

February 21, 2018

Safeway Trucking Ltd.
15299 68th Avenue
Surrey, BC V3S 2C1

Commissioner's Decision

Safeway Trucking Ltd. (CTC Decision No.05/2018)

Introduction

1. Safeway Trucking Ltd. ("Safeway") 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 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 26 of the Act, any person may make a complaint to the British Columbia Container Trucking Commissioner (the "Commissioner") that a licensee has contravened a provision of the Act. Under section 29, the Commissioner reviews such complaints and, under section 31, may conduct an audit or investigation to ensure compliance with the Act, the *Container Trucking Regulation* (the "Regulation") or a licence. The Commissioner may also initiate an audit or investigation under section 31 whether or not a complaint has been received.

Facts

3. Safeway performs Container Trucking Services under a Container Trucking Services Licence. Between January 2015 and June 1, 2015, Safeway was not in operation due to a loss of its Container Trucking Services Licence under the Port of Vancouver's licence reform process.
4. On June 20, 2016, Jagbir Graya, a former Safeway Independent Operator ("I/O"), became a shareholder in Safeway. Safeway's majority shareholder, Mr. Harp Gill, passed away shortly thereafter, leaving Mr. Graya with the responsibility for the daily operation of the company. To date, the question of ownership of the company has not been settled between Mr. Graya and the executor of Mr. Gill's estate.
5. Safeway currently operates with 15 truck tags issued by the Office of the BC Container Trucking Commissioner ("OBCCTC"). It employed 17 I/Os and 20 company drivers during the June 1, 2014 to June 30, 2016 audit period.

6. The OBCCTC received a complaint on April 5, 2017 from a former Safeway I/O alleging that he had not received all the remuneration owed to him between April 3, 2014 and the termination of his sponsorship in February of 2016.

Initial Audit Period

7. The initial audit began on April 11, 2017, when the OBCCTC Registrar advised Safeway of the audit and requested it provide records for all I/Os and company drivers employed during the months of June 2014 and June 2016 ("Initial Audit Period"). The information was required by April 26, 2017. Safeway partially met this timeline by submitting all the records Mr. Graya was able to locate. Safeway noted that a lack of co-operation between Mr. Graya and the executor of Mr. Gill's estate had resulted in Mr. Graya being denied access to many financial and personnel records, including cancelled pay cheques, for the Initial Audit Period.
8. In addition, Safeway misinterpreted the OBCCTC's record request and submitted all records that could be located for the entire period between June 1, 2014 and June 30, 2016. Therefore, the Initial Audit Period was adjusted to include the period between June 1, 2014 and June 30, 2016.
9. The auditor reviewed the records and determined that during the Initial Audit Period, Safeway paid its I/Os the minimum on-dock rates required under the *Regulation* but did not pay its I/Os the minimum off-dock rates required under the *Regulation*. The auditor also determined that Safeway was deducting the costs for bridge tolls, reservation fees, and "wrong can" penalties from I/O earnings and was "trip splitting" (not paying I/Os for container moves to and from Safeway's yard). The auditor also noted that in December 2015 and January 2016, some I/Os were paid adjustment payments in recognition of the retroactive pay requirements introduced in the *Regulation*.
10. The auditor concluded for the months included in the Initial Audit Period, Safeway owed 17 I/Os a combined total of \$23,145.86. That amount was later adjusted as noted below.
11. The auditor also found that during the Initial Audit Period Safeway did not pay its company drivers the minimum hourly rates required under the *Regulation*. The auditor determined that Safeway owed 20 company drivers \$66,072.14 as a result of time being deducted for unpaid meal breaks, the payment of incorrect hourly rates, and the payment of the lower of the two prescribed rates (\$25.13 per hour rather than \$26.28 per hour).
12. During the course of the audit, it was further determined that a Safeway I/O, Superman Trucking, utilized the services of several indirectly employed operators for short periods of time. Safeway has been unable to provide payroll records for these drivers. As a result, the auditor was unable to audit Superman Trucking's indirectly employed operators to determine whether or not they were paid in accordance with section 14 of the *Regulation*. This is a violation of Appendix D to Schedule 1 of Safeway's Container Trucking Services Licence.

Expanded Audit Period

13. The audit established that after June 2016, Safeway began paying its I/Os compliant on and off-dock rates. Therefore, the auditor determined that Safeway would not be required to conduct a self-audit of its I/Os for the period July 2016 to present.
14. However, having established that Safeway was paying non-compliant rates to company drivers during the Initial Audit Period, the auditor required the company to conduct a self-audit for the period from July 1, 2016 to January 2018 (the "Expanded Audit Period").
15. Despite requests to the company and the company's legal counsel, Safeway has not conducted this self-audit.

Company Position/Actions

16. On June 29, 2017, Safeway was advised of the auditor's findings regarding I/Os. Safeway did not dispute the auditor's calculations but did indicate that it would not be able to immediately make full payment of monies owed. Safeway subsequently issued payments to I/Os throughout the period between July 2017 and December 2017, including a payment of money owed to the complainant. In many cases, the auditor was not advised of these payments until after writing to the company requiring payment. In each instance the auditor revised her calculations to reflect Safeway's payments.
17. On January 4, 2018, the auditor received correspondence from Safeway's legal counsel. Safeway's legal counsel explained Safeway's attempts to pay drivers. The letter noted a number of payments to I/Os that had been made (which have been accounted for by the auditor in the sums found to be owing) and, in the case of company drivers, identified individuals who the company has no ability to contact and other drivers the company believes should not be owed money.
18. The auditor responded to the January 4, 2018 letter. Specifically, the auditor:
 - revised her calculations based on the new payment information supplied;
 - communicated the process required if drivers were unreachable (the provision of evidence that the cheques were sent by registered mail and returned as undeliverable);
 - supplied legal counsel with driver contact information found on the records provided by Safeway;
 - clarified her position on monies found to be owing, explained the audit process, and referenced previous Commissioner decisions in order to inform legal counsel of the basis of her audit findings;
 - advised of her inability to audit the indirectly employed operators; and
 - noted that Safeway had not completed a self-audit as directed.

19. Safeway's legal counsel responded on January 23, 2018 and supplied further evidence of payment, confirmed it would send out certain cheques via registered mail, and confirmed the employment history of specific drivers in order to justify the company's payment of the lower regulated rate.
20. On January 29, 2018, the auditor replied, noting that upon confirmation of the undelivered cheques and/or cancelled cheques and bank statements referenced in counsel's letter, Safeway would owe four I/Os \$6,431.43. Safeway has not provided the required evidence to date.
21. The auditor also revised the amounts found to be owing to company drivers based on the information provided, but noted that Safeway still owed \$59,062.54 to its company drivers and had yet to conduct a self-audit to confirm compliance for the period from July 1, 2016 to January 2018.

Decision

22. As described above, the circumstances of this case are that:
 - Safeway has failed to demonstrate to the satisfaction of the auditor that it has paid the adjustment amounts found to be owing to its I/Os during the Initial Audit Period. A total of \$6,431.43 is owing to four I/O's provided that Safeway confirms specific I/O payments;
 - If Safeway does not confirm the specific I/O payments noted, Safeway owes \$11,998.29 to I/Os during the Initial Audit Period;
 - Safeway has failed to demonstrate to the satisfaction of the auditor that it has paid all of its company drivers the adjustment amounts found to be owing during the Initial Audit Period. A total of \$59,062.54 remains outstanding to 20 company drivers;
 - Safeway has failed to confirm that it has paid complaint rates to its company drivers for the period July 1, 2016 to January 2018; and
 - Safeway has not provided sufficient evidence to demonstrate that it has ensured payment of indirectly employed operators working for a Safeway I/O in violation of Appendix D to Schedule 1 of Safeway's Container Trucking Services Licence.
23. As Safeway has not paid the amounts owing to their drivers under the legislation or addressed their non-complaint payment practices as they relate to indirectly employed operators, I make the following Order pursuant to section 9 of the *Act*.

I hereby order Safeway to:

 - a. pay forthwith, and in any event no later than March 19, 2018, the four I/Os collectively owed \$11,998.29 for container trucking services performed between June 1, 2014 and June 30, 2016 in the event the confirmation ordered below is not provided;
 - b. by no later than February 26, 2018, provide evidence satisfactory to the auditor that payment has been made to the I/Os represented by Safeway in its letter of January 23, 2018 as having been paid;

- c. pay forthwith, and in any event no later than March 19, 2018, the 20 company drivers collectively owed \$59,062.54 for container trucking services performed between June 1, 2014 and June 30, 2016;
 - d. send cheques by registered mail to the last known address of all I/Os and company drivers found to owed by the auditor forthwith, and in any event no later than March 19, 2018;
 - e. immediately conduct a self-audit, as directed by the auditor, of all company drivers during the period from July 1, 2016 to January 31, 2018;
 - f. immediately correct its payment practices to ensure that Safeway is making and keeping records of payment to indirectly employed operators in accordance with the *Regulation*; and
 - g. by no later than March 20, 2018, demonstrate to the auditor's satisfaction that it has taken all necessary steps to bring itself into compliance with the *Act* and *Regulation*.
24. 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.
25. 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. 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.
26. The *Act* does not, however, require penalties to be imposed for non-compliance in all cases. Rather, the Commissioner is granted discretion to impose penalties in appropriate cases. In this case it has been determined that as a result of an ownership dispute the current shareholder responsible for Safeway's operations was denied access to key financial and personnel records, including cancelled pay cheques, for the Initial Audit Period ; further, Safeway demonstrated that it undertook two voluntary self-audits in December 2015 and January 2016 and issued adjustment payments to some I/Os in recognition of the retroactive pay requirements introduced in the *Regulation*. The auditor confirms that since June 2016, Safeway has paid its I/Os compliant on and off-dock rates and that the complainant, whose complaint initiated Safeway's audit, has been paid all sums found to be owing.
27. In these circumstances, while I record the fact of Safeway's non-compliance with the *Act* by way of this decision, I decline to exercise my discretion to impose a penalty on Safeway at this time.
28. However, Safeway has failed to pay the amounts owing to their drivers under the legislation and has not addressed their non-complaint payment practices as they relate to indirectly employed operators. In addition, Safeway has admitted to its inability to pay the money found to be owing. This has been demonstrated by the sporadic payments of money, often confirmed only after the auditor contacted the company to confirm payment. For these reasons, I hereby notify Safeway

that failure to comply with the orders set out in this decision will be viewed as serious non-compliance with the *Act*. Should Safeway not comply with the above orders, a penalty may be imposed under section 34 of the *Act*. Based on the facts in this case, all available penalties will be considered.

29. This decision will be delivered to the companies and published on the Commissioner's website (www.obcctc.ca).

Dated at Vancouver, B.C., this 21st day of February, 2018.



Michael Crawford, Commissioner