



July 22, 2020

Orca Canadian Transport Ltd.
12331 77A Avenue,
Surrey, BC V3W 2W9

Commissioner's Decision
Orca Canadian Transport Ltd. (CTC Decision No. 09/2020)

Introduction

1. Orca Canadian Transport Ltd. ("Orca") is a licensee 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 the Commissioner, and a licensee must comply with those statutorily established rates. In particular, section 23(2) of the Act 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 26 of the Act, any person may make a complaint to the Commissioner that a licensee has contravened a provision of the Act. Under section 29, the Commissioner reviews such complaints and, under section 31, may conduct an audit or investigation to ensure compliance with the Act, the *Container Trucking Regulation* (the "Regulation") or a licence. The Commissioner may also initiate an audit or investigation under section 31 whether or not a complaint has been received.
3. In April 2019, the Commissioner received a complaint alleging that Orca was not distributing wait time payments to its drivers and that no monthly pay statement or pay stub was given to drivers with their pay cheque showing the hourly rate or fuel surcharge percentage ("FSC").
4. On April 24, 2019, the Commissioner directed an auditor to audit Orca's records to determine if Orca was in compliance with the remuneration requirements of the Regulation. The auditor was directed to audit the months of June 2018 and March 2019 (together, the "Initial Audit Period") to determine compliance.
5. On May 13, 2020, a subsequent complaint from another Orca driver was received. That driver alleged that he was not being paid for the 45 minutes to one and one-half hour travel time from Orca's facility to Raymont Logistics Vancouver Inc. ("Raymont") (Raymont sub-contracts with Orca for container trucking services). The complainant also stated that he was not paid according to the timelines set out in the Regulation.
6. The auditor was also directed to investigate this complaint.

Initial Audit Period

7. Records for all drivers in the Initial Audit Period were requested on April 30, 2019 for delivery to the Office of the BC Container Trucking Commissioner (“OBCCTC”) by no later than May 15, 2019. Orca did not supply all the requested records by the deadline. The auditor reports that a large number of documents required to complete the audit were not included in the initial record package. Further, the auditor reports that:

Orca did not provide sufficient documentation throughout the audit and two deadlines were missed. On June 4, additional information for the I/Os sponsored by other licensees was requested with a deadline of June 12. Partial documentation was received on June 17 with the remainder provided on June 18. On July 16, additional supporting documentation was requested and to be provided by July 23. Partial information was received on July 23; therefore, more information was requested with an extension granted to July 30. Partial responses were received on July 31 and the remainder was received on August 2.

I asked for an explanation as to why the driver safety logs did not mirror the driver’s timesheets on September 25 and did not receive a response until October 21.

8. Orca sponsored 18 independent operators (“I/O”) in June 2018 and 17 I/Os in March 2019. Orca also utilized four other I/Os to perform container trucking services in March 2019 that were sponsored by AMK Carrier Inc., Roadstar Transport Company Ltd., and Future Trucking Ltd. (“I/Os sponsored by other licensees”).
9. Orca pays hourly rates. Its sponsored I/Os perform container trucking services for Raymont as well as Orca. Raymont pays Orca for any container trucking services performed by Orca I/Os. The hours worked for both companies are combined by Orca and the I/Os are paid a flat hourly rate by Orca.
10. All I/O records were audited for June 2018 and March 2019.
11. The auditor reviewed the June 2018 records and determined that Orca paid its I/Os a flat rate of \$59.00, inclusive of the FSC. The applicable hourly rate for I/Os in June 2018 was \$52.61 per hour. The applicable FSC for June 2018 was 10%. Together, this resulted in a required rate payment of \$57.87 per hour for that month. Therefore, Orca was paying its I/Os more than the required rate in June 2018. Orca advised the auditor that in order to keep its drivers happy it does not lower the FSC paid for periods when the FSC decreases.
12. The auditor determined that in March 2019 Orca paid a flat rate of \$60.00, inclusive of the FSC. The applicable hourly rate for I/Os in March 2019 was \$52.61 per hour and the FSC that month was 14% which resulted in a required rate payment of \$59.98 per hour for that month. Once again, the auditor found that Orca was paying its I/Os more than the required rate in March 2019.
13. The auditor also identified the hours worked by each I/O on the drivers’ trip sheets/time sheets and compared those recorded hours to Orca’s monthly summary reports. The auditor notes that the trip sheets/time sheets only had the total hours worked recorded in the center of the sheet and did not contain a start/end time or the number of hours worked for Raymont and/or Orca.

14. The auditor requested driver logs from Orca to calculate the hours that the drivers performed either Orca or Raymont work, but it was determined that these driver logs were not reliable as they did not correlate with the drivers' timesheets. When Orca was questioned about this discrepancy they responded with the following:

The time is different because their time start at work site and every IO lives in a different city and park their trucks at their yard. Sometimes they have maintenance checkup and wash their truck or something else on their own time. That's why logbook time will not match their timesheet. Logbook checked by a different person and they questioned the driver when they go over 14 hours per day. It never acquire [occurred] to us that driver putting less time than timesheet. Going forward, we will check and make sure they are doing their paperwork right (accurately and matching trip sheets).

15. Having reviewed available records to determine if Orca's drivers were paid for all hours of container trucking services performed, the auditor found that Orca's monthly summary reports did not agree with the total hours worked when compared to driver time sheets. It was determined that during the Initial Audit Period, Orca owed \$2563.35 to four drivers resulting from a failure to pay the I/Os for all hours of container trucking services performed.
16. Additionally, Orca's monthly summary reports showed that six I/Os were paid bonuses during the Initial Audit Period. The auditor questioned Orca about the bonus payments and Orca provided an explanation for each bonus payment to the satisfaction of the auditor.
17. The auditor reports that Orca is paying its I/Os hourly and therefore it is not required to distribute wait time payments to its drivers. Orca pays its drivers monthly and is in compliance with section 24(2) of the *Regulation*.
18. Orca utilized four I/Os sponsored by other licensees in March 2019. The auditor reviewed records pertaining to these drivers and determined that Orca paid two an hourly rate of \$60 and one a flat rate for a long-haul trip. The fourth I/O was paid \$64 per hour.
19. Having established that Orca did not pay four I/Os for all hours of container trucking services performed in the Initial Audit Period, the auditor expanded the scope of the audit and sent Orca a letter on September 25, 2019 requiring them to calculate the total amount outstanding to all drivers from November 2017 (end date of previous audit) to September 2019.
20. In a previous decision issued to Orca on April 25, 2018¹, Orca was found to have been employing a hybrid pay structure. Orca replied to the auditor's September 25, 2019 letter, stating that it was unable to perform the outstanding pay calculations as directed because it had not changed its hybrid pay structure until July 2018. The auditor confirmed that Orca did not correct its hybrid payment structure until June 2018 and, as such, the auditor adjusted the outstanding pay calculations period to between July 1, 2018 and September 30, 2019 (the "Expanded Audit Period").

¹ Orca Canadian Transport Ltd. (CTC Decision No. 13/2018)

Expanded Audit Period

21. Orca submitted its Expanded Audit Period calculations by the auditor's deadline; however, the calculations only showed hours shorted and did not calculate any monies owing. Orca's calculations listed months instead of specific dates and when compared to with the Initial Audit Period calculations, it was determined that Orca's calculations were incorrect as they did not show any of the amounts found to be owing in June 2018 or March 2019.
22. As such, Orca was sent a template and asked to redo the calculations using that template. Orca redid its calculations, which then indicated that four I/Os were owed a total of \$360.00 for the Expanded Audit Period (excluding March 2019 which was included in the Initial Audit Period).
23. The auditor performed a spot audit of Orca's calculations for five I/Os in the months of November 2018 and February 2019 and determined that Orca had incorrectly calculated the amounts owing. Orca owed five I/Os a total of \$227.08. The auditor then undertook her own calculations for the entire Expanded Audit Period and, including the months of the Initial Audit Period, and determined that Orca owed eight I/Os a total of \$2790.43.
24. Orca reviewed and agreed with the auditor's calculations and on January 19, 2020, Orca provided the auditor copies of cancelled cheques and signed proof of payment forms for all eight I/Os owed money. All I/Os were then contacted by phone and they confirmed receipt of payment and successful deposit of amounts owed.
25. Throughout the audit, Orca was instructed to adjust its timesheets to ensure a proper accounting of all hours of container trucking services performed by its drivers as required by the terms of its Container Trucking Services Licence. To confirm that Orca had adjusted its record keeping practices, the auditor reviewed a sample of October and November 2019 driver timesheets and concluded that Orca drivers were not properly recording all hours worked. As such, the auditor sent Orca an email on January 9, 2020, instructing Orca to send a memo to its drivers instructing them to include the start and end times as well as the total time performing container trucking services on their daily timesheets.
26. The auditor concludes by noting that Orca unduly extended the audit:

Orca was helpful during the audit, but the initial package of records provided was not sufficient and I repeatedly needed to ask for further documentation including having to contact Raymont for records. I had to ask for all drivers' records, including the I/Os sponsored by other licensees, as they were not included in the original package. Two deadlines were missed, extensions given, and reminders needed to be sent, all resulting in the audit being delayed.
27. With respect to the complaints, the auditor concludes that:
 - a. Orca has paid its drivers hourly since June 2018 and therefore its I/Os are not entitled to receive wait time payments;
 - b. Allegations that drivers were not receiving FSC are unfounded; and
 - c. Orca pays its drivers monthly and is in compliance with section 24(2) of the *Regulation*.

28. The auditor also notes that driver concerns regarding rates of pay and hours worked resulted from Orca's failure to provide a detailed pay stub to its drivers that clearly states the hours worked, pay rate, amounts paid, including FSC (if applicable) and explanations for amounts deducted.
29. Orca was provided a copy of the auditor's report on July 8, 2020 for review and was provided an opportunity to respond. Orca responded by the required deadline stating that they had reviewed the report and concurred with some but not all of its findings.
30. Orca believes that its drivers should not have complained to the OBCCTC about missing pay, rather they should have spoken to Orca. Orca states that on May 13, 2020, it confronted "everyone" about a complaint made to the Commissioner, but no one accepted responsibility for the complaints. Orca believes that the complaints demonstrate that the complainants were attempting to "purposely hurt the company's reputation."
31. Orca also points out that the issue of a paid half an hour of travel time between Orca's yard and the Raymont yard was addressed during the audit, notes that it gives fuel cards to its I/Os and reminds the Commissioner that its I/Os had agreed to receive one pay cheque per month unless they opt to receive an advance cheque.
32. Orca does not accept the auditor's conclusion that it had not improved its record keeping practices after September 2019. The auditor found that Orca's drivers were not properly recording all hours worked. Orca states that changes were made to its timesheets starting on November 1, 2019 and that it had always issued monthly statements detailing its drivers' "port hours, hourly rate and FSC plus any deductions if applicable." Nevertheless, Orca reports that they have made the requested changes to their pay stubs and driver daily time sheets.

Decision

33. As described above, the circumstances of this case are:
 - a. The Commissioner ordered an audit of Orca's I/Os which disclosed the following:
 - Orca failed to pay its drivers for all hours of container trucking services performed between July 1, 2018 and September 30, 2019;
 - Orca owed eight I/Os \$2790.43 in unpaid wages; and
 - Orca has paid the money owing.
 - b. Orca did not provide all records requested in violation of Appendix D to Schedule 1 of the Container Trucking Services Licence;
 - c. Orca did not provide information and records requested by the OBCCTC on a timely basis;
 - d. Orca is in compliance with respect to fuel surcharge payments, wait time payments and section 24 of the *Regulation*; and
 - e. Orca has reviewed and accepted some but not all of the auditor's findings and responded to the auditor's report.
34. I accept the auditor's findings as set out in the audit report.

35. As Orca has paid the amounts owing to its drivers there is no need to issue an order pursuant to section 9 of the *Act* requiring the company to pay its drivers in compliance with the legislation.
36. 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.
37. In this case, it was determined that between July 1, 2018 and September 30, 2019, Orca failed to pay its drivers for all hours of container trucking services performed. The audit findings indicate that over this period Orca owed eight drivers adjustments totaling \$2790.43. Orca was also found to be in violation of its record keeping requirements under the Container Trucking Services Licence for failure to retain records detailing all container trucking services performed by its drivers.
38. Orca's failure to pay its drivers for all hours of container trucking services performed stemmed from its poor record keeping practices. Not only did these practices result in minor rate violations but they also resulted in driver confusion and the complaints which precipitated the audit. As noted by the auditor, Orca is paying the correct rates and this audit could have been avoided had Orca kept and maintained proper records and provided compensation information to its drivers on their payslips.
39. Orca disagrees, noting that the audit would have been avoided had its drivers not complained to the OBCCTC. I do not accept Orca's argument. The complaints which precipitated this audit were considered under section 29 of the *Act* and the audit was initiated on the basis that the complaints were made in good faith. The *Act* is beneficial legislation intended to ensure that licensees pay their drivers compliant rates and the ability to make a complaint is central to the *Act's* purpose. Drivers should not be dissuaded from making complaints and I remind Orca that section 28 of the *Act* protects drivers from being mistreated because of a complaint, inspection or investigation. Orca's admission that it confronted drivers about the complaint comes close to a breach of section 28 of the *Act*.
40. As set out above, Orca also points out that the issue of a paid half an hour of travel time between Orca's yard and the Raymont yard was addressed during the audit, notes that it gives fuel cards to its I/Os and reminds the Commissioner that its I/Os had agreed to receive one pay cheque per month unless they opt to receive an advance cheque.
41. I accept Orca's points on these issues and note that they were addressed by the auditor during the audit but am not sure why Orca chose to highlight these issues in its reply to the audit report. Driver hours were calculated using the time sheets provided by Orca because no evidence was provided to suggest that drivers were not getting paid for the travel time between the Orca and Raymont yards. The auditor found no issues with the hourly rate paid by Orca (including the fuel surcharge) or the time period in which Orca paid its drivers.
42. Orca argues that it always issued monthly statements detailing its drivers' hours, rate and FSC payment plus any deductions if applicable. However, the auditor reported that the Orca drivers were not including start and end times on their daily timesheets and the drivers were given pay cheques with no monthly statement or pay stub that showed the total hours worked or hourly rate paid, FSC percentage included in the hourly rate, or any deductions. Despite Orca's argument, it

concedes that it has made changes to its pay stubs and driver daily time sheets as recommended by the auditor. I accept the auditor's report and conclude that the statements issued to the drivers were not sufficiently detailed.

43. The general importance of proper record keeping has been canvassed extensively in previous audits and communications of the OBCCTC.² In Hutchison Cargo Terminal Inc. (CTC Decision No. 27/2018), I penalized Hutchison for its failure to produce records and noted that the purpose of the fine was also one of general deterrence.³ Hutchison Cargo Terminal Inc. was penalized \$20,000.00 for failure to produce proper records.
44. As a holder of a Container Trucking Services Licence, Orca is responsible to know its obligations under the *Act* and the Licence and Orca ought to be aware of its record keeping requirements given that this is its second audit and decision. In Orca Canadian Transport Ltd. (CTC Decision No. 13/2018), Orca was penalized \$5,000.00 for hybrid rate payment and record keeping violations as well as its failure to assist in the timely completion of the audit.
45. It would appear that the previous penalty was not sufficiently deterrent. The auditor reports that Orca did not adjust its record keeping practices after the last decision and once again failed to assist in the timely completion of an audit. In this case, Orca did not provide sufficient documentation throughout the audit, missed deadlines for records/information set by the auditor and unduly delayed the audit by not answering auditor questions in a timely manner.
46. For these reasons, I have concluded that an administrative fine is appropriate here. Regarding the size of the proposed fine, I have decided that an administrative penalty of \$10,000.00 is appropriate when considering Orca's past conduct. Despite the small amount of money found to be owing, this is Orca's second audit and the size of the proposed penalty reflects Orca's failure to rectify its past practices.
47. 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 Orca Canadian Transport Ltd. in the amount of \$10,000.00;
 - b. Should it wish to do so, Orca Canadian Transport Ltd. 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 Orca Canadian Transport Ltd. provides a written response in accordance with the above, I will consider its response, and I will provide notice to Orca Canadian Transport Ltd. 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.

48. This decision will be delivered to Orca Canadian Transport Ltd. and may be published on the

² Olympia Transportation (CTC Decision No. 02/2016), HAP Enterprises Ltd. (CTC Decision No. 17/2016), MDW Express Transport Ltd. (CTC Decision No. 01/2017) and OBCCTC Record Keeping Requirements Bulletin, August 10, 2016.

³ Hutchison Cargo Terminal Inc. (CTC Decision No. 27/2018), paragraph 23.

Commissioner's website (www.obcctc.ca) after Orca Canadian Transport Ltd.'s response period has closed.

Dated at Vancouver, B.C., this 22nd day of July, 2020.

A handwritten signature in blue ink, appearing to read "Michael Crawford".

Michael Crawford, Commissioner