



March 13, 2018

Aquatrans Distributors Inc.
101 – 5355 152 Street
Surrey, BC V3S 5A5

Aquatrans Distributors Inc. (CTC Decision No. 06/2018) – Decision Notice

A. Overview

In Aquatrans Distributors Inc. (CTC Decision No. 06/2018) (the “Original Decision”), I determined that Aquatrans Distributors Inc. (“Aquatrans”) failed to pay its company drivers the correct minimum rate required under the *Container Trucking Act* (the “Act”) and *Container Trucking Regulation* (the “Regulation”).

Through the audit process it was determined that the hourly rate paid by Aquatrans to its drivers was less than \$26.28 as a result of an incorrect health benefits calculation and the inclusion of cell phone fees in the company’s benefits calculation. In some instances, Aquatrans paid drivers the less of the two legislated hourly rates on the basis that the drivers had not met or exceeded the required number of hours of container trucking services for Aquatrans rather any licensee. The audit found that adjustments totaling \$13,589.42 were owed to 13 company drivers for the period April 3, 2014 to April 1, 2017 (after which Aquatrans was found to be paying all drivers at least \$26.28 per hour).

In the Original Decision I concluded that this was an appropriate case to issue a penalty for the reasons set out in paragraphs 15-21 of the Original Decision. In that regard, I proposed to impose an administrative fine against Aquatrans in the amount of \$5,000.00. Consistent with s. 34(2) of the *Act* I advised Aquatrans that I would consider its written response to the proposed penalty if it was received within 7 days.

Aquatrans has provided a written response within the required time disputing the proposed penalty and providing arguments in support of its position.

B. Aquatrans’ Response

Aquatrans argues that the proposed penalty should not be imposed. Its arguments can be summarized as follows:

- a. Aquatrans proactively revised its compensation structure to comply with the legislation. Aquatrans has provided evidence which is intended to demonstrate that it made efforts to comply with the legislation prior to the Acting Commissioner’s January 22, 2016 compliance deadline. Aquatrans also argues that following a Commissioner bulletin in August of 2016, it prepared a “payroll reconcile form” which further demonstrates that the company made efforts to ensure that its base rate plus benefits met the legislated minimum hourly rate.

- b. The amount found to be owing by the auditor was a result of a difference between the auditor and Aquatrans' benefits calculation.

Aquatrans argues that it believed it was paying compliant rates and that it wasn't until the auditor explained how to calculate the health benefits and noted that cell phone costs are not benefits that Aquatrans was assessed as owing money. Aquatrans notes that once the auditor explained her findings, Aquatrans immediately paid the money owing to its drivers.

C. Consideration of Company's Response

- a. Aquatrans proactively revised its compensation structure to comply with the legislation.

Aquatrans argues in its submission that it "thought [it] was fully compliant with the letter and spirit of the Port agreement." As part of its submission in dispute of the proposed penalty, Aquatrans has provided evidence that indicates it made payments in January 2016 to two drivers, which it contends demonstrates an attempt to bring itself into compliance. The auditor has also confirmed that Aquatrans did provide information (characterized by Aquatrans as a "payroll reconciliation form") which was intended to demonstrate that the legislated hourly rates were being applied. However, the information provided by Aquatrans does not indicate the date upon which the company began paying compliant rates. Nevertheless, a further review of the audit records indicate that beginning in May 2014, the company began adjusting its hourly rate in what can be assumed to be recognition of the hourly rates agreed to in the Joint Action Plan.

Aquatrans did not, however, provide an explanation for its failure to keep records which differentiated between container trucking services ("CTS") work and non-CTS work as required by its Container Trucking Services Licence and referenced in the Commissioner's August 10, 2016 bulletin, cited in the Original Decision.

Despite Aquatrans' failure to keep and maintain records pursuant to its Container Trucking Services Licence, the subsequent provision of payroll information, corroborated by the auditor, which indicates that Aquatrans took some steps to adjust its payroll practices in reflection of the legislated rates, persuades me to reduce the quantum of the proposed penalty.

- b. The amount found to be owing by the auditor was a result of a small difference between the auditor and Aquatrans' benefits calculation.

Aquatrans submits that its ultimate failure to pay the legislated rates resulted from "a small variance in how [it] measured [its] benefits on an hourly basis and included cell phones as part of the benefits program." The auditor found that the amounts owing were the result of three circumstances:

1. The difference between Aquatrans' and the auditor's health benefits calculation method;
2. The inclusion of driver cell phone fees in Aquatrans' calculation of benefits; and
3. The payment of the lower of the two legislated hourly rates on the basis that Aquatrans' drivers had not worked 2340 hours for Aquatrans.

Aquatrans does not dispute the auditor's calculations based on the audit findings noted above. Rather, Aquatrans contends that a fine should not be levied against it for failure to pay the legislated rates because "once [it] understood the difference and...received an explanation [from the auditor] [it] paid [the] back pay to [its] drivers" immediately.

The Original Decision did note that the size of the proposed penalty was “intended to strike a balance between Aquatrans’ cooperation and efforts during the audit process [and] its acceptance of its non-compliant behaviors.” However, the penalty was proposed, in part, because “Aquatrans did not, or did not sufficiently, review the legislation...to correct its non-compliant behavior. Rather, Aquatrans waited until it was audited to comply...” In other words, Aquatrans did not exercise sufficient diligence in reviewing the legislation or decisions/bulletins of the Office of the BC Container Trucking Commissioner (“OBCCTC”) prior to its audit. Had it done so, Aquatrans would have reviewed section 13 (1) of the *Regulation* and noted that a particular hourly rate applied “if the directly employed operator has performed 2340 or more hours of container trucking services on behalf of any licensee.”

Regarding the treatment of cell phone fees as a benefit, in Forfar Enterprises Ltd. (CTC Decision No. 20/2016), the Commissioner stated that:

The OBCCTC has consistently taken the view, that telephone allowances are not a benefit for the purposes of Section 13 of the *Regulation*. The definition of “benefit” found in the *Regulation* includes a list of very specific types of benefits such as medical, disability extended health, life, accidental death and dismemberment, dental or orthodontic insurance, and pension plan or retirement fund contributions. A phone allowance is very different than the types of benefits listed. Drivers use their cell phones in their daily work. The allowance compensates drivers for using their personal phones for work related purposes. Thus the telephone allowances are properly characterized as a business cost. The definition of “benefits” expressly excludes “the licensee’s or employer’s costs of doing business.” I conclude the telephone allowance is not a “benefit” for purposes of the legislation.

I also take this opportunity to remind Aquatrans that it is a licensee’s obligation, not the auditor’s, to ensure compliance with the requirements of the *Act*. In Olympia Transportation (CTC Decision No. 02/2016) and Seaville Transportation Logistics Ltd. (CTC Decision No. 12/2016), the Commissioner has established that:

The onus to become and remain compliant with the requirements of the *Act* rest entirely with the Licensee. Licensees should not rely on Commission auditors to determine whether or not they are compliant, nor should they wait until a Commission audit process is undertaken before taking steps to ensure compliance.

For these reasons, I am not persuaded to change my conclusion that Aquatrans failed to pay 13 of its company drivers the correct minimum rate required under the *Act* and *Regulation*.

D. Conclusion

Having carefully considered Aquatrans’ submission, and for the reasons outlined above and in my Original Decision, I do not accept Aquatrans’ submission that I should refrain from imposing a penalty. I have, however, decided to propose a reduced penalty of \$3,000.00 in recognition of subsequent information provided by Aquatrans which demonstrates recognition of the legislated rates and the Acting Commissioner’s January 22, 2016 deadline to comply.

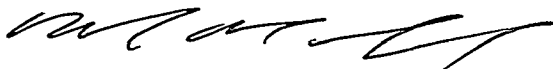
In the result, I hereby order Aquatrans Distributors Inc. to pay an administrative fine in the amount of \$3,000.00. Section 35(2) of the *Container Trucking Act* requires that this fine be paid within 30 days of the issuance of this Notice. Payment should be made by delivering to the Office of the BC Container Trucking Commissioner ("OBCCTC") a cheque in the amount of \$3,000.00 payable to the Minister of Finance.

Finally, I note that Aquatrans 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.

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 13th day of March, 2018.



Michael Crawford, Commissioner