



March 5, 2021

Aheer Transportation Ltd.
8970 River Road
Delta, BC V4G 1B5

Commissioner's Decision

Aheer Transportation Ltd. (CTC Decision No. 01/2021)

Introduction

1. Aheer Transportation Ltd. ("Aheer") 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 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. On October 25, 2018, the Commissioner received complaints from three Aheer independent operators ("I/Os") alleging that Aheer paid incorrect trip rates in August and September 2018, that drivers at another company were "taking trips" from Aheer drivers, and that Aheer was telling drivers to scan all paperwork showing pay discrepancies and submit electronically rather than handing paperwork in person.
4. On August 22, 2019, the Commissioner received complaints from two Aheer company drivers and on March 21, 2020 the Commissioner received another complaint from another company driver. All alleged that Aheer was paying its company drivers by the trip, resulting in lower wages than if paid by the hour. The complainants also alleged that Aheer was requiring them to keep two timesheets and did not pay for overtime and holidays.
5. In response to the October 2018 complaints, the Commissioner directed an auditor to audit Aheer's records to determine if its I/Os were being paid the required minimum rates. In October 2019, the auditor was directed to expand the scope of the audit and audit Aheer's records to determine if its company drivers were also being paid the required minimum rates.
6. The auditor was directed to audit I/O records for the pay periods in the month of September 2018 and company driver records for the pay periods between March 16, 2019 and April 15, 2019 and the month of August 2019 (the "Initial Audit Period") to determine compliance.

7. The requirement to pay overtime and holiday pay per the *Employment Standards Act* is not within the jurisdiction of the Commissioner and therefore the auditor was not directed to investigate these complaints.

Initial Audit Period - I/Os

8. The auditor requested and obtained relevant records from Aheer and determined that during September 2018, Aheer did not pay its I/Os trip rates consistent with the *Act* and the *Container Trucking Regulation* (the "*Regulation*") and did not pay its I/Os for all trips performed.
9. Specifically, the auditor found discrepancies, where trips were listed on the drivers' timesheets but not included on the drivers' monthly summaries and therefore not paid to the drivers.¹ The auditor also found that Aheer did not consistently pay its I/Os the regulated trip rates.
10. The auditor advised Aheer of her calculations. Aheer provided revised calculations and documentation, and explained that the auditor had made some errors in the calculations as a result of illegible driver timesheets, unidentified combo chassis movements and location errors on drivers' timesheets. Aheer also decreased the amount calculated by the auditor as outstanding by netting overpayments against underpayments.
11. The auditor accepted Aheer's revised calculations, which took into account both the auditor's assessment and corrected for her errors, but the auditor did not accept Aheer's attempt to net overpayments against underpayments, as this practice is prohibited by the OBCCTC as set out below. Ultimately, the auditor calculated that the total amount outstanding to thirty-six (36) I/Os in September 2018 was \$7,007.52 for missed trip payments and trip rate payment errors.
12. The auditor also identified instances of I/Os being paid both hourly and trip rates. Aheer paid its I/Os hourly rates when they performed work for Raymont Logistics and trip rates for all other container trucking services. The drivers were paid correctly for all the hours they performed container trucking services but because Aheer sometimes paid a driver a trip rate and other times paid the same driver an hourly rate, the drivers received less money than they would have received had they been paid for all the work by the trip. This is also a violation of Aheer's Licence which prohibits paying trucker a method of compensation that is a hybrid of per trip and hourly (Appendix A, Prohibited Practices).

Expanded Audit Period - I/Os

13. Having established that Aheer did not always pay its I/Os correct trip rates or for all trips performed, the auditor expanded the scope of the I/O portion of the audit to cover the period between May 1, 2015 (the date following Aheer's last audit) and November 30, 2019 (the last pay period before Aheer was instructed to change its payroll practices) (the "Expanded Audit Period").

¹ The monthly summaries break down each trip for which the driver was paid. If the trip was not listed on the monthly summary, then the driver was not paid for that trip.

14. Aheer was also directed to adjust its pay structure and practices immediately in order to bring itself into compliance with the rate requirements. The auditor directed Aheer to undertake outstanding I/O pay calculations by no later than December 30, 2019.
15. In response, Aheer made three separate deadline extension requests on December 12, 2019, January 23, 2020, and April 14, 2020, all of which were agreed to by the auditor. Ultimately, Aheer was required to complete the outstanding pay calculations by May 1, 2020. Aheer met that deadline.
16. At the same time and over the approximately five (5) month period between the first outstanding pay calculation direction from the auditor and Aheer's submission of its calculations, the owner of Aheer and an Aheer staff member both sent correspondence arguing that overpayments should be applied against underpayments. In response, the auditor advised the owner of Aheer of the OBCCTC's policy respecting offsets and the Deputy Commissioner wrote a letter stating:

As a statutory body, the OBCCTC is responsible for enforcing compliance with the *Container Trucking Act*, ("Act") the *Container Trucking Regulation*, the Commissioner's Rate Order (January 2020) and any other relevant legislation. With respect to the payment of driver remuneration, 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. (emphasis added)

Several decisions issued by this office have expressly prohibited the practice of using overpayments as an offset or set off against remuneration owed to drivers. For example, in Sunlover Holdings Co. Ltd. (CTC Decision No. 10/2017), the Commissioner discussed his position regarding set-offs noting that overpayments cannot be used as a set-off against wages owed by a licensee to its drivers. The Commissioner noted that rates of pay are minimum rates which must be paid and cannot be reduced by alleged overpayments in other areas.

17. Aheer was advised by the Deputy Commissioner that Aheer was expected to comply with the auditor's calculation request and would be provided with an opportunity to dispute and/or respond to the findings of the auditor once she had completed her report.
18. Aheer provided its outstanding pay calculations on April 29, 2020. Aheer determined that for the period between May 1, 2015 and November 30, 2019 (exclusive of the September 2018 audit period) it owed thirty-six (36) I/Os \$66,383.20. The auditor spot-audited Aheer's calculations, found no material errors, and determined that between May 1, 2015 and November 30, 2019 (inclusive of the September 2018 audit period) Aheer owed thirty-six (36) I/Os \$73,390.72 for incorrect and missing trip rate payments.
19. The auditor conducted a cut-off audit which examined the month of December 2019 (the period immediately following the Expanded Audit Period) to ensure that Aheer had corrected its pay practices. The auditor confirms that Aheer has corrected its pay structure.

20. Aheer was directed to pay the money outstanding to its I/Os and demonstrate that the I/Os had received the payments. Aheer worked with the auditor to confirm driver contact information, particularly contact information for drivers who had left Aheer. Aheer requested that it be allowed to make two partial payments. Aheer dispersed the money owing on August 31, 2020 and September 1, 2020.

I/O Complaint

21. During the process of confirming driver payment, the auditor spoke with one I/O who no longer worked for Aheer. The I/O advised the auditor that he would not be cashing the cheque made out to him for the money determined to be owing because he alleged that he was owed much more money from Aheer, specifically for the period between February 2015 and April 2015 (the "Complaint Period").
22. The I/O provided records to the auditor which appeared to show that he was not paid the regulated trip rates in the Complaint Period. The I/O also claimed that he had supplied the records to the OBCCTC in 2017 as part of a previous audit.
23. The auditor reviewed the I/O's records, which suggested that during the Complaint Period, the I/O was paid trips rates of \$40.00 and \$80.00, both of which were below the regulated trip rates. On October 6, 2020, the auditor requested payroll records from Aheer for all I/Os that performed container trucking services during the period between January 1, 2015 and April 30, 2015.
24. In response, Aheer made four separate deadline extension requests, on October 13, 2020, October 21, 2020, November 9, 2020, and November 25, 2020, all of which were granted.
25. Aheer initially argued that it had already been audited for the period in question. The auditor responded to Aheer's initial claims on October 6, 2020 noting that:

Aheer has provided a copy of an Office of the BC Container Trucking Commissioner ("OBCCTC") audit record request letter dated August 11, 2015 requesting that Aheer provide records for independent operators in the period April 3, 2014 to July 31, 2015. Aheer has also provided an excel spreadsheet with accompanying copies of cheques intended to demonstrate that Aheer has already been audited and made payments to drivers for the period in question.

I have reviewed these items. They do not indicate that Aheer made any payments to independent operators for the period between January 1, 2015 and April 30, 2015.

Following the completion of the interim audit report in 2015, Aheer was found to be owing \$82,545.92 to independent operators for the period between April 3, 2014 and December 31, 2014. The OBCCTC issued an Order to Comply on January 28, 2016 directing payment of amounts owing, and OBCCTC records indicate that Aheer made payment as ordered. The payouts listed on the excel spreadsheet and reflected in the cheque copies that Aheer recently provided correspond with the payments made in response to the Order to Comply in 2016. The interim audit report did not address payments made to independent operators for the

period of January 1, 2015 to July 31, 2015. While the initial record request letter (dated August 11, 2015) did request records from the period between January 1, 2015 and July 31, 2015, there are no records indicating that the audit for this period was completed or that Aheer has paid any money owing to independent operators for the period.

26. Aheer's legal counsel responded to the auditor's letter on October 21, 2020 seeking a copy of the interim audit report of the OBCCTC cited in the auditor's October 6, 2020 letter noted above. I responded to Aheer's legal counsel on October 23, 2020. A copy of the requested report was provided, and I advised that:

Aheer has provided a copy of an OBCCTC audit record request letter dated August 11, 2015 requesting that Aheer provide records for independent operators in the period April 3, 2014 to July 31, 2015. Aheer also provided an excel spreadsheet with accompanying copies of cheques intended to demonstrate that Aheer has already been audited and made payments to drivers for the period in question.

I have reviewed these items. They do not indicate that Aheer's records for independent operators in the period between January 1, 2015 and July 31, 2015 were audited or that Aheer made any payments to independent operators for this period. In fact, the interim audit report specifically indicates that although they were requested, independent operator records for this period were not audited.

Following the completion of the interim audit report in 2015, Aheer was found to be owing \$82,545.92 to independent operators for the period between April 3, 2014 and December 31, 2014. The OBCCTC issued an Order to Comply on January 28, 2016 directing payment of the \$82,545.92 found to be owing and OBCCTC records indicate that Aheer made payment as ordered. The payouts listed on the excel spreadsheet and reflected in the cheque copies that Aheer has recently provided correspond with the payments made in response to the Order to Comply in 2016.

The interim audit report explicitly did not address payments made to independent operators for the period of January 1, 2015 to July 31, 2015. While the initial record request letter (dated August 11, 2015) did request records from the period between January 1, 2015 and July 31, 2015, there are no records indicating that the audit for this period was completed or that Aheer has paid any money owing to independent operators for the period. I have attached a redacted copy (driver names removed) of the interim audit report for your review.

27. Aheer's legal counsel responded on October 27, 2020 and raised concerns that the interim audit report provided cited instruction from a previous Commissioner to stop auditing Aheer's records for the period after December 31, 2014 as "alternate plans were underway to resolve the rate issues." Aheer's counsel also asked that the OBCCTC advise why the audit for the period in question had not been pursued for over five (5) years, what OBCCTC rules were in place respecting the complaint process (and if no rules were in place why no such rules had been issued), the legal basis upon which the Commissioner was demanding Aheer's records, and the legal basis upon which the Commissioner expected Aheer to have retained the records. Aheer's legal counsel also maintained that the Commissioner's decision to not audit Aheer previous amounted to issue estoppel and asked

that that I reconsider my decision to request the records and audit Aheer for the period in question.

28. I responded on November 2, 2020, stating that:

The OBCCTC does not have a record of any decisions or instructions of then-Commissioner Andy Smith pertaining to the request of Aheer's records for the period between January 2015 and April 2015, other than the statement of the auditor that she was instructed not to audit this period. Despite the reference to "alternative plans...to resolve the rate issues" in the interim audit report, no such plans ever came to fruition. The period was not audited, and the rate issues were not resolved. Aheer has not made any payments to independent operators for this period. There is no issue estoppel as the OBCCTC never determined the issue.

Aheer's current audit, commenced in November of 2018, has been expanded because, as I advised in my letter to you of October 23, 2020 the OBCCTC has received a complaint regarding unpaid amounts owing for the period of January 1, 2015 to July 31, 2015. That complaint was received on September 30, 2020 in the course of Ms. MacKinnon's confirmation of Aheer's payment of amounts owing under the current audit.

Sections 26-29 of the *Container Trucking Act* (the "Act") establish the process that the OBCCTC is to follow with respect to complaints. Section 31 mandates that the Commissioner accept and review complaints. Section 32 authorizes the Commissioner to require records. The OBCCTC does not at present operate under any additional rules.

I will not reconsider my decision to expand Aheer's audit or to seek the records required to complete the audit.

29. Aheer's legal counsel responded on November 9, 2020 and reiterated their request that I reconsider the record request on the basis that the absence of rules respecting the complaint process constitutes a breach of the Commissioner's legislative duties and obligations resulting in the Commissioner exercising his powers in an arbitrary manner. Aheer's legal counsel also noted that nothing in any correspondence between the Commissioner and Aheer on this matter amounted to an admission that the records requested existed or were in the possession or control of Aheer.

30. I replied on November 12, 2020 and advised Aheer that its failure to produce the requested records by November 23, 2020 would result in the OBCCTC considering only the records supplied by the complainant. Aheer did not supply the records by the deadline.

31. The auditor reviewed the complainant's records and determined the he was owed \$22,069.91 for the period between February 2015 and April 2015 as a result of incorrect trip rate payments. The auditor advised Aheer of her findings on December 4, 2020 and asked Aheer to review her calculations. Aheer's owner responded on the same day stating that he disagreed "as this person I understand worked as an off-dock [sic] over 5 years ago" and noted that the auditor's findings would be challenged as "the labour law [sic] goes back to 4 years only."

32. In response to Aheer's assertion that the complainant only performed off-dock work during the period in question, the auditor advises that the complainant performed a total of nine (9) trips to Delta Port in April 2015 indicating that the complainant was not solely performing off-dock work as Aheer suggested.
33. On January 4, 2020, the OBCCTC received a letter from Aheer's legal counsel, stating that Aheer was unable to locate the records requested and making a series of arguments as to why Aheer should not have to pay the complainant. Aheer's arguments are set out below.

A complaint from 2015 being dealt with in 2020 is unfair and unreasonable

34. Aheer argues that "belated" complaints should not be entertained by the OBCCTC. In this case, the auditor expanded the audit in response to a complaint received in 2020 during the course of an audit commenced in 2018 regarding payment for container trucking services performed in 2015. It is Aheer's position that submitting a complaint five years after the alleged infraction is unreasonable and the OBCCTC should set guidelines on its complaint process that include the imposition of "reasonable" time limits on accepting complaints.

An audit for the period has already been conducted

35. Aheer submits that an audit for the period in question has already been conducted by the OBCCTC and, given that Aheer's records were found to be in good order at the time, Aheer should not be compelled to provide the records again. Being forced to do so, Aheer argues, breaches administrative law principles and amounts to an abuse of power.

The request for documents is contrary to the Container Trucking Services Licence

36. Aheer notes that paragraph (g) of Schedule 2 of the 2018 Container Trucking Services Licence (the "Licence") requires licensees to maintain and provide to the Commissioner payroll records, as defined in and required by the *Employment Standards Act*, which only requires an employer to keep employee records for a period of four (4) years. Per this requirement, Aheer points out that it was only required to keep the complainant's records until April 30, 2019, well before the auditor's record request on October 6, 2020.
37. On this basis, Aheer asks that I dismiss the complaint filed by the I/O and reconsider my request for documents from the period between February 2015 and April 2015.
38. On February 9, 2021, Aheer was sent a copy of the I/O complainant's records and re-sent a copy of the auditor's related calculation spreadsheet for review and was provided an opportunity to provide comments/analysis respecting the accuracy of the complainant's records and the auditor's calculations by no later than February 23rd, 2021. Aheer did not provide a response.

Initial Audit Period - Company Drivers

39. The auditor requested and obtained relevant records from Aheer and determined that during the Initial Audit Period (pay periods between March 16, 2019 and April 15, 2019 and August 1-31, 2019),

Aheer paid its company drivers hourly rates consistent with the *Act* and the Commissioner's Rate Order.

40. The auditor also determined that Aheer had made bonus payments to its company drivers. When queried about the bonus payments, Aheer advised the auditor that the payments were incentive intended to ensure that the drivers performed "to the best of their ability."
41. The auditor compared the total amount of hours listed on ten drivers' timesheets during the Initial Audit Period with the amounts listed on their pay statements and found \$1,384.40 in discrepancies. The drivers' net pay was then compared to their paystubs and copies of cancelled cheques. No discrepancies were noted, suggesting that the hours recorded on the driver's timesheets were incorrect.
42. When questioned about the discrepancies, Aheer noted that each of the discrepancies identified by the auditor were calculation errors made by payroll except for one instance, for which an adequate explanation was provided. The auditor accepted Aheer's explanations.
43. The company driver complaints that precipitated this component of the audit referenced company drivers being paid by the trip. Specifically, two company drivers complained that they were being dispatched for trips that take longer than most to complete and were paid a trip rate for the work, thereby reducing their overall pay. They stated that some company drivers paid by the trip were performing trips (shorter trips) that made being paid by the trip worthwhile, but other drivers, including the complainants, did not get the "good" trips; therefore, they made less when they were paid by the trip than they would if they were paid hourly. The complainants stated that they asked Aheer to be paid hourly in May 2019. Aheer agreed and the complainants alleged that their workload decreased since then as a result.
44. When reviewing the drivers' timesheets, the auditor found that many timesheets had the number of containers moved written on the timesheets, which is unusual for a driver paid by the hour. When asked why this was the case, and if Aheer was, in fact, paying some of its company drivers by the trip, Aheer explained that the number of containers written on the timesheets were written by drivers keeping track of hours and containers but that Aheer pays its company drivers an hourly rate.
45. The complainants also alleged that they were being instructed by Aheer dispatchers to prepare two timesheets and that the first timesheet was not to exceed eight (8) hours. If the driver worked more than eight (8) hours, the drivers claim that they were required to record those hours on the second timesheet.
46. The auditor noted that that the hours on the timesheets submitted by Aheer matched the hours the drivers were paid on the drivers' pay statements. On the basis of these records, no anomalies were identified. When asked about two timesheets, Aheer claimed that, to the best of its knowledge, all drivers were only handing in one timesheet.
47. On April 30, 2020, the auditor wrote to Aheer and asked the company to provide a detailed, step by step explanation (and supporting examples), of Aheer's company driver payroll calculation method

during the audit periods with particular focus on Aheer's use of "bonus payments" that were listed on the drivers' paystubs. Aheer was also asked to provide any additional timesheets (second timesheets) not supplied by Aheer in response to the initial record request.

48. Aheer's owner replied on May 13, 2020 to say that Aheer had changed its payroll to only pay all company drivers the minimum hourly rate because business was slow due to Covid 19. Two days later, Aheer provided the "second" timesheets submitted by company drivers that had not been provided with the initial audit records request. Aheer did not provide a detailed explanation of its company driver payroll process with particular focus on Aheer's use of "bonus payments" or evidence to support that it had changed its payment/payroll practices.
49. Using the additional records provided, the auditor conducted a second review and found that if the "bonus" amount listed on the company drivers' pay statements was included as part of the drivers' regular earnings for a particular period, then Aheer was correctly compensating the drivers for the number of hours worked as recorded on both of the time sheets together. If, however, the "bonus" payment was excluded from the drivers' regular earnings, the drivers were significantly underpaid.
50. Aheer was given a further opportunity to explain the payment/payroll process and to provide justification for why the "bonus" should be included in the earnings calculation. Aheer was also asked to provide a written response detailing the changes made to its payment/payroll practices in 2020. In response, Aheer described in detail its "bonus" payment calculation² and in doing so, admitted that it paid company drivers based on a calculation involving the number of hours of container trucking services performed (paid at the correct hourly rate) and containers moved (trips made) (paid at \$50.00 per container/trip). Aheer advised that it began paying all its company drivers exclusively an hourly rate on March 1, 2020 and the auditor has confirmed that to be the case.
51. The auditor examined Aheer's payroll structure, comparing the amounts the drivers were paid based on the blended trip/hourly rate against the amount they would have been paid had they been paid exclusively by the hour and found that drivers were adequately compensated. The auditor did not consider the "bonus" amount to be a genuine bonus because the drivers were being paid \$50.00 a trip and the sum of the \$50.00 trip rates was simply split between two columns on the drivers pay

² Aheer allocated \$50.00 per trip to each container moved but instead of putting the sum of the trip rates on the drivers' pay stubs it divided that amount between the regular pay and bonus pay columns on the drivers' pay stubs. The regular pay column was calculated by taking the number of hours worked on a driver's first timesheet and applying the regulated hourly rate. The bonus column represents the difference between the total value of the \$50.00 trip rates and the regular pay amount. Aheer provided the following example:

"We allocate \$50.00 per container, so we take the number of containers in a pay period.

Example 10 working days at 6 container per day = 60 containers

60 containers @ \$50.00 per day equals \$3,000.00

Then we take the total hours for the 10 days

Example 10days X 8hrs = 80hrs

80hrs X \$26.96 = \$2,156.80 + 4% = \$2,243.07 (Regular Pay Column)

Then we take \$3,000.00 – \$2,243.07 = \$756.93 (Bonus Column)

So technically instead of paying \$2,243.07 we end up paying \$3,000.00"

stub.

52. The auditor also addressed the question of why Aheer might have elected to construct its payroll in the manner that it did, paying the drivers \$50.00 a trip while also paying the drivers the correct hourly rate:

...there is a possibility that in periods outside of the audit, driver trip rate payments would not exceed the hourly remuneration they were entitled to. This circumstance would present itself when a driver is dispatched for a small number of long trips.

There are no regulated trip rates for company drivers, therefore, if company drivers are paid by the trip the company would be required to demonstrate that they have paid the driver more or equal to the amount the driver would have received had the driver been paid by the hour. Furthermore, when paying an hourly paid company driver by the trip, the company has the power to strategically dispatch drivers to control which drivers receive short trips and which receive the long trips, thus controlling how much each driver can earn in a day.

Aheer's past payroll structure has made it confusing for drivers to determine if they are adequately compensated due to their pay being separated as regular pay and bonus on their pay statements. It was also complicated by the fact that their pay statements showed an hourly rate when the drivers were actually paid by the trip.

53. The auditor concludes by noting that Aheer's records were organized and readily available upon request but that, throughout the audit, additional records and explanations were required and Aheer sought multiple extensions to deadlines. The auditor further noted that Aheer's explanations often differed from the records and/or information provided to the auditor by complainants and other industry sources (Aheer customers - Damco Distribution and Delco Container), creating significant time delays.

Summary

54. Aheer was not paying its I/Os in accordance with the *Act* during the Initial Audit Period. It was determined that between May 1, 2015 and November 30, 2019 (inclusive of the September 2018 audit period) Aheer owed 36 I/Os \$73,390.72 collectively for incorrect and missing trip rate payments. Aheer has corrected its payroll practices and paid the money determined to be owing.
55. The auditor has found that Aheer owes one I/O \$22,069.91 for the period between February 2015 and April 2015 as a result of incorrect trip rate payments. Aheer contests its requirement to pay the money and the auditor reports that Aheer has not paid the complainant.
56. Aheer was also found to be paying its I/Os a combination of hourly and trip rates when they performed work for Ray-Mont Logistics and also paid its company drivers trip rates using a calculation based on hours performing container trucking services (paid at the correct hourly rate) and containers moved (paid at \$50.00 per container/trip) in order to hide that they were paying company drivers by the trip.

57. On January 18, 2021, Aheer was provided a copy of the auditor's report and an opportunity to respond. Aheer did not respond by the required deadline. On February 9, 2021, the actual records submitted by the I/O complaining about underpayment between February and April 2015 were sent to Aheer and its response was invited to those records. Aheer did not respond by the required deadline.

Decision

58. As described above, the auditor reports that:

1. In November 2018 and October 2019, the Commissioner ordered audits of Aheer's I/Os and company drivers;
2. Thirty-six (36) I/Os were found to be owed \$73,390.72 collectively for the period between May 1, 2015 and November 30, 2019 because they were not paid the correct trip rates and/or not paid for all trips performed.
3. Aheer owes one (1) I/O \$22,069.91 for the period between February 2015 and April 2015 because the driver was not paid the correct trip rates;
4. Aheer paid its trip rate I/Os by the hour when they were performing Raymont Logistics and yard work;
5. Prior to March 1, 2020, Aheer was paying its company drivers trip rates using a calculation based on the number of hours of container trucking services performed (paid at the correct hourly rate) and the number of containers moved/ trips (paid at \$50.00 per container/trip);
6. Aheer did not provide the auditor with all the records initially requested, withheld important records (the second company driver timesheets), and initially denied their existence;
7. Aheer did supply the auditor additional records/materials and explanations upon request but was required to seek extensions to multiple deadlines imposed by the auditor resulting in substantial delays of the audit; and
8. Aheer has paid all but one (1) I/O the amounts determined to be owing.

59. I have considered the auditor's report and Aheer's submissions and, for the reasons set out below, I find Aheer to be in violation of the *Act* and the *Regulation* for failure to pay its I/Os the correct trip rates and/or for all trips performed. I also find Aheer in violation of the *Act*, *Regulation*, Commissioner's Rate Order and Appendix A (Prohibited Practices) section 1(g) of the Container Trucking Services Licence for paying its I/Os and company drivers a hybrid of trip and hourly rates that included paying its company drivers an incorrect trip rate (\$50.00).

60. I also find that Aheer owes one (1) I/O \$22,069.91 for the period between February 2015 and April 2015. Aheer argues that I should dismiss the complaint filed by this I/O and reconsider my request for documents from the period between February, 2015 and April 2015 on the basis that a five year old complaint being dealt with in 2020 is unfair and unreasonable, an audit for the period has already been conducted, and the request for documents is contrary to the Container Trucking Services Licence.

61. I do not agree that it is unfair and unreasonable to pursue a five-year-old complaint. Section 26 of the *Act* stipulates that any person may make a complaint to the Commissioner that a licensee has

contravened the *Act*. Unlike the *Employment Standards Act* (“*ESA*”), it does not set a time limit for making a complaint. Section 29 of the *Act* requires the Commissioner to accept and review a complaint. Section 29(2) of the *Act* sets out the reasons why the Commissioner may refuse to accept or review or stop reviewing a complaint. Section 29 of the *Act* is similar to section 76 of the *ESA*, but, unlike the *ESA*, it does not contain a provision allowing the Commissioner to stop reviewing a complaint if it is made outside of a specified time limit. If a person can reasonably demonstrate that a licensee has contravened the *Act*, then it is not only fair, but necessary, that the Commissioner pursue the complaint. To do otherwise would be unfair and contrary to the purpose of the *Act* which is to ensure that drivers are properly remunerated for container trucking services.

62. However, there must be a reasonable prospect that the complaint will succeed. Successful complaints very often involve drivers having kept records that support their complaint, and, in the case of an older complaint, this is particularly important. In this case, the complainant was able to provide detailed records which the auditor reviewed and accepted as being legitimate records of the complainant’s activities and pay during the period. The complainant’s records indicate that he was not paid the correct trip rates during the period in question.
63. On February 9, 2021, the OBCCTC provided Aheer with a copy of the auditor’s outstanding pay calculations which were based upon the records provided by the complainant. Aheer was also provided with a copy of the records provided by the complainant for review and comment. Aheer did not provide a response by the required deadline and has therefore not suggested that the complainant’s records are not authentic or accurate. Nor am I aware of any reason they should not be accepted. I accept that Aheer owes the complainant I/O \$22,069.91 for the period between February 2015 and April 2015
64. It is the practice of the OBCCTC to request documents from licensees under audit for some or all drivers in the period under audit and, in the case of this I/O’s complaint, the auditor requested documents from Aheer for the period between January 1, 2015 and April 30, 2015. In so doing the auditor was trying to establish Aheer’s compliance not only as it related to the complainant but also to the balance of Aheer’s sponsored I/Os in the period. Aheer has advised that it is unable to locate the requested records and points out that it is not required to have kept the records for a period longer than four years.
65. I agree with Aheer in this respect. Per the Container Trucking Services Licence, licensees are required to keep payroll records as defined and required by section 28 of the *ESA*. Section 28 of the *ESA* requires employers to retain specific records for each employee for four years after the date on which the payroll records were created. For this reason, I will not require Aheer to provide I/O records for the period between February 2015 and April 2015 and will not penalize Aheer for its inability to do so.
66. In response to Aheer’s argument that an audit for the period has already been conducted and therefore Aheer should not be compelled to provide records for the same period again, that argument is now moot for the reasons set out in the paragraph above. However, I note, as explained at paragraphs 25-28 of this Decision, that I have responded to that argument in two separate letters dated October 27, 2020 and November 2, 2020, in which I explained that Aheer’s I/Os had not in fact been audited for the period in question. This fact was clear in the records of the

previous audit which were supplied to Aheer.

67. As Aheer has not paid one (1) I/O for the period between February 2015 and April 2015, I make the following Order pursuant to section 9 of the Act:

I hereby Order Aheer to pay a total adjustment in the amount of \$22,069.91 to the complainant. A money order (not cheque) is to be made out to the complainant and delivered forthwith, and in any event no later than **April 5, 2021** to the OBCCTC for distribution.

68. 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. In this case, Aheer was found to be non-compliant for failure to pay thirty-six (36) I/Os the correct trip rates and/or for all trips performed. Aheer was also found to be paying its I/Os a hybrid of trip and hourly rates, to be paying company drivers by the trip (\$50.00 per trip). While the auditor determined that, in the period under audit, company drivers were adequately compensated based on the number of hours they worked had all their work been paid at an hourly rate, the payment structure employed by Aheer prior to March 1, 2020 may not have always resulted in its company drivers being paid amounts that met or exceeded the minimum rates established by regulation and the Commissioner's Rate Order.
69. Aheer was not entitled to pay I/Os a combination or hybrid of hourly and trip rates. The hybrid prohibition was introduced in 2015 in response to the *Recommendation Report – British Columbia Lower Mainland Ports* (the "Ready/Bell Report"), which noted that overly complex compensation models led to rate undercutting and created challenges in monitoring and enforcing rate compliance.³
70. It was the recommendation of Ready/Bell that "trucking companies be prohibited from moving drivers from an hourly model to a trip rate model, depending on the day and/or circumstances" on the basis that it is "important that drivers know whether they are employed with a company on a trip rate basis or an hourly rate basis and that such is clearly defined by the company at the outset of the relationship."⁴ As such, the regulated rates and the rates established by the Commissioner do not allow for alternate payments methods for specific classifications of drivers beyond those established. For example, the only rates to be paid to company drivers are hourly rates. Further, a method of compensation that is a hybrid of per trip and hourly is prohibited under the Licence. This issue has been canvassed in previous decisions and other licensees have been penalized for paying hybrid rates.⁵
71. In these circumstances, I have concluded that an administrative fine is appropriate for Aheer's failure to pay the correct trip rates and/or failure to pay for all trips performed to thirty-six (36) I/Os for the period between May 1, 2015 and November 30, 2019 and for Aheer's use of a hybrid payment method.
72. In addition to the above, Aheer prolonged this audit by seeking multiple deadline extensions and did not fully cooperate with the auditor. On several occasions Aheer failed to provide answers to all the

³ Recommendation Report, British Columbia Lower Mainland Ports, Ready/Bell, October 2014, p. 20.

⁴ Recommendation Report, British Columbia Lower Mainland Ports, Ready/Bell, October 2014, p. 31.

⁵ See for example, Lower Mainland Fast Freight Inc. (CTC Decision No. 07/2018).

auditor's questions and at times provided misleading, evasive, and partial explanations regarding their payment methods. Aheer withheld timesheets from the auditor and initially denied their existence.

73. An administrative fine is not being levied for Aheer's failure to keep records longer than four years.
74. Regarding the size of the proposed fine, I have decided that an administrative penalty of \$60,000.00 is appropriate in this case. This is Aheer's first **penalty** for non-compliant rate payments but not its first violation of the rate payment requirements. Aheer has demonstrated a history of non-compliance which includes non-compliant rate payments, unlawful pay deductions and mistreating a driver (the latter for which Aheer received its first administrative fine).
75. In 2015, Aheer was audited and ordered to pay \$141,769.23 to I/Os and company drivers for failure to pay the regulated rates. A 2016 audit resulted in a decision requiring Aheer to repay deductions it had taken from a driver's pay (CTC Decision No. 14/2016). In 2018, Aheer was found to have violated section 28(a) of the *Act* by refusing dispatch to a driver as a result of a complaint lodged with the OBCCTC (CTC Decision No. 17/2018). An administrative fine of \$50,000.00 was imposed in that case.
76. 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 Aheer Transportation Ltd. in the amount of \$60,000.00;
 - b. Should it wish to do so, Aheer Transportation 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 Aheer Transportation Ltd. provides a written response in accordance with the above, I will consider its response and I will provide notice to Aheer Transportation 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.
77. This decision will be delivered to Aheer Transportation Ltd. and may be published on the Commissioner's website after Aheer Transportation Ltd.'s response period has closed (www.obcctc.ca).

Dated at Vancouver, B.C., this 5th day of March, 2021.



Michael Crawford, Commissioner