" at Gulzar. The Complainant's first two pay cheques in a month were consistent with the two pay cheques an hourly paid company driver in the industry would receive in a month, including vacation pay, CPP and income tax withholdings. The auditor also determined that these two pay cheques had been included in the Companies' payroll records, supplied by Gulzar, following the OBCCTC's initial audit record request.
9. The third pay cheque provided by the Complainant was not included in the payroll records that Gulzar provided during the audit. The Complainant stated that the third cheque included with it a reconciliation that listed what he was owed for work he had performed on a per trip, as opposed to an hourly, basis less money he had already received and less the costs of insurance, rent, and fuel.
10. The auditor showed the Complainant logbooks provided by the Companies to the OBCCTC following the initial audit record request (June 2018 logbooks). The Complainant reviewed them and stated that he believed that they were forged. The Complainant provided copies of alternate June 2018 log books which recorded truckers having worked more hours than the number shown in the logbooks the Companies had provided.

11. The auditor advised the OBCCTC of this and, on August 25, 2018, OBCCTC investigators entered the Companies' office and removed ten (10) boxes of payroll records, including records of the Complainant.

Record Review

12. The auditor reviewed the records seized by the OBCCTC investigators. The records consisted of ten driver binders. The binders typically included a monthly payroll reconciliation as well as driver timesheets from January 2018 to July 2018, but not all seven months were not included in each binder.
13. One of the binders consisted of the Complainant's records which included the reconciliation document that the Complainant had referred to when initially speaking with the auditor (the "payroll reconciliation"). The binder also included timesheets for the Complainant which were not provided to the OBCCTC by the Companies as part of the Initial Audit Period record request. The timesheets in the Complainant's binder had I/O trip rates written beside each trip. A fuel deduction was shown on the Complainant's payroll reconciliation but there was no evidence in the records of a fuel surcharge payment made to the Complainant.
14. The auditor conducted an audit of the trip rates that applied to the trips on the Complainant's April 2018 timesheets (the timesheets supplied by the Complainant were cross referenced against the timesheets seized) and found that Gulzar did not pay the correct trip rates to the Complainant resulting in an underpayment of \$406.80 in April 2018.
15. Included in the records obtained by the investigators were packages of driver logbooks by payroll period. Included at the front of some the packages were excel spreadsheets (referred to as a "payroll summary"). The payroll summaries included the following:
 - Unit #
 - Date
 - Driver's name
 - Company
 - Start time
 - Finish Time
16. The auditor found, in multiple instances, two sets of log books for various days in a payroll period. One set of log books, included at the end of each package, appeared to be written by a different person than the other set of log books. Otherwise, the auditor reported that the two sets of log books differed only in the number of hours worked. On occasion, a payroll summary used the log book with fewer hours (indicating the driver had been underpaid) but other times the payroll summary used the log book with more hours. The log books with more hours did not have more trips. Rather, the time recorded as "on duty" time was extended.
17. One set of driver records seized had duplicated timesheets for each day the driver had worked in the August 1-15, 2018 period. In this case, the hours on the driver's payroll summary matched the logbook with fewer hours. As the auditor did not have access to pay stubs for this driver, she was

not able to match the payroll summary to the driver's pay stub to determine what he actually received in pay. The driver's payroll summary also had a sticky note attached that read: "Make sure all logs are in accordance to email...Change all logs..."; the note was then signed with initials that appear to read "RS".

18. Another driver's binder included timesheets for April 1-15, 2018. This was of particular interest to the auditor as the Companies had only supplied log books (not timesheets) to the OBCCTC following the initial audit record request.
19. In this case, the auditor attempted to match the hours on this driver's timesheets to his payroll summary, but they did not match. Hours on this driver's log books did not match the hours on his payroll summary either. There were, however, four duplicate log books for April 3, 7, 11 and 12, 2018. The hours used on the payroll summary were from the log books with more hours.
20. The auditor also notes that when the trip rates written on this driver's timesheets were tallied, they matched the gross pay the driver received on his pay stub, demonstrating that the driver was being paid by the trip not by the hour.
21. Finally, the auditor questioned why drivers had been recording container trucking services performed on log books from a company call Triple S Logistics.

Supplementary Record/Information Request

22. Following the auditor's review of the seized records, on November 19, 2018, the OBCCTC wrote to the Companies, requesting further records and audit information. Specifically, the OBCCTC asked the Companies to:
 - Provide proof of purchase documents demonstrating that the Companies own the trucks driven by the employees and listed being company trucks under the Companies' CTS Licences;
 - Explain what appears to be the Companies' use of a three-pay cheque system to pay drivers, including an explanation of the purpose of the third pay cheque and why it was not included in the Gulzar payroll records supplied to the OBCCTC following the initial audit record request;
 - Explain how the payroll reconciliations which accompany the third pay cheques noted above are prepared and calculated, including how the "other" column is calculated, and provide examples of supporting documentation which explain the amounts listed on the payroll reconciliations (insurance, fuel, etc.);
 - Explain why there are, at times, two log books for a driver for the same day and why the log books are inconsistent with one another;
 - Explain why the hours listed on the Companies' driver log books do not always match the hours listed on the Companies' payroll summaries;
 - Explain what the word "corrected" means on the Companies' payroll summaries; and
 - Explain the Companies' relationship to Triple S Logistics and explain why container trucking services are being performed by drivers for Triple S Logistics.

23. An extension was requested by the Companies and approved by the OBCCTC. The Companies provided their response on December 7, 2018.
24. The Companies claimed that 12 company drivers who wanted to make the switch to I/O were helped by the Companies by selling the driver a company truck. However, these drivers continued to be treated as company drivers on the Companies' licences. Ten names were listed as I/Os for Gulzar and two names for Jet Speed.
25. The Companies stated that the remainder of their company trucks are owned by the Companies and not company drivers. The Companies claimed that due to the lapse of time since the purchase of some of the trucks, they were unable to locate and obtain the purchase documents requested by the OBCCTC.
26. The Companies did provide transfer tax forms and insurance documents in lieu of purchase documents. The auditor reviewed the transfer tax forms provided and found that the Companies only provided 30 transfer tax documents to support their claim of ownership for the 54 trucks in their fleets. Further, the transfer tax forms provided only demonstrated that the Companies owned those trucks at a particular date in time. The auditor could not confirm that these trucks were not sold to company drivers at a later date.
27. The auditor also reviewed insurance documents for 36 trucks provided by the Companies. Each document demonstrated that the Companies are the registered owners of the trucks. However, the auditor does not accept these documents as evidence of ownership because it is a common practice in the industry for companies to put their I/O trucks under their fleet insurance.
28. The auditor did conclude, based upon the review of the records supplied by the Companies, that the 14 drivers identified by the Companies as being I/Os owned their trucks and were, in fact, I/Os, but was not able to confirm the truck ownership of the remaining trucks in the Companies' fleet.
29. The Companies stated that their "payroll department miscalculated their rates" for six of the 14 drivers identified as I/Os and that they had subsequently conducted an internal audit and calculated all outstanding amounts owed by the companies to the six drivers. The Companies stated that a total of \$29,246.80 had already been paid to the six drivers but no evidence detailing the Companies' calculations or proof that the six drivers had been paid was supplied.
30. With regards to the three-pay cheque system, the Companies claimed that they gave the converted I/Os biweekly cheques for their drayage work and a third cheque for long-haul and non-container trucking services. The Companies did not initially provide supporting documentation to explain the amounts listed on the payroll reconciliation such as repairs and maintenance, parking, fuel, etc. This information was, however, provided as part of a subsequent record request.
31. The Companies stated that they used two logs books in order to "rectify the errors committed by drivers and owner operators in filling out their log books." It was explained that the Companies had been using a "rapid log system to check drivers log books." The Companies would often find errors, usually related to missing pre/post trips, breaks, meter readings, fuel fill up information, etc. When these errors were found, the software system would issue violations and then the drivers would

usually prepare a new log correcting their mistakes. According to the Companies, it was this that led to the existence of multiple log books.

32. The Companies also claimed that any payroll errors that were not caught by the system were often brought to the attention of the Companies by drivers. When this occurred, the Companies would rectify the error and pay the balance on the next cheque.
33. With respect to Triple S Logistics, the Companies stated that Triple S Logistics solely conducts long-haul work and does not perform any container trucking services. The Companies claim that sometimes a driver would mistakenly use a log book belonging to Triple S Logistics for their drayage work but that the Companies paid the drivers based upon the type of work done by the drivers.

Supplementary Record/Information Request - #2

34. In response to the Companies' December 7, 2018 correspondence/response, the OBCCTC wrote back on December 12, 2018 to inform the Companies that the request for more material and information had not been fully addressed. Specifically, the Companies were advised that they had not:

- Explained why the third pay cheque was not included in the Companies' payroll records supplied to the OBCCTC following the initial audit record request;
- Explained how they calculated the \$29,246.80 in outstanding pay to six I/Os;
- Explained why time sheets were not included in the initial audit request; or
- Explained how the payroll reconciliations which accompany the third pay cheques are prepared and calculated, including how the "other" column is calculated, and provided examples of supporting documentation which explain the amounts listed on the payroll reconciliations (insurance, fuel, etc.).

35. The Companies were asked to provide information, including supporting documentation, in support of their fleet composition analysis and were asked to provide supporting documentation showing how the sum of \$29,246.80 had been reached and the terms under which the drivers had been paid. The letter concluded by noting that the Companies had not provided cheque stubs for the third pay cheques or supporting evidence that the work performed and compensated for under the third pay cheques was for non-container trucking services.

36. The Companies were given until January 9, 2019 to respond and provide the requested documentation/calculations set out in the letter. The Companies met the deadline and explained that they have two payroll teams, one for container trucking services ("CTS") work and one for non-CTS work. The CTS team prepared two cheques for drivers for all CTS work and the second payroll team prepared the third, non-CTS work cheque. The third cheque was not included in the Companies' payroll records supplied to the OBCCTC following the initial audit record request because of "miscommunication between the two teams". They noted that effective November 2018, the use of a three-cheque system had stopped.

37. The Companies stated that they did not supply timesheets because they prepared pay cheques based upon log books, not time sheets, and the \$29,246.80 in outstanding pay to six I/Os was for

fuel surcharge payments the Companies had calculated to be owing between January and June 2018. Regarding the "other" column, the Companies stated that it represented "the semi-monthly cheque amount paid to the driver" which is deducted from the final third cheque.

38. The auditor reviewed the Companies' submission and records provided by the Companies' for drivers they claim were I/Os in November 2018 (the first month of using a two-pay cheque system). The auditor reports that the first pay cheque issued in November was based on an hourly rate of either \$26.28 or \$30.78 per hour and was purported to be for CTS work. The Companies claim that the second cheque was payment for non-CTS work, but the auditor found that the payroll records indicated that all of the pay on the second cheque was for CTS work. The Companies did not provide a breakdown of the CTS and non-CTS work performed by the drivers.
39. In addition, the auditor notes that the first cheque included over-time pay as well as income tax deductions which should not be made since the drivers are I/Os paid by the trip. Further, the payments should have been based upon the required trip rates not upon company driver hourly rates. The Companies argued that the first cheque was an advance to the drivers. This is a typical method of paying I/Os in the industry; however, most companies pay a lump sum as an advance, which is usually an even amount, that then gets deducted from the amount earned by the driver for the entire month. The Companies' records did not indicate that the payment on the first cheque was a lump sum advance because the amounts were based on the number of hours performing container trucking services at an hourly rate.

Supplementary Record/Information Request - #3

40. The OBCCTC wrote to the Companies on January 17, 2019 to inform the Companies that the second supplementary record/information request had not been fully addressed. The Companies were asked to provide payroll information for the I/Os in question for the periods April 2016, December 2017, and March 2018 by no later than January 25, 2019 and were told that following a review of the documents, an OBCCTC auditor would contact the Companies directly to discuss the audit findings and seek any further clarification that may be required.
41. At the same time, the auditor, having reviewed the original records supplied by the Companies for the Initial Audit Period, the records seized by OBCCTC investigators, and subsequent records and explanations supplied by the Companies at the request of the OBCCTC, advised the OBCCTC that the following violations may have occurred, and that further auditing was required:
 - Non-payment of minimum rates to company drivers;
 - Non-payment of minimum rates to I/Os;
 - Misclassification of I/Os as company drivers;
 - Falsification/modification of records;
 - Failure to produce/retain/submit records; and
 - Failure to pass on wait time payments to I/Os.
42. As such, the OBCCTC directed the auditor to expand the initial audit to include all the Companies' drivers. The OBCCTC then began calling drivers to confirm the Companies' assertion that only 14

drivers were I/Os (who owned their truck) because an audit to determine rate compliance cannot be adequately performed if the auditor is not able to determine the status of the driver. Fifteen drivers were contacted, each of whom stated that they were company drivers. Ultimately, the OBCCTC was unable to determine if there were more than 14 I/Os working for the Companies and when particular drivers may have bought trucks from the Companies.

Initial Audit – Expanded

43. The expanded audit was undertaken using the records which were obtained during the Initial Audit, from the record seizure and from subsequent record requests. The audit periods ranged from December 2017 through November 2018 although a complete, accurate set records for all drivers during this period was not available for several reasons noted here.

I/Os

44. Because the Companies did not provide exact dates when drivers were sold trucks (company drivers converted to I/Os), the months of April 2016, December 2017 and March 2018 were selected at random and I/O payroll records in those months were requested. Ultimately, the April 2016 audit period was not used because, following the records request, the Companies claimed that no I/Os were working for them at that time. Therefore, I/O records for the months of December 2017 and March 2018 were audited.
45. Thirteen I/Os worked for the Companies in these months and received three pay cheques in each of the months. The first two pay cheques in each month were issued bi-weekly and were based upon hours worked at an hourly rate consistent with directly employed operator rates. The third pay cheque received by the I/Os in each month was based on a reconciliation of the total trip rates for trips performed by the I/O in the month, less what the I/O received on their first two pay cheques. The information provided did not show that the pay cheques were split for CTS and non-CTS.
46. Trips performed, identified on the I/O's trip sheets¹, were compared with the I/O's pay statements. In some instances, trips logged were not paid for and the auditor reports that explanations provided by the Companies were insufficient as they claimed that either the driver did not perform the trip or that the trip was paid despite the evidence to the contrary.
47. The driver's net pay on their driver statements was compared with their cancelled cheques. No discrepancies were noted. Trip rates were reviewed to determine if the companies paid drivers in accordance with the Act. The auditor found numerous instances where the I/Os were paid rates less than minimum rates. The auditor also found that the fuel surcharge was not consistently or correctly paid to the I/Os in these periods.
48. In their January 9, 2019 submission to the Commissioner, the Companies stated that they had completed their own calculations of unpaid fuel surcharge and calculated that six of their I/Os were owed \$29,103.42 in fuel surcharge payments for the period between January and June 2018.

¹ The Companies initially claimed that they did not have trip sheets for their drivers and only provided logbooks for the initial audit. Trip sheets were found in the records seized by investigators.

Records were provided demonstrating that these I/Os had already received payment totaling this amount.

49. The auditor reviewed these calculations as part of the audit and found that the calculations were incorrect. Some drivers who had received an incorrect fuel surcharge payment in December 2017 and March 2018 had not been included in the Companies' overall unpaid fuel surcharge calculations. The auditor found that \$1,862.76 was owed and this amount was captured in the auditor's calculations and paid out by the Companies following the auditor's direction.
50. The auditor ultimately determined that 13 I/Os were owed \$15,581.81 collectively for the periods at issue. The unpaid fuel surcharge already paid out to the drivers (noted above) was deducted from this amount.

Company Drivers

51. The auditor utilized records seized by the investigators to complete the company driver audit. The records used for the audit were for eight drivers and covered periods between April 2018 and July 2018.² The auditor reviewed the records and notes that they were not consistent. Drivers' timesheets included total hours, trips rates, or a combination of both and they were difficult to reconcile to the drivers' pay stubs.
52. Records appeared to indicate that some of these drivers may have been paid by the trip while others may have been paid by the hour, or perhaps a combination of both, despite all driver pay stubs showing minimum hourly rates of pay per hour recorded.
53. Those company drivers that appear to have been paid by the trip were paid trip rates of approximately \$50. In these cases, the auditor found that the amount owing to the driver for trip rates was divided by the minimum hourly rate to plug the number of hours that the Companies recorded on the drivers' pay stubs for the purpose of showing that the drivers were being paid the required hourly rates.
54. For those drivers who appeared to be paid by the hour, the auditor used the total hours worked, identified on the drivers' timesheets, and compared that with the hours listed on the drivers' pay stubs. Numerous discrepancies were noted.
55. In some cases, the drivers' trip sheets included trip rates as well as hours worked. In these cases, the auditor compared the hours worked per the drivers' trip sheets to the amount paid per the drivers' pay stub and found that the Companies did not pay those drivers in accordance with the Act, as the hours worked per the drivers' timesheets was more than the hours listed on the drivers pay stub.
56. When these discrepancies were raised with the Companies, the auditor was advised that the hours

² There were only timesheets, from the seized binders, available for eight company drivers.

worked on the drivers' time sheets were not to be used as the time sheets were for internal purposes only. The Companies requested that the auditor use the number of hours noted on the logbooks that they provided and then multiply the number of hours from the logbooks by \$26.96 (minimum rate) to determine the amount the driver was entitled to.

57. The auditor did not accept this method of calculation because the logbook hours differed from the timesheet hours and there were instances where the auditor saw two different logbooks for the same day, which also differed. Furthermore, the auditor questions the authenticity of the logbooks supplied by the Companies for the audit. As set out above, one driver, when shown a logbook by the auditor, alleged that the logbook provided by the Companies had been forged and immediately sent the auditor a copy of his logbook for that day. This copy differed from the Companies' logbook provided for the audit.
58. In addition, the Companies' proposed method of calculation arrived at a total that included overtime pay when this amount was what the driver was in fact entitled to in regular pay. The Companies were informed that the overtime rate is over and above the regular rate of pay and could not be used in the audit calculations in this way.
59. The auditor concluded by noting that a definitive amount owing to the company drivers could not be determined because the drivers' hours were not consistently tracked by the Companies, making it impossible for the auditor to compare what the driver was actually entitled to against what the driver was paid. Therefore, a range of calculation methods based upon the available information and the apparent method of payment were utilized to determine compliance.
60. Where hours were logged on time sheets, these hours were used to determine compliance based upon the regulated rates and the drivers' pay stubs. Where trips were logged on trip sheets, but no hours were recorded, the auditor tallied up the number of trips recorded and compared that amount to the amount paid as shown on the drivers' pay stub. This amount was always found to be lower than the sum of the applicable trip rates, resulting in non-compliance. Ultimately, the auditor determined that the eight company drivers were owed \$10,944.43 collectively for the periods in question.

Expanded Audit

61. Having established that the Companies had not paid I/Os and company drivers the correct rates during the expanded Initial Audit Period, the auditor expanded the scope of the audit and instructed the Companies to calculate all amounts outstanding to its drivers (the "Expanded Audit"). I/O calculations were to be for the period from the first I/O sponsorship (the Companies claimed that this was February 2017) to the pay period where the Companies ceased utilizing a three-pay cheque system (the Companies claimed that this was November 2018). Company driver calculations were to be conducted for the period between April 3, 2014 until the date the Companies were able to demonstrate that they had corrected their pay structure.

62. Audit templates were provided and the deadline for the calculations was set for May 28, 2019. On May 24, 2019, the Companies contacted the OBCCTC requesting an extension. The Companies were granted an extension until June 14, 2019 for the outstanding pay calculations pertaining to I/Os; however, the deadline for the company driver outstanding pay calculations did not change.

I/Os

63. The Companies met the extended deadline for the I/O calculation component of the Expanded Audit. The auditor reviewed the Companies' calculations and found that one I/O had not been included in the calculations and that the Companies had not performed calculations for the period between February 2017 and September 2017.
64. The Companies advised that the records for the period between February 2017 and September 2017 could not be located. To account for the missing records, the Companies elected to calculate the average monthly amount owed to its I/Os from October 2017 to October 2018. That amount was then used to determine the amount owing for the missing pay periods. In order to determine an amount owing to I/Os and in recognition of the Companies' inability to supply records, the auditor accepted the Companies' calculations.
65. The auditor then selected three months (October 2017, August 2018 and November 2018) to spot audit and requested that the Companies provide payroll records for all I/Os who performed container trucking services in these periods. The Companies were also asked to provide outstanding pay calculations for the missing I/O.
66. The Companies provided the requested records for the spot audit months and advised that the missing I/O records were not provided because the I/Os had been fully compensated for all amounts outstanding and an explanation of his compensation was included in the Companies' January 9, 2019 correspondence to the OBCCTC. The Companies' also stated that the I/O's records had been seized by the OBCCTC investigators; however, the auditor notes that that investigators only seized January 2018 to April 2018 timesheets and payroll reconciliations.³
67. The auditor selected a sample of five I/Os for each spot audit period and reviewed their records. Ten instances of incorrect trip rates were found in the sample and not included in the Companies' outstanding pay calculations. During the October 2017 to May 2018 period, the Companies' calculated trip rates based upon the wrong rate table and used incorrect zone rates when calculating payment for trips to and from four locations frequented by the Companies' I/Os.
68. The month of November 2018 was audited to ensure that the Companies had corrected their pay structure as of October 31, 2018 (the end date of their outstanding pay calculations). The auditor found that the Companies had continued to use incorrect zone rates at four key locations that month. The Companies were advised of the auditor's findings on August 16, 2019 and stated in response that their system would be fixed immediately.

³ In the January 9th letter, the Companies claimed to have paid the I/O \$9446.80 in unpaid fuel surcharge and a breakdown of this number was eventually provided by the Companies. During the expanded audit, an additional \$9K was also said to have been paid to the I/O. A breakdown of the additional \$9K was never provided.

69. Records supplied by the Companies for the Initial Audit Period (and the OBCCTC's Licence records) always indicated that the Companies had one sponsored I/O. (It was later confirmed that 13 additional drivers, listed as hourly paid company drivers, were actually sponsored I/Os paid by the trip). The Companies included this I/O in their Expanded Audit calculations and the auditor examined his records for August 2018 as part of the spot audit and found that his rates had not been increased following the 2% rate increase in June 2018. The auditor noted that during the Initial Audit, records for this I/O for June 2018 were supplied and those records had indicated that the I/O had received the 2% increase.
70. Based upon the findings of the spot audit of the Expanded Audit calculations, the auditor amended the Companies' calculations for the Expanded Audit period and found that the 13 drivers, claimed by the Companies' to be I/Os effective February 2017, were owed a total of \$96,879.49. The auditor confirms that the Companies have since paid the full amounts owed to the 13 I/Os.
71. It has also been confirmed that all wait time payments made by the Vancouver Fraser Port Authority to the Companies on June 13, 2019 were distributed by the Companies to the 13 I/Os in question in compliance with the Act.

Company Drivers

72. On May 6, 2019, the Companies advised the auditor that they did not agree with the method of calculation used by the auditor to determine that the company drivers had been underpaid. On May 31, 2019, the Companies reiterated their position and stated that they "do not owe any outstanding salaries to drivers."
73. The Companies continued to argue that the auditor should have used the logbooks supplied to determine hours worked and then apply the \$26.96 hourly rate to the total hours to determine the amount the driver was entitled to. The Companies stated that the amount the company drivers are entitled to is the amount they were paid according to their pay stub; therefore, no money is owing to the company drivers and no Expanded Audit calculations would be performed.
74. The auditor states that the logbooks supplied by the Companies are not a reliable source of documentation and should not be used to determine the amount owing to the company drivers. The auditor also states that the Companies' pay structure is otherwise not correct as the Companies include overtime pay in a calculation used to demonstrate that the drivers are paid the regulated rates when overtime pay/rates should in fact be calculated over and above the regulated hourly rate.
75. Therefore, on October 30, 2019, the Companies were ordered by the OBCCTC to calculate the amounts outstanding in wages to all its company drivers who performed container trucking services between April 3, 2014 and April 30, 2019 using the template and methodology provided by the auditor and submit the calculations to the OBCCTC by no later than November 13, 2019. The Companies sought an extension to this deadline which was not granted.

76. On November 13, 2019, the Companies advised the OBCCTC that they continue to disagree with the auditor's method of calculation and claimed that their drivers support the use of logbooks to calculate payroll.

Conclusion

77. The auditor concluded by noting that the Companies' failure to read emails carefully often resulted in the submission of incomplete records or information. In addition, the auditor noted that the Companies were not able to provide I/O payroll records for February 2017 to September 2017, were still paying incorrect trip rates for certain locations, had refused to perform calculations as ordered for monies owed to company drivers and, as of November 2018, were still using the three-pay cheque system.

78. The auditor found the Companies non-compliant, listing the following violations:

- Non-payment of regulated rates to company drivers;
- Non-payment of regulated rates to I/Os;
- Misclassification of I/Os;
- Falsification/modification of records; and
- Failure to produce, retain and submit records.

79. I accept the findings of the auditor.

Decision

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

1. The Commissioner ordered an audit of the Companies' drivers;
2. The Initial Audit found that the Companies paid their drivers rates consistent with the *Act and Regulation*;
3. A Gulzar driver, listed as a company driver under its licence, advised an OBCCTC auditor that he was an I/O who owned his own truck and was paid by the trip and not by the hour as indicated by Gulzar in the Initial Audit records;
4. Records provided by the Complainant showed evidence of a three-pay cheque system at Gulzar and the Complainant alleged that logbooks provided by Gulzar for the Initial Audit were forged;
5. On August 25, 2018, OBCCTC investigators entered the Companies' office and removed ten (10) boxes of payroll records, including records of the Complainant, which demonstrated:
 - The Companies had not supplied all documents requested by the OBCCTC for the Initial Audit;
 - The Companies utilized a three-pay cheque system to pay some of its drivers;
 - The Companies utilized the services of I/Os that they paid by the trip but listed as hourly paid company drivers under their licences;
 - The Companies did not pay correct trip rates; and
 - The Companies keep multiple sets of logbooks and trip sheets with conflicting information recorded.

6. The OBCCTC made three supplementary information and record requests to the Companies;
7. The Companies were unable or unwilling to answer all OBCCTC questions and/or provide all information requested;
8. The Initial Audit Period was expanded, and it was determined that the Companies:
 - o had misclassified I/Os as hourly rate company drivers in violation of section 6.11 & 6.12 and Appendix D to Schedule 1 of its Container Trucking Services Licence;
 - o Utilized a three-pay cheque system resulting in rate reductions in violation of section 23 of the *Container Trucking Act*;
 - o Modified/falsified records in violation of section 6.11 and Schedule 2 of its Container Trucking Services Licence;
 - o Were not paying compliant trip rates in violation of section 23 of the *Container Trucking Act*; and
 - o Where not paying compliant hourly rates in violation of section 23 of the *Container Trucking Act*.
9. Thirteen I/Os were owed a total of \$96,879.49 which has been paid in full by the Companies;
10. The Companies have not demonstrated to the auditor that they have corrected their payroll practices; and
11. The Companies are in violation of an OBCCTC order to calculate money owing to company drivers.

81. Many decisions of the Commissioner have stressed that the *Act* is beneficial legislation intended to ensure that licensees pay their drivers in compliance with the minimum rates. Decisions have also emphasized that a licensee's inability or unwillingness to calculate money owing to their drivers does not mean that the drivers are not entitled to be compensated for non-compliant rates.

82. I do not accept the Companies' position that they do not owe any money to these drivers because the amount on the drivers' paystubs matches the driver's log books. It has been established that the Companies' used two sets of log books, one of which was often altered by the Companies. The very existence of multiple, mis-matched log books excludes the possibility that the auditor could rely on the log books selected by the Companies to perform the calculations. Certainly, the Companies have not given any good reason for preferring one set of log books over another. In addition, I accept the auditor's conclusion that overtime pay should not be included in the Companies' calculations. Drivers are entitled to the Commissioner's base rate of pay for every hour performing container trucking services and are also entitled to overtime pay above the Commissioner's rate when overtime is performed.

83. As the Companies would not perform the calculations as ordered, other means had to be found to assess the amount of money owing to the company drivers in this case. I directed the auditor to review the records of 7 Gulzar drivers for the month of June 2018 (the most complete and reliable month of records available) omit the highest and lowest amounts found to be owing (as those amounts are outliers) and perform the following calculation:
- total the remaining 5 drivers' amounts outstanding and divide it by 5 to determine the average amount owing per driver in June 2018; and
 - average the amount owing per driver and multiply that number by the number of company drivers employed by the Companies (51) to arrive at the total average amount owing to drivers for one month.
84. Using this method of calculation, the auditor has estimated that Gulzar owes 30 company drivers \$125,000.00 per year for the period between April 2014 and April 2019 for a total amount owing of \$625,000.00 and Jet Speed owes 21 company drivers \$87,500.00 per year for the period between April 2014 and April 2019 for a total amount owing of \$437,500.00. If the Companies cannot, or will not, perform their own calculations based on my instructions I am required to calculate amounts owing based on the information available to me and averages.
85. With respect to the balance of the auditor's findings, I have considered the Companies' submissions supplied on December 7, 2018, January 9, 2019, May 6, 2019 and October 21, 2019 and for the reasons set out below I am not persuaded that the Companies have acted in compliance with the *Act, Regulation or Licence*.
86. The Companies have breached their legislated obligations to pay their drivers compliant rates and to comply with orders of the Commissioner.
87. The Companies have also conceded that their pay system led to the underpayment of some drivers and made payment to drivers before the OBCCTC could determine the extent of the money owed. As a result, the audit was unnecessarily extended as the OBCCTC and auditor sought to determine the basis upon which the Companies had calculated that money was owed to particular drivers and confirm that the correct amount of payments had been made to all drivers who were owed money.
88. The auditor was able to determine that the Companies had misclassified 13 drivers, that were really I/Os being paid by the trip and that between February 2017 and October 2018, the Companies failed to comply with the minimum rates required under the *Act*. The audit findings indicate that over this period, the Companies owed all confirmed I/Os (14 drivers) adjustments totaling \$96,879.49. The adjustment payments were required because the Companies missed trip payments, paid incorrect trip rates and did not consistently or correctly pay the fuel surcharge. The Companies do not dispute the auditor's findings with respect to its I/Os and have paid the money owing.

89. The audit findings also indicated that between April 2018 and July 2018, the Companies owed eight company drivers \$10,944.43 in total. This money was found to be owing because the Companies did not always pay drivers for all hours performing container trucking services and calculated the drivers' base rate using amounts paid for overtime.
90. The Companies have argued that they were not aware of their staff's failure to properly classify drivers under their Licences. They state that their staff did not understand the concept of I/Os under the *Act*, the truck tag system or the requirement to sponsor I/Os under a licence. They claim that some employee drivers at the Companies had asked to buy fleet trucks in order to perform long-haul work, and when this request was granted, employees at the Companies assumed that the Companies' truck tags could be assigned to these trucks and no sponsorships were required.
91. I do not accept this explanation. To accept that it was employee error that led to the misclassification of drivers would be to accept either that the Companies' owners never advised employees of the rules under which they are to operate or that the Companies' owners were also not aware. The Companies would be responsible in either scenario, but I note that the owners of the Companies have, on three occasions, signed licences (with conditions regarding I/O sponsorship and tags) and statutory declarations stating that they are in compliance with the *Act* and the owners have also been privy to numerous OBCCTC communications regarding I/Os and truck tags. The onus is on the licence holder to ensure compliance with the *Act*, *Regulation* and Licence and it is the responsibility of the licence holder to ensure that its employees are in compliance. Ignorance of the regulatory regime is not an acceptable argument.
92. It is more likely that the misclassification was intentional. The rate structure, set by order of the Commissioner, reflects the composition of the drivers who work for licensees. If a driver owns their truck (I/O) they are responsible for the cost of operating and maintaining that truck and therefore are paid either an hourly rate or trip rate which is higher than the hourly rate paid to company employee drivers who are not responsible for truck ownership. It is not sustainable for an I/O to only get paid the company driver hourly rate.
93. Licensees quote customers an "all-in" price for the movement of containerized goods, which includes the cost of paying a driver to move a container. If a container is to be moved by an hourly paid driver, a licensee's quote will include a calculation of the estimated number of hours it will take to move the container. If a container is moved by a trip rate paid I/O, a licensee's quote will include the trip rate for moving the container between two or more locations in the Lower Mainland.
94. Competition and the customer's desire for the best possible price for the movement of their containerized goods, means that licensees will seek to reduce costs in order to quote competitive rates. The purpose of the *Act* is to eliminate the option of reducing driver pay to reduce licensee costs and thereby reduce customer rate quotes. However, OBCCTC audits have identified many non-compliant methods employed by licensees in an effort to reduce costs. It would appear that these methods now include the three-pay cheque system used by these particular Companies, which relies on treating drivers as hourly paid employees for the purpose of payroll while actually paying the drivers non-compliant trip rates and fuel surcharges.

95. The Companies disagree, arguing that the three-pay cheque system was used to split CTS and non-CTS (i.e. short haul and long haul). They have stated that the first two cheques issued to the drivers was for CTS payment and the third cheque for long-haul work payment.
96. However, the auditor has confirmed that the three-pay cheque system was used to pay company drivers trip rates. The third pay cheque was based on a reconciliation of the total trip rates for trips performed by the I/O in the month, less what the I/O received on their first two pay cheques. The auditor found that although records did show that some drivers performed non-CTS, the pay cheques were not used to differentiate between CTS and non-CTS work. The Companies were also not able to provide any evidence to substantiate their claim.
97. Further, determining the nature and the extent of the Companies' non-compliance was made particularly challenging because of the Companies' record keeping practices. The auditor encountered missing records, duplicate log books and timesheets and payroll reconciliation documents that did not match pay slips. There were handwritten notes on many of the records which appeared to indicate that some method of calculating trip rates but paying hourly rates was being employed.
98. The Companies were asked to explain their record keeping and payroll practices. The Companies acknowledged that their systems needed to be corrected and explained that a combination of employee and driver error had resulted in non-compliant practices. The Companies explained that they have two payroll teams, one for CTS work and one for non-CTS work. The CTS team prepared two cheques for drivers for all CTS work and the second payroll team prepared the third, non-CTS work cheque. It is the Companies' position that a "miscommunication" between the two teams and the combination of CTS and non-CTS work performed by the drivers led to payroll errors.
99. It is argued that employees of the Companies also inadvertently miscalculated rates and misinterpreted zones, resulting in non-compliant rate payments. These errors were exacerbated, the Companies claim, by the volume of payroll records processed each pay period. The Companies argued for instance that its employees erred by "inadvertently" paying wrong trip rates to drivers and cited examples to support their argument. One of these examples was the admission that the Companies' employees were paying drivers a North Surrey zone trip rate for trips to and from the CN Vancouver Intermodal Facility which is located in the Port Kells zone. I do not accept that these incorrect rate payments were made in error. On July 4, 2016, the Commissioner issued a clarifying Bulletin stating that the CN Vancouver Intermodal Terminal was in the Port Kells zone. This Bulletin was widely discussed within the industry because the North Surrey zone rate is less than the Port Kells zone rate. It is unlikely that the Companies did not know of the Commissioner's direction and it was certainly their responsibility to be aware and direct their employees accordingly.
100. The Companies also acknowledge that while they should not have allowed the use of multiple log books, the existence of multiple log books was the result of driver errors which were caught by the Companies and corrected when drivers were instructed to fill out a second, correct log book. Although the Companies say that the use of multiple log books was due to driver error and that the second log book was filled out by the drivers after the Companies pointed out driver mistakes in filling out the original log books, the auditor noted that the hand writing on the second set of logs books did not always match the handwriting on the first set. It is therefore not believable that the

author of the first log book was also the author of the second as the Companies claim. Further, it was not the drivers who attached notes/directions to the log books regarding changes and corrections.

101. As stated, employee and driver error is not an argument which I will accept when considering penalties under the *Act*. The Companies have acknowledged poor practice and argue that the resulting non-compliance was unintentional. I do not agree. Instead, I find that the Companies intentionally employed a three-pay cheque system which, it has been established, did not differentiate between CTS and non-CTS work and resulted in non-compliant rate payments.
102. 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.
103. In previous decisions of the Commissioner, the violations of the types identified in this audit, non-compliant rate payments and poor record keeping in particular, have resulted in financial penalties to the licensee. However, the circumstances of this case differ.
104. It is not probable that the Companies' actions were in error and it is particularly egregious that the Companies' practices were withheld from the OBCCTC and were only discovered following driver complaints and a record seizure. The Companies engaged in deliberate deception in order to appear compliant based upon the payment of hourly rates to company drivers when, in fact, the Companies had misclassified drivers and were using a three-pay cheque system, combined with non-compliant record keeping practices, to pay non-compliant rates.
105. In addition, when confronted with these findings, the Companies admitted errors but made preemptive payments to drivers without consulting the OBCCTC, answered auditor and OBCCTC questions selectively and claimed missing documents, all of which slowed the audit process. When considered together, these actions demonstrate a pattern of obfuscation intended to undermine or weaken the impact of the OBCCTC's audit.
106. The legislation and regulatory regime, including the available penalties under the *Act*, were introduced in order to prevent these very actions. I have therefore concluded that Gulzar Transport Inc. and Jet Speed Transport Inc.'s licences should be cancelled. In proposing this penalty, I have weighed the impact of a licence cancellation on drivers against the need to address longstanding and chronic non-compliant practices across the sector. I feel the importance of addressing non-compliance outweighs the impact of a licence cancellation on the particular drivers who will be required to find work at other licensees.

107. In the result and in accordance with section 34(2) of the *Act*, I hereby give notice that:
- a. I propose to cancel Gulzar Transport Inc. and Jet Speed Transport Inc.'s Container Trucking Services licences;
 - b. Should they wish to do so, Gulzar Transport Inc. and Jet Speed Transport Inc. have 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 Gulzar Transport Inc. and Jet Speed Transport Inc. provide a written response in accordance with the above I will consider their responses and I will provide notice to Gulzar Transport Inc. and Jet Speed Transport Inc. of my decision respecting that response.
108. This decision will be delivered to Gulzar Transport Inc. and Jet Speed Transport Inc. and may be published on the Commissioner's website (www.obcctc.ca) after Gulzar Transport Inc. and Jet Speed Transport Inc.'s response period had closed.

Dated at Vancouver, B.C., this 19th day of November, 2019.



Michael Crawford, Commissioner