

April 23, 2018

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

Safeway Trucking Ltd. (CTC Decision No.10/2018) – Decision Notice

A. Overview

In Safeway Trucking Ltd. (CTC Decision No.05/2018) (the “Original Decision”), I determined that Safeway Trucking Ltd. (“Safeway”) failed to pay its company drivers and independent operators (“I/Os”) the correct minimum rates required under the *Container Trucking Act* (the “Act”) and *Container Trucking Regulation* (the “Regulation”) and was not making and keeping records of payment to indirectly employed operators in accordance with the *Regulation*. Safeway was ordered demonstrate to the auditor’s satisfaction that it had taken all necessary steps to bring itself into compliance with the *Act* and *Regulation* by March 20, 2018. An administrative fine was not proposed at that time; however, Safeway was advised 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.

In Safeway Trucking Ltd. (CTC Decision No.10/2018) (the “Supplemental Decision”), the auditor was tasked with confirming Safeway’s compliance with the orders of the Original Decision. The auditor reported that Safeway:

- a. did not comply with the Commissioner’s February 21, 2018 order and ensure that the I/Os collectively owed \$11,998.29 for container trucking services performed between June 1, 2014 and June 30, 2016 were paid on or before March 19, 2018;
- b. did not comply with the Commissioner’s February 21, 2018 order and ensure that the company drivers owed \$59,062.54 for container trucking services performed between June 1, 2014 and June 30, 2016 were paid on or before March 19, 2018;
- c. has undertaken a self-audit which demonstrates that all Safeway company drivers performing container trucking services during the period from July 1, 2016 to January 31, 2018 have been paid in accordance with the minimum hourly rates set out in the *Regulation* but which also demonstrates that drivers were not paid in accordance with section 24 (1) of the *Regulation*, which requires company drivers be paid semi-monthly and no later than 8 days after the end of a pay period; and
- d. has not demonstrated to the auditor’s satisfaction that the necessary steps have been taken to correct their deficient payment practices as they relate to indirectly employed operators.

As such, a penalty of \$10,000.00 was proposed and Safeway was ordered to:

- a. comply with the order (a), (b) and (d) of the Decision and either confirm payment or attempted payment or pay forthwith, and in any event no later than April 19, 2018, the four I/Os collectively owed \$11,998.29 for container trucking services performed between June 1, 2014 and June 30, 2016;
- b. comply with order (c) and (d) of the Decision and either confirm payment or attempted payment or pay forthwith, and in any event no later than April 19, 2018, the 20 company drivers collectively owed \$59,062.54 for container trucking services performed between June 1, 2014 and June 30, 2016; and
- c. provide to the auditor evidence that for the drivers owed money in (a) and (b), bank drafts (not cheques) have been provided to each driver owed money under this order (who Safeway can demonstrate are in contact with the company) along with a breakdown of the bank draft amount for each driver by no later than April 19, 2018.

I also proposed to suspend Safeway's Container Trucking Services Licence if it did not comply with the orders in the Supplemental Decision by April 19, 2018.

Following issuance of the Supplemental Decision, counsel for Safeway wrote to the auditor and the Office of the BC Container Trucking Commissioner ("OBCCTC") on April 9, 2018 detailing further action taken by Safeway to comply with the orders. On the same day, the OBCCTC replied, informing Safeway's counsel that:

...the information provided below satisfies some, but not all of the requirements ordered under the Supplemental Decision specifically confirmation of payment to 4 company drivers remains outstanding. As per the order of the Supplemental Decision, Safeway Trucking has until April 19, 2018 to comply with the Commissioner's order.¹

Counsel for Safeway replied on April 10, 2018 and provided further evidence of Safeway's compliance and arguments in support of its position that the proposed penalty should not be imposed. The OBCCTC auditor reviewed the payment information provided and requested further evidence to demonstrate that the drivers in question had been paid the money found to be owing. On April 11 & 12, 2018 Safeway's counsel sent additional details. The OBCCTC auditor has reviewed all the information supplied and determined the following:

- Safeway has resolved all outstanding payments owed to 13 independent operators. It has committed to paying monies owed to two I/Os if they are located in the future and argues that it has resolved the outstanding payment owed to Superman Trucking following the offset of parking fees owed to Safeway by Superman Trucking;
- Safeway has issued cheques totaling \$14,130.10 to seven company drivers. Five of these cheques totaling \$6,371.17 are dated after the final payment date of April 19, 2018 pursuant to CTC Decision No. 10/2018; and
- a balance of \$44,932.44 remains owing to seven company drivers who Safeway claims cannot be located. Safeway has committed to paying these drivers if they are located in the future.²

¹ OBCCTC correspondence to Safeway's counsel, April 9, 2018.

² OBCCTC auditor Supplemental Report #2, April 13, 2018.

As Safeway has provided a written argument in response to the proposed penalty within 7 days, consistent with s. 34(2) of the *Act*, I have considered its arguments, the conclusions of the auditor and provide the following Decision Notice.

B. Safeway's Response

Safeway argues that the proposed penalty should not be imposed. Its arguments are as follows:

- a. Safeway's non-compliance is historic and does not reflect the policies of current the operating mind.
Safeway argues that the current director of Safeway is new to the position and, since the inception of the current director's tenure, Safeway has strived to ensure that the workings within the company, and the treatment of drivers and owner operators, is in accordance with the *Act* and *Regulation*.
- b. Safeway has been cooperative during the audit and made demonstrated efforts to comply with auditor/OBCCTC requests.
Safeway argues that its intention to comply with the *Act* and *Regulation* is demonstrated by its efforts to locate drivers owed under the audit and, when and where possible, pay the money found to be owing. It believes that its efforts and actions do not warrant the imposition of the proposed penalty.
- c. Audit delays on the part of Safeway were inadvertent.
Safeway argues that any audit delays as a result of Safeway's failure to meet audit deadlines were inadvertent and only occurred because the director is new to the position. Safeway notes that once the audit was completed, and concerns raised, the director "started working towards alleviating such concerns, and continues to do so."

C. Consideration of Company's Response

Safeway's argues that its was historically non-compliant under a previous director, but that is no longer the case. Following completion of the audit, Safeway claims that it has cooperated with the OBCCTC and made demonstrated efforts to bring itself into compliance. It contends that any actions which may be viewed otherwise were made inadvertently and only because of the current director's relatively new position with the company.

The OBCCTC is aware that the current director became a shareholder of Safeway on June 20, 2016 and that the ownership of the company remains in dispute.³ The audit demonstrated that under this director's leadership, "Safeway began paying its I/Os compliant on and off-dock rates."⁴ The audit also ultimately demonstrated that Safeway was paying its company drivers "the minimum rates required under the *Regulation* from July 1, 2016 to January 31, 2018."⁵

³ Safeway Trucking Ltd. (CTC Decision No. 05/2018), p. 2.

⁴ Safeway Trucking Ltd. (CTC Decision No. 05/2018), p. 3.

⁵ Safeway Trucking Ltd. (CTC Decision No. 10/2018), p. 3.

I accept that Safeway, under new directorship, has concerned itself with the requirements of the legislation. Indeed, Safeway's rate compliance under the new director was recognized in the Original Decision and cited in the Original Decision's reasons for **not** imposing a penalty at that time:

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.⁶

However, Safeway subsequently failed to comply with the orders under the Original Decision and a penalty was proposed in the Supplemental Decision in order to "send the message to the community that non-compliance with orders will not be tolerated."⁷ Had Safeway complied with the orders in the Original Decision, this would have been taken into account when proposing the penalty in the Supplemental Decision.

In addition, Safeway's failure to comply with my orders is ongoing. Following the Supplemental Decision, Safeway's legal counsel provided a series of emails detailing Safeway's efforts to comply. The evidence provided has been reviewed and the auditor has determined that Safeway would only be in compliance with the orders if I were to accept the issuance of post-dated (after the April 19, 2018 order deadline) cheques as evidence of compliance. The auditor also reports that Safeway reduced the amount the auditor found to be owing to Superman Trucking (a Safeway I/O) by \$885.86 after Safeway determined that Superman Trucking owed the money in parking space rental charges. As such, Safeway can only be found to be in compliance with the orders if I determine that Safeway should be allowed to offset parking fees against money owed.

In previous decisions, I have cited TMS Transportation Management Services Ltd. (CTC Decision No. 08/2016) in order to highlight that the purpose of the *Act* is to create "fair compensation for container truckers and **ensur[e] that they are paid in a timely fashion**" (emphasis added).⁸ In the Supplemental Decision, I cited the penalty quantum factors articulated in Smart Choice Transportation Ltd. (CTC Decision No. 21/2016), which include considerations of the harm suffered by drivers and the extent in which the licensee was enriched. In the Supplemental Decision, I ordered Safeway to issue bank drafts, as opposed to cheques, because I sought to ensure that Safeway's drivers (current and former) were paid forthwith and did not continue to suffer financial hardship. While the issuance of post-dated cheques may demonstrate an effort to comply, it does not satisfy the letter or purpose of the order.

⁶ Safeway Trucking Ltd. (CTC Decision No. 05/2018), p. 5.

⁷ Safeway Trucking Ltd. (CTC Decision No. 10/2018), p. 5.

⁸ See Gantry Trucking Ltd. and TSD Holding Inc. (CTC Decision No. 14/2017) – Decision Notice, p. 4.

In Lower Mainland Fast Freight Inc. (CTC Decision No. 07/2018) – Decision Notice, I addressed the use of offsets in audit calculations and found that the use of trip rate overpayments to offset underpayments was not permitted as it was a “financial set-off” in accordance with section 24 of the *Act*. I also note that in the audit of Canadian Boys Transport Ltd., the licensee was advised that an I/O’s earnings could not be offset against money loaned.⁹

Safeway Trucking did not consult the OBCCTC in making its decision to offset the money owed to Superman Trucking, rather its legal counsel informed the OBCCTC of the offset. Had it sought my opinion, I would have advised Safeway that I consider its claw-back of parking rent as a “financial set-off” in this case. Therefore, Safeway remains non-compliant and in contravention of my orders.

For these reasons I am not persuaded to refrain from issuing a penalty on the basis that Safeway has failed to comply with orders.

D. Conclusion

Having carefully considered Safeway’s submission, and for the reasons outlined above and in my Supplemental Decision, I will not refrain from imposing a monetary penalty. I will, however, refrain from suspending Safeway’s licence at this time, in recognition of the fact that Safeway has complied to some degree with my orders. Should the post-dated cheques issued by Safeway to its drivers fail to clear, or should Safeway fail to remit the money owed to Superman Trucking in full, then I will reconsider suspending Safeway’s licence.

In the result, I hereby order Safeway Trucking Ltd. to pay an administrative fine in the amount of \$10,000.00. Section 35(2) of the *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 a cheque in the amount of \$10,000.00 payable to the Minister of Finance.

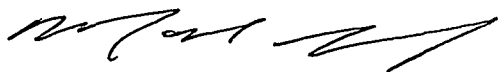
Finally, I note that Safeway Trucking Ltd. may request a reconsideration of the Commissioner’s Decision by filing a Notice of Reconsideration with the Commissioner not more than 30 days after the company’s receipt of this Decision Notice. A Notice of Reconsideration must be:

- a. 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, include the full name, address for delivery and telephone number of the applicant’s counsel; and
- f. signed by the applicant or the applicant’s counsel.

⁹ Canadian Boys Transport Ltd. (CTC Decision No. 03/2017), p. 3.

Despite the filing of a Notice of Reconsideration, the above order remains in effect until the reconsideration application is determined. This order will be published on the Commissioner's website.

Dated at Vancouver, B.C., this 23rd day of April, 2018.



Michael Crawford, Commissioner