



October 14, 2016

HAP Enterprises Ltd.  
7954 Webster Road  
Delta, BC V6G 1G6

Via email: [harry@hapenterprises.ca](mailto:harry@hapenterprises.ca)  
Original via mail

Attention: Mr. Harry Gill

Dear Mr. Gill:

## **Commissioner's Decision HAP Enterprises Ltd. (CTC Decision No. 17/2016) Decision Notice**

### **A. Overview**

1. In CTC Decision #17/2016 (the "Decision") I gave notice of my intention to impose an administrative fine against HAP Enterprises Ltd. ("HAP") in the amount of \$4,000. That notice is found at paragraph 27 of the Decision:

"In accordance with Section 34(2) of the *Act*, I hereby give notice as follows:

- a. I propose to impose an administrative fine against HAP in the amount of \$4,000.00;
  - b. Should it wish to do so, HAP 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 HAP provides a written response in accordance with the above I will consider its response, and I will provide notice to HAP 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."
2. The reasons for the proposed penalty are set out beginning at paragraph 14 of the Original Decision. In essence, I found HAP had contravened the *Container Trucking Act* (the "*Act*") and *Container Trucking Regulation* (the "*Regulation*"), as well as terms of the Container Trucking Services Licence (the "*Licence*"). I further found this was an appropriate case to impose a penalty, citing HAP's non-compliance with the legislation by way of deficient record-keeping, trip-splitting, and seeking cash payments from its drivers (para. 26).
  3. HAP provided a written response within the required time, stating that it disputes the proposed penalty and providing a number of arguments in support of its position.

### **B. HAP's Response**

4. HAP advances four arguments in support of its position that the proposed penalty should not be imposed:

a. Delay in the Audit Process.

HAP notes there was delay in the audit process, including a period of approximately five months, from September 2015 to January 2016, when the audit was put on hold. HAP complains that it was not informed the audit was being put on hold, and it notes that in December 2015 the Acting Commissioner posted a bulletin asking all licensees to come into compliance voluntarily to avoid facing a penalty. HAP submits: "If HAP had been informed of the audit being put on hold it would have voluntarily come into compliance." HAP further submits that there was "no delay at all from HAP side but all from the auditing side, therefore HAP cannot be held liable for the delay in the audit which led to a penalty". It submits that it cooperated with the audit process, and that the expansion of the audit periods part-way through the process "was an obstruction in HAP making voluntary payment as it did not know what was the exact auditing periods".

b. Trip Splitting

HAP does not deny that it was engaged in trip splitting, but makes a number of arguments why it should not be penalized for the practice. First it submits that it ended the practice in May 2015, prior to the OBCCTC's March 21, 2016 bulletin which confirmed that trip splitting is impermissible. Second, HAP submits it should not be held liable for trip splitting that occurred before the bulletin, as "prior to the bulletin there [was] no clarification at all regarding the per trip rate". Third HAP argues it did not benefit from trip splitting, claiming that it was "still paying the exact same amount for the job". Finally, it submits that its drivers did not object to the trip splitting, and notes that it was "one of the few carriers that serviced the ports throughout the strike period in 2014".

c. Record Keeping

HAP submits that it provided all documents necessary to complete the audit, and that the Licence "does not anywhere indicate that it specifically requires a container sheet to be kept as a record", although it notes it has "voluntarily" kept a "container sheet" as an additional document since the audit. HAP further submits it keeps payroll records as required by Section 28 of the *Employment Standards Act*, and therefore it should not be penalized for lack of record keeping.

d. Claw Back

HAP does not deny asking for cash back from its drivers. Rather it asserts that the requested cash payments were entirely unrelated to the issuance of the adjustment cheques to its drivers. HAP argues that the requested payments were separately intended to recover overpayments to its drivers. It notes that when the OBCCTC advised that it could not collect overpayments in that manner, it stopped right away. It requests the penalty not be imposed as the claw back was "not an intentional decision of [HAP] to go against the decision or claw back any amounts related to the audit".

5. As required by the Act I have carefully considered HAP's response. Each of HAP's arguments is

addressed below.

### C. Consideration of HAP's Response

#### Delay in the Audit Process

6. As recognized in the Decision, this audit took a longer than usual time to complete, and not all of the delay was attributable to HAP (see paragraph 24 of the Decision). The extended length of the audit process does not, however, provide an excuse for HAP's failure to pay in a timely way rates which comply with the legislative requirements.
7. This conclusion is supported by the following factors:
  - a. HAP does not dispute the auditor's conclusion that it failed to pay the minimum rates required by the container trucking legislation.
  - b. The *Act* is beneficial legislation, its purpose being to ensure that drivers are paid the statutorily mandated rates in a timely way. In this case it took over a year before HAP remedied its non-compliance. As stated on many occasions in previous decisions, licensees should not wait until the conclusion of an audit before taking steps to bring themselves into compliance. The fact that an audit is underway does not provide an excuse for non-compliance or a reason for delaying efforts to ensure compliance.
  - c. I do not accept HAP's claims that it would have voluntarily brought itself into compliance had it known that the audit had been put on hold for a period of time, or that the change to the scope of the audit obstructed its ability to comply. Licensees are required to comply with the legislation regardless of whether they are under audit, and regardless of the time taken to perform the audit. The audit is carried out for the benefit of this Office in performing its statutory duty to assess and enforce compliance. It is not carried out to provide a "bill" to licensees which they can wait to pay until they receive a final figure from the auditor.

As previously communicated to stakeholders, licensees who fail to bring themselves into compliance with the legislation in a timely way are likely to incur a penalty. Timely payment does not mean when an audit is complete. As has been previously stated, licensees are responsible for ensuring they are compliant with the *Act*.

#### Trip Splitting

8. As confirmed in the March 21, 2016 bulletin, trip splitting is a prohibited practice. The Decision notes that, as a result of engaging in this practice, HAP underpaid its drivers by a total \$25,555.00. HAP does not dispute that it engaged in trip splitting and does not contest the amounts calculated by the auditor to be owing as a result. I find none of the arguments HAP puts forward justify its practice of trip splitting. The fact that drivers did not expressly complain about the practice, or that HAP believes that it paid the same amount despite the practice, does not justify a practice which is inconsistent with the requirements of the *Act*.
9. The auditor's report disclosed that HAP conceded it owed its company drivers the calculated amounts

and subsequently paid the outstanding amounts found to be owing to its drivers. In the Decision I recognized and acknowledged that HAP engaged in the practice of trip splitting prior to the OBCCTC's bulletin confirming that trip splitting is a contravention of the legislation, and that HAP has since ceased this practice. This acknowledgement was one of the relevant factors taken into account in determining the size of the proposed administrative penalty. Had HAP engaged in trip splitting following the issuance of the bulletin, the penalty would likely have been higher.

### Record Keeping

10. HAP disputes the finding that its record keeping was deficient and submits it should not be subject to a penalty for lack of proper record keeping. It argues that:

“Paragraph 18 of the commissioner’s decision states that “HAP’s record keeping has been found to be deficient”. HAP disputes that it provided all documents necessary to complete the audit, according to Paragraph 3 of appendix D to Schedule 1 of the container trucking license, it does not anywhere indicate that it specifically requires a container sheet to be kept as a record, although HAP voluntarily keeps a container sheet as an additional document for the past six months. Paragraph 3 section “F” requires “hours worked and trips completed on each day by the trucker on behalf of the Licensee” be recorded and HAP does that through logbooks, therefore HAP has provided records, throughout Paragraph 3 it nowhere states that a container sheet is mandatory.”

11. With respect, HAP’s argument misses the point. Prior to January 31<sup>st</sup>, 2015 HAP paid its drivers on a trip rated basis. As recorded at paragraph 10(b) of the Decision, HAP was unable, “to provide adequate records sufficient to allow the auditor to determine how much the company drivers were being paid per trip.” As a result, for the period from December 22<sup>nd</sup>, 2015 to February 1, 2015 the auditor was unable to audit HAP on a trip rate basis (the manner in which the drivers were being paid). Instead, because of the absence of such records, the auditor was forced to use the information provided to calculate what the drivers would have been paid if they were being paid on an hourly basis and to compare this rate to the hourly minimums established by the *Regulation*.
12. Paragraph 3(c) of Appendix D to Schedule 1 of the Container Trucking Services Licence (formerly Paragraph 3 of Appendix D to Schedule 1 of Licence “B”) requires Licensee’s to retain a record of:

*“The rate of remuneration for the Trucker, whether hourly or per trip”.*

13. Additionally, as noted in the Decision, licensees are required to maintain payroll records as defined in Section 28 of the *Employment Standards Act*. Amongst other records, Section 28 requires Licensees to keep a record of:

*“The employee’s wage rate, whether hourly, on a salary basis or on a flat rate, piece rate, commission or other incentive basis”.*

14. Separately, and together, these requirements obligate a licensee who is paying its drivers on a trip

rate basis to keep a record of what drivers are being paid per trip. HAP failed to keep such records. As a result HAP's record keeping was deficient.

15. In *Olympia Transportation Ltd.* (CTC Decision No. 02/2016), I gave Licensees express notice that, "a failure to maintain required records will almost certainly result in a penalty." I am not persuaded that HAP maintained adequate records, for the reasons given.

#### Claw Back

16. As recorded in the Decision, the OBCCTC received complaints that HAP drivers were informed by HAP that in order to collect their adjustment cheques they needed to make cash payments to HAP. When contacted by the auditor, HAP did not deny making the request, explaining that the payments were intended to reimburse HAP for what it viewed as overpayments. HAP did not deny that the drivers were informed that the requested cash payments were required in return for receiving their reimbursement cheques.
17. I do not accept the submission that the cash back payments requested by HAP were "unrelated" to payment of the adjustment cheques. HAP does not deny, that it was demanding these cash payments as a condition of its delivery of the adjustment cheques. It is reasonable to conclude that HAP was not prepared to issue an adjustment cheque to a driver unless that driver complied with its cash payment demand. The reason for making the cash payment demand is not relevant.
18. This behavior contravenes Section 24 of the *Act*, which prohibits a licensee from soliciting or receiving, "...directly or indirectly, a financial set-off, commission or rate deduction or rebate from a trucker." Moreover, this conduct is a prohibited under Appendix A to Schedule 1 of the Container Trucking Services License which provides in part that:

*"A Licensee must not do any of the following:*

*(h) threaten, harass coerce, or attempt to influence a Trucker in any way, either directly or indirectly, regarding a Trucker's right to retain his or her Compensation."*

In my view such behavior reasonably supports the imposition of a penalty under the *Act*.

#### **D. Conclusion**

19. Having carefully considered HAP's response, I remain of the view that the imposition of a penalty is appropriate in this case. The proposed amount of the penalty - \$4,000 - is relatively small given the number of violations identified by the audit. The moderate size of the penalty reflects, in part, the fact that the trip splitting identified by the auditor (which was the reason for most of the rate non-compliance identified in the audit) pre-dated the OBCCTC's trip splitting bulletin.
20. Having considered all these factors and the arguments HAP presents, I am not persuaded to refrain from imposing the proposed administrative penalty.
21. In the result I hereby order HAP to pay an administrative fine in the amount of \$4,000.00. Section 35(2) of the Container Trucking Act requires that this fine be paid within 30 days of the issuance of

this Notice. Payment should be made by delivering to the Office of the BC Container Trucking Commissioner ("OBCCTC") a cheque in the amount of \$4,000.00 payable to the Minister of Finance.

22. Finally, I note that, pursuant to Section 38 of the *Act*, HAP may request a reconsideration of the Commissioner's Decision by filing a Notice of Reconsideration with the Commissioner not more than 30 days after HAP's receipt of this Decision Notice. A Notice of Reconsideration must:
- a. be made in writing,
  - b. identify the decision for which a reconsideration is requested,
  - c. state why the decision should be changed,
  - d. state the outcome requested,
  - e. include the name, an address for delivery, and telephone number of the applicant and, if the applicant is represented by counsel or an agent, include the full name, address for delivery and telephone number of the applicant's counsel or agent,
  - f. be signed by the applicant or the applicant's counsel or agent.
23. Despite the filing of a Notice of Reconsideration, the above orders remain in effect until the reconsideration application is determined. This Order will be published on the Commissioner's website.

Yours truly,

**OFFICE OF THE BC CONTAINER TRUCKING COMMISSIONER**

Duncan MacPhail  
Commissioner

