



May 19, 2023

Ferndale Transport Ltd.
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Abbotsford BC V3G 0C1

Commissioner's Decision Ferndale Transport Ltd. (CTC Decision No 07/2023)

Introduction

1. Ferndale Transport Ltd. ("Ferndale") is a licensee within the meaning of the *Container Trucking Act* (the "Act").
2. Section 16(1)(b) of the *Act* states that a licensee must carry out the container trucking service in compliance with:
 - (i) this Act and the regulations,
 - (ii) the license, and
 - (iii) if applicable, an order issued to the person under the Act.
3. 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. 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.
4. Ferndale currently operates under a container trucking services license that came into force on December 1, 2022 ("2022 CTS Licence"). Section 6.3 of the CTS Licence states: "The Licensee must not enter into any Subcontract for Container Trucking Services with any party who is not a Licensee." Section 6.15 states: "The Licensee must carry out Container Trucking Services using only Truck Tags allocated by the Commissioner on the conditions imposed by the Commissioner."
5. Under section 31 of the *Act*, the Commissioner may conduct an audit or investigation to ensure compliance with the *Act*, the *Container Trucking Regulation* (the "*Regulation*") or a licence.
6. Ferndale has been the subject of two other decisions. In 2016, the Commissioner found that Ferndale had underpaid seventeen (17) drivers by a total of \$65,610.03: *Ferndale Transport Ltd.*, CTC Decision No.

22/2016 (“Ferndale #1”). Ferndale was ordered to compensate the drivers and to pay an administrative fine of \$10,000.00. In 2022, Ferndale was found to have underpaid eleven (11) drivers by a total of \$14,971.87: *Ferndale Transport Ltd.*, CTC Decision No. 5/2022 (“Ferndale #2”). Ferndale paid the drivers and was ordered to pay an administrative fine of \$25,000.

7. On March 15, 2023, the OBCCTC participated in an enforcement initiative alongside the Commercial Vehicle Safety and Enforcement branch (“CVSE”).

Investigation

8. On March 15, 2023, a container truck without a truck tag was observed moving a container at or near Kennedy Road in Pitt Meadows. The container truck with licence plate NM3532 was identified as owned by Ferndale (the “Untagged Unit”).
9. On April 18, 2023, the Commissioner wrote to Ferndale concerning the Untagged Unit that appeared to be performing untagged CTS work on March 15, 2023 and requested the driver’s payroll records for that day and invited Ferndale to provide a submission.
10. On May 2, 2023, Ferndale advised the OBCCTC that the Untagged Unit had performed untagged container trucking work on its behalf on March 15, 2023. Ferndale explained that a tagged truck was originally sent to pick up the container at the CP Rail yard on Kennedy Road but experienced mechanical difficulties while loading the container. A mechanic was dispatched to the CP Rail yard near Kennedy Road with the Untagged Unit. The mechanic used the Untagged Unit to complete the container delivery to Surrey, BC.
11. Ferndale provided receipts and a cheque issued to West Coast Mobile Diesel Ltd. (“West Coast”) to confirm West Coast was dispatched to the CP Rail yard and charged five (5) units of work at \$75.00 per hour for a total of \$375.00 to move the container from CP Rail yard to Klondike Cold Storage in Surrey, BC.
12. West Coast has not been issued a licence in accordance with the *Act*.

Decision

13. As described above, the circumstances of this case are:
 - a. The OBCCTC conducted an enforcement initiative on March 15, 2023.
 - b. On March 15, 2023, the Untagged Unit contracted by Ferndale was observed performing off-dock container work at or near Kennedy Road.
 - c. A mechanical failure with Ferndale’s tagged truck resulted in the Untagged Unit being used to move a container on March 15, 2023.
 - d. Ferndale paid West Coast \$375.00 to drive an Untagged Unit moving a container between the CP Rail yard to Klondike Storage facility in Surrey.
 - e. West Coast is not a licensee.

- f. Ferndale acknowledged that it had performed untagged CTS work on March 15, 2023 but says that it was necessary to avoid disruption at the rail yard.
14. Section 34 of the *Act* provides that, if the Commissioner is satisfied that a licensee has failed to comply with the *Act* or the terms of its licence, 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 may not exceed \$500,000 in cases relating to the payment remuneration, wait time remuneration or fuel surcharge. In any other case an administrative fine may not exceed \$10,000.
15. The seriousness of the available penalties indicates the gravity of non-compliance with the *Act*. The *Act* is beneficial legislation intended to ensure that licensees pay their employees and independent operators in compliance with the rates established by the legislation (*Act* and *Regulation*). Licensees must comply with the legislation, as well as the terms and conditions of their licences, and the Commissioner is tasked under the *Act* with investigating and enforcing compliance.
16. In keeping with the above-described purpose of the legislation, the factors which will be considered when assessing the appropriate administrative penalty include the following as set out in *Smart Choice Transportation Ltd.* (OBCCTC Decision #21/2016):
- The seriousness of the respondent's conduct;
 - The harm suffered by drivers as a result of the respondent's conduct;
 - The damage done to the integrity of Container Trucking Industry;
 - The extent to which the licensee was enriched;
 - Factors that mitigate the respondent's conduct;
 - The respondent's past conduct;
 - The need to demonstrate the consequences of inappropriate conduct to those who enjoy the benefits of having a CTS licence;
 - The need to deter licensees from engaging in inappropriate conduct; and
 - Orders made by the Commission in similar circumstances in the past.
17. Historical labour disruptions in the container trucking industry were caused in part because there were too many I/Os chasing too few containers, forcing many drivers and to undercut each other's rates. The drivers would offset their lower wages by increasing the volume of containers they moved each day. This practice led to an unequal distribution of work as the lowest paid drivers moved the most containers. As it eventually became less economically viable for drivers to move containers, labour unrest occurred.
18. In order to address this instability in the drayage sector, the *Act* and the *Regulation* established minimum rates, and the OBCCTC adopted the Vancouver Port Authority's truck tags system. Minimum rates ensure that it is economically viable for drivers to move containers. Truck tags are a visible indicator to other container drivers and licensees that the truck is registered with the OBCCTC and are an important way to balance the number of trucks with the volume of container trucking services available and encourage the movement of drivers to high performing companies.

19. The OBCCTC monitors the efficiency of licensees and ensures drivers are being paid the minimum rates by capturing GPS data generated from each tagged truck. GPS data assists the OBCCTC auditors in ensuring drivers are paid the minimum rates. The GPS data is also used to create a scorecard (“Scorecard”) that assists the Commissioner in evaluating the performance of each licensee. To ensure that there is enough work for the drivers, the Commissioner uses the Scorecard and other information to reallocate tags assigned to trucks that are underperforming to licensees who have trucks that are overperforming.
20. Untagged trucks do not have a GPS system accessible to the OBCTCC, which hinders the OBCCTC’s ability to track trucks to ensure drivers are paid correctly. Having untagged trucks without GPS performing container trucking work also skews the Scorecards used to reallocate truck tags by not recording all the container moves of the licensee.
21. In the present case, Ferndale does not dispute that it performed untagged container trucking services. Ferndale states that replacing a mechanically disabled tagged truck with the Untagged Truck was the “best option to clear the rail yard in a timely manner without causing further disruption.”
22. I acknowledge that Ferndale was placed in a difficult position when its tagged truck was unavailable to perform the CTS work on March 15, 2023. However, the decision of Ferndale to subcontract work to an unlicensed third party and use an untagged truck on March 15, 2023 resulted in a container move which the OBCCTC was unaware of and hinders the OBCCTC’s enforcement as outlined above. The amended licence that became effective December 1, 2022 reinforces the prohibition against the performance of untagged off-dock container trucking services by adding a term prohibiting licensees from subcontracting off-dock work to non-licensees. The requirement to use only tagged trucks for container trucking services work (both on-dock and off-dock) existed in previous licences issued to Ferndale.
23. Mechanical failures do occur from time to time but there are steps a licensee can take to address these situations including sending another tagged truck, contracting out to another licensee with a tagged truck, or using the short-term replacement truck program which issues a new tag and GPS to a container truck (including truck rentals) offered through the Vancouver Fraser Port Authority. What a licensee cannot do is use an untagged truck or subcontract to a non-licensee to perform CTS work.
24. Like all licensees, Ferndale is responsible for knowing its obligations under the legislation and its licence, including ensuring that vehicles performing container trucking services are properly tagged. I find that Ferndale breached the 2022 CTS license when it subcontracted for container trucking services to a party who is not a licensee when it contracted with West Coast on March 15, 2023.
25. In this case, I did not find any breach of the *Act, Regulation* or term of the licence related to payments of remuneration, wait time remuneration, or fuel surcharge. The maximum available administrative fine in any other case is \$10,000.
26. In *Smart Choice Transportation Ltd.* (CTC Decision No. 21/2016), it was noted that “the amount of any financial penalty must be sufficiently large to meet the objective of deterring non-compliance.” The

purpose of the fine is also one of general deterrence. It is intended to discourage other licence holders from using untagged trucks to move containers in the Lower Mainland.

27. I have also considered Ferndale's previous audits. Ferndale has been penalized in Ferndale #1 and Ferndale #2 for breaching the *Act, Regulation* or licence.
28. For these reasons I have concluded that an administrative fine of \$1,500.00 is appropriate in this case. This fine is higher than fines proposed in *Goodrich Transport Ltd.* (CTC Decision No.06/2023) and *Tri-R Transport Ltd.* (CTC Decision No.03/2023) because Ferndale had been issued two previous administrative fines.
29. With this decision, it should make clear to all licensees that all container trucking services – both off-dock and on-dock – must be performed using tagged trucks and that licensees are not permitted to subcontract work to any party who is not a licensee. Failure to comply is likely to result in a penalty.
30. Considering all the factors present in this case, and in accordance with s. 34(2) of the *Act* I hereby give notice as follows:
31. I propose to impose an administrative fine against Ferndale in the amount of \$1,500.00;
32. Should it wish to do so, Ferndale 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;
33. If Ferndale provides a written response in accordance with the above I will consider its response, and I will provide notice to Ferndale 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.
34. In summary, Ferndale has been found to have violated its CTS licence by subcontracting container trucking services in the Lower Mainland on March 15, 2023. I have determined that it is appropriate to propose the imposition of a \$1,500.00

Dated at Vancouver, B.C. this 19 day of May, 2023



Glen MacInnes
Commissioner