November 13, 2020

Safeway Trucking Ltd. and Coast Pacific Carrier Inc.
8035 170th Street
Surrey, B.C. V4N 4Y9

Safeway Trucking Ltd./Coast Pacific Carrier Inc. (CTC Decision No. 11/2020) – Decision Notice

A. Overview

1. In Safeway Trucking Ltd./Coast Pacific Carrier Inc. (CTC Decision No. 11/2020) (the "Decision") I found that Safeway Trucking Ltd. and Coast Pacific Carrier Inc. (together the "Companies") failed to pay one driver (the "Complainant") for all hours of container trucking services performed. The audit findings indicated that for the period between March 27, 2017 and April 17, 2017 the Companies owed the Complainant $2,628.00 for 100 hours of container trucking services performed. An administrative penalty of $15,000.00 was proposed.

2. Consistent with s. 34(2) of the *Act,* the Companies were given 7 days to provide a written response setting out why the proposed penalty should not be imposed. The Companies provided a written argument in response to the proposed penalty within the specified timeframe. I have considered the Companies' submission and provide the following Decision Notice.

B. The Companies' Response

3. The Companies ask that the proposed penalty be reduced or not imposed.

4. The Companies argue that I failed to exercise my discretion and I should have dismissed the Complainant's allegation that the Companies owed him money because it had already been decided by the Civil Resolution Tribunal ("CRT"). They also disagree with my finding that the Companies did not intend to pay the Complainant in 2019.

5. Regarding the size of penalty, the Companies argue as follows with respect to the relevant sentencing considerations:

    1. There is no evidence of the nature and extent of harm suffered by the Complainant as a result of this non-payment;
    2. There is no evidence that such a non-payment has damaged the integrity of the Container Trucking Industry;
    3. There is no evidence of any enrichment of the Companies; as far as they were concerned a cheque had been issued to the last known address of the Complainant; if it was not cashed, then they had no obligation to inquire from the Complainant, and even if they could, the Complainant had not updated his address with the Companies. Also, the Complainant did not take any steps to contact the Companies to seek the payment of the ordered amount, and nor did he enforce the order of the CRT through proper legal provisions;

4. The Companies fully cooperated with the auditor and provided full disclosure to the auditor; sought an updated address and re-issued a cheque to the Complainant, as per the order of the CRT;
5. The Companies' past conduct shows that there were issues with the Companies and payments to the drivers and owner operators during the times of the previous management; for that Safeway paid the fine that was imposed on it;
6. There is no need in this case for a general deterrence element; and
7. There are no orders made by the OBCCTC having similar facts and circumstances; the best analogy is the UCL decision, where a penalty of $5,000.00 was imposed for an amount of over $42,000.00 owed to the drivers and owner operators.

C. Consideration of the Companies' Response

Failure to exercise discretion

6. The Companies argue that I undertook a process of enforcing a CRT order that was outside my jurisdiction to enforce. I do not agree. In the Decision, I noted that the matters of remuneration specifically related to the Commissioner's Rate Order are the exclusive jurisdiction of the Commissioner and they should not be raised in any other forum. In this case, the issue was mistakenly raised at, and decided by, the CRT.

7. My Decision does not represent the enforcement of the CRT order. On the contrary, the amount that I found to be owing to the Complainant by the Companies, and the proposed penalty, resulted from an OBCCTC audit which was conducted after the Complainant reported his concern (the "Complaint") to the OBCCTC pursuant to section 26 of the *Act*. My Decision did not rely on the CRT order and my assessment was independent of the CRT order. I found that the Complainant was owed $2,628.00, and the Companies were involved in this determination, whereas the CRT order was for $2,500.00 plus interest and was decided largely without the Companies' participation (the Companies appeared not to want to cooperate in the process).

8. The Complainant claimed that he was still owed the money that the CRT had ordered the Safeway to pay. I pursued the Complaint in accordance with section 29(1) of the *Act* which mandates the Commissioner to accept and review a complaint.

9. Section 29(2), which the Companies cite, says that the Commissioner ***may*** (emphasis added) refuse to accept or stop reviewing in particular circumstances, including if a court, a tribunal or an arbitrator has made a decision or an award relating to the subject matter of the complaint. Section 29(2) does not *require* that I refuse to accept or stop reviewing a complaint that has been the subject of a court, tribunal or arbitrator decision or award, rather it is at the discretion of the Commissioner to refuse to accept or stop reviewing a complaint.

Credibility finding

10. The Companies argue that I should not have concluded or did not sufficiently set out my reasons for concluding, that the Companies did not intend to pay the Complainant in 2019.

11. Although my finding that the Companies did not intend to pay the Complainant in 2019 does not affect the size of the proposed penalty, I have considered the Companies' submissions and still do not accept that the Companies intended to pay the Complainant in May of 2019.

12. In my opinion, the circumstances and sequence of events around the May 15, 2019 cheque stub produced by the Companies are questionable. They do not "add up." As reported in the CRT decision, the Companies did not participate in the CRT's dispute process, although they were aware of it. This suggests an unwillingness to consider whether the Complainant was in fact owed money at all. The cheque stub provided by the Companies to the OBCCTC auditor was handwritten, which is not in keeping with common practice. Additionally, and regardless of whether the Companies were aware of the CRT order, there is no clear reason why the Companies would issue the Complainant a cheque in May of 2019, years after the money first became owing, and many months after the CRT order. Regardless of why the Companies issued the May 15, 2019 cheque, they claim not to have noticed that it did not clear their account. Considered together, and along with the fact that the Companies did not pay the Complainant in 2017, all of this makes it more likely than not that the Companies did not intend to pay the Complainant in 2019.

13. However, this issue is of no consequence to my penalty finding. The Companies' failure to pay the Complainant in 2017, when the services were performed, is the breach for which the Companies are being penalized. I would set the penalty at $15,000.00 whether the Companies did not intend to pay in 2019 or simply failed to confirm their May 15, 2019 cheque had cleared their accounts. As set out below, of most relevance is the fact that the Companies failure to pay the Complainant in 2019 is a second violation of the *Act*.

Penalty factors

14. The factors outlined in Smart Choice Transportation Ltd. (CTC Decision Not. 21/2016) were applied and weighed in consideration of the proposed penalty. The seriousness of the Companies' conduct, the harm suffered by the driver, the damage done to the industry's integrity, the extent to which the Companies were enriched, the Companies' conduct during the audit, and the Companies' past conduct were all considered.

15. The Companies in their submissions characterize this as a dispute over non-payment of monies owing and say that the "best evidence available" showed that the monies had been issued to the Complainant in May 2019. However, the Companies breached the *Act* by failing to compensate their driver in 2017. This is the critical issue and is the breach for which I am penalizing the Companies.

16. The Companies' argument that the proposed penalty should not be imposed or reduced on the basis that there is no evidence of the nature and extent of harm suffered by the Complainant as a result of this non-payment and no evidence that the non-payment has damaged the integrity of the Container Trucking Industry is without merit. The nature and extent of the harm suffered by the

Complainant is self-evident. The Complainant was harmed financially when he was not paid $2,628.00 for container trucking services performed in 2017. The Companies' failure to pay in 2017 was a violation of the *Act* and any violation of the *Act* is damaging to the integrity of the container trucking industry. There is no question that the Companies were enriched by $2,628.00 as a result of their actions.

17. I do not accept the Companies' argument that general deterrence should not factor into my penalty decision. Commissioner decisions, whether a penalty has been assessed or not, are publicized for the purpose of informing licensees and drayage stakeholders more generally about the requirements of the *Act* and, in the case of penalties issued by the Commissioner, for the purpose of sending a message of general deterrence. There is always an element of general deterrence when issuing a penalty and this case is no different.

18. The Companies argue that the past conduct of the Companies was the result of previous management during a time when "the current ownership of the Companies was not there." The Companies further state that "since the current ownership has taken over the reins of the Companies there has not been any compliance issues of a nature that would show that the Companies have a history of non-compliance."

19. In Hutchison Cargo Terminal Inc. (CTC Decision No. 27/2018) – Decision Notice, I noted that:

> A company is its own person. A licensed company must comply with the terms and conditions of the Licence, *Act* and *Regulation* and may be penalized if it does not. This is regardless of who owned or managed the company under licence during the period under audit. The penalty is directed at the company.

20. I do not accept the Companies' argument that only the compliance history of the new ownership should have been considered when assessing a penalty in this case. Companies are responsible for their historic non-compliance.

21. The Companies argue that I did not properly weigh the factors of the case and cite three decisions of the Commissioner where the factors, they suggest, were properly weighed.[1] They summarize those cases in terms of the size of the penalty in comparison with the amount of money owed and suggest that, in this case, the proposed penalty is disproportionate to the amount of money owed. They also suggest that the Companies' cooperation should reduce the size of the proposed penalty.

22. The Companies cooperated with the auditor and in the Decision, I noted their cooperation but stated that "holders of Container Trucking Services Licences are responsible for paying their drivers the required rates, within the required time period, for all container trucking services performed." The Companies failed to fulfill this obligation. Cooperation with an auditor is a factor which is considered when assessing a penalty, but it is not a factor which generally outweighs findings of non-compliance to the degree is negates or dramatically reduces a penalty.

[1] Smart Choice Transportation Ltd. (CTC Decision No. 21/2016); White Hawk Transport Ltd. (CTC Decision No. 11/2017); and United Coastal Logistics Ltd. (CTC Decision No. 25/2018).

23. Of greater significance is the fact that this is the second finding of non-compliance against one of the Companies. Safeway was fined $10,000.00 for its first finding of non-compliance of the same nature. In responding to that penalty, Safeway's counsel made the same arguments he makes here --specifically, that Safeway's non-compliance was not the fault of the current owner. That argument was rejected in the earlier decision, but Safeway continues to make it.

24. Failure to pay drivers for container trucking services may result in a penalty and repeated failures to comply with the *Act* will almost certainly result in an escalating penalty as evidenced by escalating penalties issued in previous decisions.[2]

D. Conclusion

25. Having carefully considered the Companies' submission, and for the reasons outlined above and in my Decision, I will not refrain from imposing a monetary penalty.

26. In the result, I hereby order Safeway Trucking Ltd. and Coast Pacific Carrier Inc. to pay an administrative fine in the amount of $15,000.00. 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 $15,000.00 payable to the Minister of Finance.

27. Finally, I note that Safeway Trucking Ltd. and Coast Pacific Carrier Inc. may request a reconsideration of this 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.

28. 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 November, 2020.

Michael Crawford, Commissioner

[2] AMK Carrier Inc. (CTC Decision No. 03/2020) and Can American Enterprises Ltd. (CTC Decision No. 12/2020).