



September 30, 2020

Can. American Enterprises Ltd.  
126 – 7475 135 Street  
Surrey, BC V3W 0M8

## **Commissioner's Decision**

### **Can American Enterprises Ltd. (CTC Decision No. 12/2020)**

#### **Introduction**

1. Can American Enterprises Ltd. ("Can American") is a licence holder within the meaning of the *Container Trucking Act* (the "Act"). Under sections 22 and 23 of the Act, minimum rates that licensees must pay to truckers who provide container trucking services are established by regulation, and a licensee must comply with those statutorily established rates. In particular, section 23(2) states:

A licensee who employs or retains a trucker to provide container trucking services must pay the trucker a rate and a fuel surcharge that is not less than the rate and fuel surcharge established under section 22 for those container trucking services.
2. Under section 31 of the Act, the Commissioner may initiate an audit or investigation to ensure compliance with the "Act, the regulations and a licence" whether or not a complaint has been received by the Commissioner.
3. In July 2019, the Commissioner received complaints from three Can American independent operators ("I/O") alleging that Can American was not paying them for off-dock container moves where a container was live-loaded at the customer's location and then brought back to the Can American yard for storage. The complainants also alleged that Can American was instructing them to not record these trips on their timesheets.
4. On July 22, 2019 the OBCCTC requested the following records from Can American for the months of April and May 2019 for all of the licensee's I/Os:
  - List of each container (including record of container number), whether empty or loaded, moved in the audit months with a matching list identifying the VIN Number and Unit Number of the truck which moved the container, the origin and destination of each container moved, and the amount paid for each move;
  - All daily tripsheets;
  - Terminal interchange records for each container, whether empty or loaded, (including record of container number) moved in the audit months;
  - Customer load sheets for each container (including record of container number) loaded and moved in the audit months;
  - Company dispatch records for each container, whether empty or loaded, (including record

- of container number) moved in the audit months;
- Pay statements for each I/O showing total gross earnings in each pay period, all deductions from pay with the reasons for those deductions, and net pay amounts; and
  - Copies of all cancelled pay cheques or bank records for each I/O confirming direct-deposit amounts for work performed during the audit period.
5. Can American provided some but not all of the requested records. Specifically, Can American did not supply the requested dispatch records. Can American advised the OBCCTC that it was unable to provide the dispatch records as it was Can American's practice to field instructions to drivers via phone or text.
  6. Can American also noted the challenge of providing terminal interchange records and customer load sheets as some of these records (interchange slips) were retained by the client and would need to be obtained from them for each applicable container move.
  7. In a letter dated August 26, 2019, the OBCCTC advised Can American that the audit involved tracking the movement of empty containers from origin to final destination and therefore documentation related to container movement was critical to ensuring that drivers were correctly remunerated for every eligible trip leg. Can American was advised that the OBCCTC had reviewed the records supplied by Can American and identified eight specific examples where a Can American driver had picked up an empty container from either a terminal or storage facility and transported the container to a client to be live-loaded but where the records did not indicate the final destination/trip of the container after it was loaded.
  8. Can American was instructed to provide records and documentation detailing each movement/trip leg for the eight listed containers from the live-load location to the container's final destination. Can American was instructed to provide this information by no later than September 4, 2019.
  9. On November 7, 2019, the OBCCTC wrote to Can American and advised that the documents provided by Can American had been reviewed (as had the documents supplied by the complainants) and that two examples were found where an off-dock trip leg was recorded on a timesheet provided by a driver but was crossed out on the same tripsheet provided by Can American. In both cases, the driver was not paid for the crossed-out trip leg, where a loaded container was moved from a customer's facility to the Can American yard.
  10. It was also noted that for four of the eight container movements recorded in the records, there was a time lag of several days between when an empty container was picked up from a port terminal or storage facility and when it was delivered loaded for shipment. In the documentation supplied, Can American had stated that the containers, except for container TCLU8049670, were "not live loads. These were drop and pick as per the customer request." Can American also stated that "in drop and pick cases, containers are dropped on the dock and picked up once ready."
  11. As part of the OBCCTC's review of the records, a Can American customer was contacted to determine if the empty containers were live-loaded and if so, how long it took to load the containers and whether the loaded containers remained in the customer's yard to be picked up at a later date.

12. Representatives from Can American's customer confirmed it was not their usual practice to keep loaded containers on their property. Four specific containers were discussed, and it was confirmed that those containers had arrived at their facility, were live-loaded within an hour of their arrival and were then moved loaded to another location.
13. The information provided by Can American's customer was consistent with the statements provided by the complainants who said it was the usual practice to move the loaded containers to Can American's Surrey yard for storage until they could be shipped out to their outbound destination. These trip legs were not recorded on the complainant's trip sheets.
14. The OBCCTC advised Can American that it did not accept its position that the four containers reviewed were not live-loaded and remained at the customer's facility until they were picked up, and instead found that the loaded containers were brought to Can-American's yard for storage until they were shipped, and those trips were not recorded on the driver's timesheets and the drivers were not paid for those container trips.
15. Can American was instructed to complete a self-audit listing all off-dock container moves that were completed by all its I/Os and not recorded on their tripsheets for the period March 1, 2019 – November 7, 2019. Can American met its deadline but only provided records that listed trips to and from Can American's yard which were recorded on the tripsheets they supplied. Can American did not supply records which accounted for the trips recorded by the complainants.
16. As such, an OBCCTC auditor was directed to audit the records provided by Can American to determine if its I/Os were being paid for all trips as required by the *Container Trucking Act* (the "Act"). Specifically, the auditor was directed to identify missing trips and to calculate an amount owing to the drivers for the missing trips.

#### **Initial Audit - I/Os March 2019**

17. Trips on the drivers' March 2019 timesheets where the driver would pick up an empty container from a port terminal and deliver it to a location for loading or emptying were identified. These containers would then be recorded on the drivers' timesheets either the next day or days later as being picked up from the same location and delivered to a port terminal.
18. As the OBCCTC had confirmed that these locations do not store containers at their facilities, these unrecorded trips were considered to be container trips bound for Can American's yard for storage until the container could be delivered back to a port terminal.
19. The auditor accounted for each of these trips and calculated an amount owing for each trip. The auditor calculates that in March 2019, Can American owed 13 I/Os \$5,536.00 in unpaid trips.

**Expanded Audit**

20. On January 10, 2020, Can American was advised of the auditor's calculations and was directed to calculate the total amount outstanding to all I/Os for the period April 1, 2019 to November 30, 2019.
21. Two extensions were granted to Can American and on April 28, 2020, Can American sent a response letter stating the following:
1. The audit was ordered after Can American terminated the complainants because they would not agree to work on an hourly basis;
  2. The complainants had been relocated to Can American by the OBCCTC following a decision against Roadstar Trucking Ltd. (their previous employer) that resulted in the cancellation of Roadstar Trucking Ltd.'s licence. Roadstar Trucking Ltd. then communicated with the drivers relocated to Can American in an effort to create conflict. For this reason, the complainants were terminated by Can American;
  3. The complainants have filed claims against Can American in court for wrongful dismissal;
  4. All other I/Os who have subsequently left Can American had no complaints and left because the introduction of the Positioning Movement Rate resulted in loss of business for Can American;
  5. The OBCCTC did not conduct the audit efficiently (misplaced records on two occasions);
  6. Can American voluntarily provided records demonstrating that it pays the Commissioner's rates to drivers who are not entitled to the rates;
  7. Can American does not accept the findings of the auditor. Specifically, Can American argues that the trips identified by the auditor unpaid were paid on the next working day;
  8. The majority of the trips identified by the auditor were trips between Can American's yard and Cascades Surrey which is 550 meters from Can American's yard. Can American's drivers made more than the required rates despite not being paid for the trip because it is more cost effective for the drivers to travel 550 meters to drop the unit rather than travelling and paying for fuel for 55.6 km to accomplish the same job with less pay. Can American asks that the Commissioner apply the "meets or exceeds" principle cited in CNTL Decision No. 02 2019;<sup>1</sup>
  9. The audit findings do not represent Can American's normal practices and its intentions with regard to its dispatching practices (and the resulting unpaid moves) are good. Can American always tries to give drivers double-ended moves to eliminate dead runs for which drivers do not get paid;
  10. Can American has conducted a self-audit and it does not owe any money for the period between March and November 2019. Further, Can American relies on a "joint effort" between itself and its drivers to ensure the drivers are paid correctly;

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<sup>1</sup> The auditor interprets Can American's argument to mean the following: Normally a driver will drop a container off at the Port then pick up an empty container and have it live loaded at Cascades then stored at Can-American's yard ready to be delivered to the Port in the morning. If Can-American pays for every trip between Cascades and the Can-American yard, it would not be cost effective for Can American and the drivers would be told to bobtail back to the Can-American yard for which they would not get paid and then bobtail back to the Port in the morning, for which they also would not get paid, to pick up the empty container to be live loaded at Cascades Recovery. The drivers would then make less money as they would have to pay for more fuel as well as make less trips during the day.

11. Can American has not changed its dispatch practices following this audit as it does not make sense to send I/Os on trips with empty chassis;
  12. If the OBCCTC is not satisfied with Can American's explanations and arguments, Can American is concerned that its I/Os will not be satisfied with having to dead-run to terminals the following day to collect a container they could have picked up the previous day for the extra paid leg instead of coming back empty without a paid leg;
  13. The complaints have resulted in a lengthy audit and Can American has also incurred legal costs as a result of the legal proceedings initiated by the complainants; and
  14. Can American's track record is good, with no driver complaints since the current Acting Director and President assumed responsibility for the company in 2014.
22. The auditor reports in response to point 7 above that Can-American did record explanations beside the missing trips identified on the auditor's spreadsheet to show that some of the missing trips had been paid. The auditor states that these explanations are insufficient to demonstrate that drivers were paid. Many of the "explanations" consisted of the word "DROP" as well as a date they were paid with the trip recorded on the spreadsheet as proof. The auditor notes that the unpaid trips recorded on her spreadsheet and provided to Can American were not recorded on any of the driver's timesheets (or reflected in their pay) so there is no way to confirm Can American's assertion that the trips were paid for.
23. The auditor concludes the audit report as follows:
- Can American has admitted to not paying its drivers for trips from Cascades Recovery to and from their yard because of the close proximity of the two locations. They have refused to calculate and pay amounts owing to their drivers for these trips. In my review of their records, there are other locations that they are also not paying for trips to and from their yard. In the beginning of this audit, Can American denied that they were even making the container moves from Cascades Recovery to their yard. It wasn't until further proof was obtained that Can American admitted to these trips occurring and then explained why they were not being recorded or paid. Can American has argued that it is more beneficial to the drivers that they do these container moves without pay. Three complainants allege that Can American directed them to exclude these trips from their time sheets. Also, Can American had from November 7 - 28, 2019 and April 14 - April 28, 2020 to complete the required calculations. Rather than completing the calculations as required the first time, they dropped off all of their records for us to complete them. When they were directed to complete them for a second time, they waited until the calculation deadline and then sent a letter outlining why they should not have to do the calculations. Can American has not paid their drivers as required by the Commissioner's Rate Order for the period March 1 – 31, 2019 – present.
24. Can American was sent a copy of the auditor's report on August 31, 2020 and was provided an opportunity to respond. Can American responded on September 15, 2020. Can American reiterated its positions noted above and provided the following additional comments:
1. Can American refutes the auditor's claim that there were multiple locations where Can American employed its "return and park dispatch" practice resulting in missed trip rate payments;

2. Can American denies instructing drivers to omit trips on their tripsheets and states that any missed trips and/or missed payments were the result of driver's not bringing the issue to the attention of Can American;
3. Can American disagrees with the auditor's characterization of its conduct in the conclusion of her audit report; and
4. Can American states that conversations with the OBCCTC led them to believe that the unpaid movements between Cascades Recovery and its yard fell into a "grey area where circumstances dictate the final decision."

### **Decision**

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

- a. The Commissioner ordered an audit of Can American's I/Os;
- b. The auditor found that Can American did not pay its I/Os for all trips performed in accordance with section 25 of the Act and Appendix E to Schedule 1(1) of its Container Trucking Services Licence;
- c. Can American violated section 1(f) of Appendix D to Schedule 1 of its Container Trucking Services Licence when it did not retain a record of each trip completed on each day by its I/Os;
- d. As of August 10, 2020 (the date of the auditor's report), Can American remained non-compliant as it had not paid its I/Os for the unpaid trips undertaken between March 1-31, 2019; and
- e. Can American has not calculated the amount of money owing to its I/Os in unpaid trips performed between April 1, 2019 and the present.

26. As Can American has not paid the amounts owing to its drivers under the legislation for all container trucking services performed between March 1, 2019 and the present, I make the following Order pursuant to section 9 of the Act:

I hereby order Can American to calculate the amount owing to each of its I/Os in unpaid trips (using the methodology provided by the auditor) performed between April 1, 2019 and the present and provide those calculations to the auditor for review by no later than October 14, 2020. Once the auditor has confirmed the calculations, Can American is ordered to pay the amount owing to its I/Os for unpaid trips performed between March 1, 2019 and the present.

27. I have considered the auditor's report and Can American's submissions and for the reasons set out below, I find Can American to be in violation of the Act and its Container Trucking Services Licence for failure to pay its I/Os for all container trucking services performed, and for not keeping records of all container trucking services trips performed. I also find that Can American has not been cooperative.

28. In March 2019, Can American was found to owe 13 I/Os a combined total of \$5,536.00 in remuneration, which has not yet been paid. Can American argues that the trips identified by the auditor as being unpaid were paid on the next working day; however, I accept the auditor's findings

that there was insufficient evidence to establish that the drivers had been paid. I note that Can American also argues that the majority of the trips in question were, in fact not paid, but the drivers ultimately made more than the required rates when cost savings are considered. This undermines its assertion that the trips were in fact paid.

29. Nor do I accept Can American's argument that its drivers are better compensated under its current model. Can American admits to its non-compliance and attempts to mitigate the consequences by calling into question the rate structure, noting that it is unsustainable for its business. It has provided a detailed example of how drivers are paid more using its dispatch/pay model that splits trips (thereby not paying a trip rate for all trips) and does not include a Positioning Movement Rate (which was introduced to address the issue of trip rate drivers not being paid for bobtail and empty chassis moves).
30. Can American's dispatch/pay model does not result in more money for its drivers and the payment of the required rates is not optional. Licensees are not entitled to assess the practicality of the required rates, or the *Act*, and adjust their rate structures in response.
31. Can American also asks to have a "meets or exceeds" test, as employed in Canadian National Transportations Ltd. (CTC Decision No. 02/2019), employed in this case. In the OBCCTC's April 17, 2020 Bulletin (Off-Dock Rates and Truck Tag Requirements) the Canadian National Transportations Ltd. ("CNTL") decision was discussed and it was noted that "the CNTL decision should only be viewed within the context of that audit and the unique factors and circumstances which were considered for the purpose of that audit only and are not broadly relevant."
32. This audit will not be conducted using a "meets or exceeds" test. The circumstances of the CNTL audit, in particular CNTL's national rate structure, were such that a "meets or exceeds" test was required in order to conduct the audit. That is not the case here. Can American pays its drivers in a manner consistent with the required rates and was audited based upon that rate structure.
33. I do not accept Can American's statement that it owes no money for the period between March and November 2019. The auditor has already determined that Can American owes 13 I/Os \$5,536.00 for March 2019 and Can American's self-audit calculations were not shared with the auditor for review. Can American should conduct a self-audit as required and provide the auditor with the findings for review.
34. Can American explains that any requirement to pay its I/Os for the unpaid trips will result in I/O dissatisfaction resulting from future unpaid dead runs. I remind Can American that the Positioning Movement Rate addresses this issue by ensuring that I/Os are paid an additional \$25 for every trip performed for the purpose of accounting for dead runs and bobtails.
35. Can American denies the complainants' allegation that it instructed them to omit the unpaid trips on their trip sheets and suggests that this allegation is unsubstantiated and likely the result of the complainants' resentment at being terminated by Can American. Can American submits that its drivers are paid for every trip recorded on their trip sheets and has provided records which demonstrate that its drivers were paid for some trips between Cascades Recovery and its yard in

response to the allegation that it instructed drivers not to record these trips. Can American also suggests that, ultimately, the onus is on its drivers to ensure that they are paid for all trips performed.

36. The onus is in fact on licensees to ensure that drivers are paid correctly. The licensee is also required to retain records which show all container trucking services performed and a corresponding payment. It is not up to Can American's drivers to ensure they are paid correctly.
37. Can American did pay for some trips between Cascades Recovery and its yard and therefore I am not persuaded that Can American instructed its drivers to omit these trips from their records.
38. Can American claims that conversations with the OBCCTC led them to believe that the un-paid movements between Cascades Recovery and its yard fell into a "grey area where circumstances dictate the final decision." There is no record of this conversation and it is unlikely that any staff member of the OBCCTC would suggest that a trip between two locations in the Lower Mainland, no matter the distance between the locations, would not attract a trip rate.
39. Can American admits that it did not always pay for the trips between Cascades Recovery and its yard but states that its drivers were paid for all other trips. However, the auditor found, and I accept, that there were three other locations (Mitsui, New West Recycle and New West Urban) where drivers were not paid for trips between one of these locations and the Can American Yard.
40. Can American disagrees with the auditor's characterization of its conduct in the conclusion of her report. Can American cites its willingness to provide "any further documentation necessary to further prove our dispatching methods yield efficiency" and notes its general willingness to provide documentation throughout the audit. Can American does not, however, reference the auditor's full conclusion:

Can-American has admitted to not paying its drivers for trips from Cascades Recovery to and from their yard because of the close proximity of the two locations. **They have refused to calculate and pay amounts owing to their drivers for these trips.** In my review of their records, there are other locations that they are also not paying for trips to and from their yard. **In the beginning of this audit, Can-American denied that they were even making the container moves from Cascades Recovery to their yard. It wasn't until further proof was obtained that Can-American admitted to these trips occurring and then explained why they were not being recorded or paid.** Can American has argued that it is more beneficial to the drivers that they do these container moves without pay. Three complainants allege that Can-American directed them to exclude these trips from their time sheets. Also, Can-American had from November 7 - 28, 2019 and April 14 - April 28, 2020 to complete the required calculations. **Rather than completing the calculations as required the first time, they dropped off all of their records for us to complete them. When they were directed to complete them for a second time, they waited until the calculation deadline and then sent a letter outlining why they should not have to do the calculations.** Can-American has not paid their drivers as required by the Commissioner's Rate Order for the period March 1 – 31, 2019 – present. (emphasis added)

41. I accept the auditor's conclusions. Can American was not cooperative throughout this audit. It also



has yet to undertake the required calculations and pay monies owing. A willingness to supply information in support of an argument is not cooperation. Can American has impeded the expeditious and successful conclusion of the audit. Further, Can American admitted to its non-compliance only when caught, and will not bring itself into compliance as instructed.

42. Can American also raises a question about the audit process by noting that one box of records was not reviewed by the auditor and sticky notes on original records supplied by Can American were missing when returned. Not all the records supplied were reviewed. Can American was instructed to conduct a self-audit but instead sent unsolicited boxes of records requiring review by the auditor. In reviewing the records supplied, the auditor began with one month's set of records (March 2019) in order to develop an audit template that Can American could use to conduct a self-audit. It was not the auditor's role to review all the records supplied by Can American.
43. Can American also elected to attached explanatory sticky notes to the records it supplied rather than conduct the self-audit as instructed. These sticky notes were reviewed but not removed by the auditor and the records were returned with the sticky notes attached. I accept that some sticky notes may have come off records during the process of record review and return but I do not find that undermines the audit in any way whatsoever.
44. I remind Can American that pursuant to Appendix D to Schedule 1 of the Licence, Can American (not its drivers) is required to retain records of hours worked and trips completed each day by each driver performing container trucking services. Schedule 2(g) of the Licence also requires licensees to keep payroll records as defined and required by section 28 of the *Employment Standards Act*. Section 28 of the *Employment Standards Act*, like Appendix D to Schedule 1, requires records that include, among other things, the rate of remuneration, hours worked, and trips completed, total compensation before deductions, and any deductions made and the reasons for them. Sticky notes do not constitute a reasonable means of record keeping and are not consistent with the requirements of the Licence and the *Employment Standards Act*.
45. 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.
46. In this case, it has been determined that in March of 2019, Can American violated section 23 of the *Act* when it failed to pay its I/Os for container trucking services trips performed and violated Appendix D to Schedule 1 of its Container Trucking Services Licence when it did not retain a record of each trip completed on each day by its I/Os. Additionally, Can American has not conducted a self-audit as instructed or demonstrated that it has brought itself into compliance by changing its rate payment practices.
47. This is not Can American's first audit or violation of this kind. In Can-American Enterprises Ltd. (CTC Decision No. 01/2018), it was determined that Can American failed to comply with the minimum trip rates required under the *Act* and *Regulation*. The audit findings there indicated that

Can American owed three I/O's adjustments totaling \$7,112.50. The adjustment payments were required because Can American was splitting trip rates for I/Os who could not complete their deliveries within one day. The trips split in that case included trips between Cascades Recovery and Can American's yard. Can American paid the money owing to its drivers and was penalized \$1,500.000.

48. In these circumstances, I have concluded that an administrative fine is again appropriate. Regarding the size of the proposed fine, I have decided that an administrative penalty of \$10,000.00 is appropriate in this case. Can American admits to its non-compliance but has prolonged the audit by refusing to calculate all monies owing and amend its payment practices resulting in the order contained herein. This is also Can American's second violation for the same issue.
49. In the result and in accordance with section 34(2) of the *Act*, I hereby give notice that, in addition to the proposed suspension of licence contained in paragraph 19 above:
- a. I propose to impose an administrative fine against Can American Enterprises Ltd. in the amount of \$10,000.00;
  - b. Should it wish to do so, Can American Enterprises 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 Can American Enterprises Ltd. provides a written response in accordance with the above, I will consider its response and I will provide notice to Can American Enterprises 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.
50. Can American is ordered to calculate the amount owing to each of its I/Os in unpaid trips (using the methodology provided by the auditor) performed between April 1, 2019 and the present and provide those calculations to the auditor for review **by no later than October 14, 2020**. Once the auditor has confirmed the calculations, Can American is ordered to pay the amount owing to its I/Os for unpaid trips performed between March 1, 2019 and the present.
51. This decision will be delivered to the Company and may published on the Commissioner's website after Can American Enterprises Ltd.'s response period has closed ([www.obcctc.ca](http://www.obcctc.ca)).

Dated at Vancouver, B.C., this 30<sup>th</sup> day of September, 2020.



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Michael Crawford, Commissioner