



December 14, 2020

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

Commissioner's Decision

Safeway Trucking Ltd. and Coast Pacific Carrier Inc. (CTC Decision No. 14/2020) (Application for Reconsideration of CTC Decision No. 11/2020)

I. Introduction

1. On December 2, 2020, the Office of the British Columbia Container Trucking Commissioner ("OBCCTC") received an application on behalf of Safeway Trucking Ltd. and Coast Pacific Carrier Inc. (the "Companies") pursuant to sections 38 of the *Container Trucking Act* (the "Act"). The application seeks reconsideration of the administrative penalty proposed in Safeway Trucking Ltd./Coast Pacific Carrier Inc. (CTC Decision No. 11/2020) (the "Original Decision") and ordered in the subsequent Decision Notice. On December 7, 2020 the Companies requested pursuant to section 39(2) of the *Act* that the Decision Notice order be suspended until the outcome of the reconsideration. I agreed to suspend the Decision Notice until the outcome of this reconsideration.
2. In the Original Decision, I determined that the Companies had failed to comply with the *Act*. Specifically, the Companies were found to have 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, and the Companies were given time to make submissions setting out why the proposed penalty should not be imposed.
3. The Companies seek a reconsideration of the Original Decision and respond to the proposed penalty by setting out why I should refrain from imposing the penalty or in the alternative reduce the amount of the penalty.
4. The Companies question whether the proposed penalty is just and equitable in the facts and circumstances of this case and rely on the principles of responsibility, proportionality, deterrence and fairness in advancing their argument, as summarized below.

Responsibility

5. The Companies accept responsibility for the non-payment of \$2,628.00 to the Complainant and commit to ensuring that "such an act is not repeated in the future." The Companies note that the "current" management does everything possible to ensure compliance and ensure that its drivers are "adequately and fairly compensated."

Proportionality

6. The Companies argue that the proposed penalty (\$15,000.00) is not proportionate to the amount of money that was owed to the complainant and is onerous and punitive. They state that the nature of the wrongdoing and quantum of the proposed penalty are not commensurate and that the proposed penalty, if imposed at all, should be equal to or marginally higher than the harm suffered by the Complainant (\$2,628.00).

Deterrence

7. The Companies recognize that the Commissioner may impose penalties in part to deter licensees from non-compliance and acknowledge the importance of the principle of deterrence but ask that the Commissioner consider other applicable principles equally when determining the quantum of the penalty. The Companies note that they cooperated with the auditor and are making best efforts to ensure continuous and ongoing compliance.

Fairness

8. The Companies argue that the quantum of the penalty imposed must be just and equitable and submit that \$15,000.00 is not, because the Complainant has been paid and any delay by the Companies in making payment in 2019 was unintentional. The Companies note that when they received the Complainant's correct mailing address from the auditor, a new cheque was issued, such that "this is not a case of ongoing non-compliance."
9. The Companies conclude by asking that the following mitigating factors be taken into consideration:
 1. The Companies provided the auditor with a cheque stub dated May 15, 2019 to demonstrate that the Complainant had been paid and note that the cheque had been mailed to the Complainant using the address the Companies had on file.
 2. Once the auditor confirmed that the cheque had been mailed to the wrong address and secured the correct address, the Companies reissued the cheque and mailed it to the Complainant who confirmed receipt.
 3. The Companies were serious in paying the Complainant.
 4. The current management is committed to ensuring compliance and will ensure that such non-payments are not repeated.
10. The Companies stress that they are in financial stress due to Covid-19 but are nevertheless paying their current drivers in a timely manner. The Companies state that they will not be able to pay the proposed penalty if ordered.

II. Decision

Responsibility

11. In the Companies' response to the Original Decision, the Companies argued that "since the current ownership has taken over the reins of the Companies, there have not been any compliance issues of a nature that would show that the Companies have a history of non-compliance." On this basis, the Companies argued that they were not responsible for past non-compliance, particularly the non-

compliance addressed in the decisions issued by the Commissioner in February, April and June 2018 (addressed in more detail below), and that proposed penalty should therefore be reduced. This argument was dismissed in the Decision Notice where I stated that:

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.¹

12. The Companies accept responsibility for the initial (2017) non-payment of the \$2,628.00, but only for this one particular act of non-compliance which they claim will not be repeated. They then argue that, generally, the current management does everything possible to ensure compliance and the happiness of its drivers.
13. The Companies' submission that there have not been any historical compliance issues under current management is not accurate. On June 20, 2016, Jagbir Graya became a shareholder and director of Safeway. Safeway's other director and majority shareholder, Mr. Harp Gill, passed away shortly thereafter, leaving Mr. Graya with the responsibility for the daily operation of the company.² Since that time, Mr. Graya has been responsible for the Companies' meeting the conditions of their licences. The matter of Safeway's compliance, and, by extension, Mr. Graya's, was canvassed extensively in the February, April and June 2018 decisions of the Commissioner set out below.
14. In Safeway Trucking Ltd. (CTC Decision No.10/2018) – Decision Notice, I responded to Safeway Trucking Ltd.'s ("Safeway") argument 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*."³ I accepted that Safeway, under new directorship, had concerned itself with the requirements of the legislation but also noted that:

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." 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.⁴

15. In the same decision, a \$10,000.00 penalty was imposed, in part, because Safeway had failed to fully comply with the Commissioner's orders. Safeway applied for a reconsideration of the penalty decision and made similar arguments to those made here – namely, that Safeway's non-compliance was "historic and [did] not reflect the policies of the current director." In its 2018 submissions Safeway also stated that "since the start 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*." Safeway also noted that while an administrative fine

¹ Safeway Trucking Ltd./Coast Pacific Carrier Inc. (CTC Decision No. 11/2020) – Decision Notice, paragraph 20.

² Safeway Trucking Ltd. (CTC Decision No.05/2018), paragraph 4.

³ Safeway Trucking Ltd. (CTC Decision No.10/2018) – Decision Notice, page 3.

⁴ Safeway Trucking Ltd. (CTC Decision No.10/2018) – Decision Notice, page 4.

was appropriate in that case, a \$10,000.00 penalty would be “overly burdensome on the company.”⁵

16. The penalty was confirmed in that case and, in dismissing Safeway’s reconsideration application, I noted that:

Throughout the course of this audit Safeway has made clear that it does not have the financial wherewithal to bring itself into immediate compliance with the *Act* and *Licence*. It has complied (or not) with the requests of the auditor and the orders of the Commissioner in a manner which suggests an intention to delay the process to its benefit. Safeway’s recent request for reconsideration is simply an extension of this tactic. Safeway has not offered additional information or new arguments in support of its reconsideration request.⁶

17. The Companies’ submission now that the \$15,000.00 penalty should be reduced on the basis that it accepts responsibility for the non-payment of \$2,628.00 to the Complainant, commits to ensuring that “such an act is not repeated in the future,” and that the “current” management does everything possible to ensure compliance and ensure that its drivers are “adequately and fairly compensated” is disingenuous. It ignores the fact that this is the current management’s second violation of the *Act* and there is a history of non-compliant behaviour on the part of current management for which one of the Companies was penalized in 2018. Therefore, I do not accept that the current management does everything in its power to ensure compliance. Rather, current management has a history of non-compliance and a history of advancing the same arguments in its defence. While it is important that licensees accept responsibility for their actions, doing so does not ensure that their pattern of general non-compliance is not considered when assessing penalties.

Proportionality

18. The Companies have accepted that the Complainant was harmed financially when he was not paid \$2,628.00 for container trucking services performed in 2017 but now argue that the \$15,000.00 penalty is not proportionate to \$2,628.00 “wrongdoing” suffered by the Complainant and is onerous and punitive.
19. The penalty is not proportionate in size to the amount of money found owing to the Complainant, nor was it meant to be. It is \$15,000.00 because Safeway was fined \$10,000.00 in a previous decision for a finding of non-compliance of the same nature. The penalty levied here, then, is an escalating penalty in recognition of the Companies’ repeated failure to comply with the *Act* and in that regard should be considered a \$5,000.00 increase over the previous penalty.

Deterrence

20. The Companies ask that the Commissioner consider the all the principles set out in their response equally when determining the quantum of the penalty, suggesting that the principle of deterrence

⁵ Safeway Trucking Ltd., CTC Decision No. 19/2018 (Application for Reconsideration of CTC Decision No. 05/2018), page 1.

⁶ Safeway Trucking Ltd., CTC Decision No. 19/2018 (Application for Reconsideration of CTC Decision No. 05/2018), page 3.

was given more weight when assessing the size of the penalty in this case, resulting in an overly large penalty that did not reflect the factors of the case or the Companies' conduct during the audit.

21. The penalty amount was determined based upon a consideration of all the relevant factors in this case, including the amount of money owing to the Complainant, the Companies' conduct (including the prior findings of non-compliance and prior administrative fine) and the need to deter these Companies and other licensees from similar behaviour. However, I am not required to give each consideration equal weight or assign a set financial quantum to each factor. Rather, in any given penalty decision, certain factors can outweigh each other, and the size of a proposed penalty is decided through an assessment of all the relevant factors together and in light of the importance of the particular factors in each case.
22. In this case, the Companies' conduct was considered and, in the Decision Notice, I acknowledged that the Companies cooperated with the auditor; however I also noted that cooperation with an auditor "is not a factor which generally outweighs findings of non-compliance to the degree it negates or dramatically reduces a penalty."⁷ The most important factor considered when assessing this penalty was deterrence, in particular the need to deter these Companies as well as other licensees from repeatedly engaging in conduct in breach of the *Act* or *Regulation*.

Fairness

23. The Companies argue that the quantum of the penalty is not just and equitable because the Complainant has been paid. It is true that the Complainant was eventually paid for the container trucking services he performed for the Companies. However, before being paid, the Complainant was required to lodge a claim with the Civil Resolution Tribunal, resulting in an order to pay which the Companies say they complied with on May 15, 2019, six months after the order was issued and over two years after the services were performed. Having not received the payment that was purportedly issued on May 15, 2019, the Complainant filed a complaint with the OBCCTC on June 15, 2020 and an OBCCTC auditor determined that the Complainant had not received the May 15, 2019 payment. The Complainant was finally paid on August 14, 2020.⁸
24. Under s. 24(2) of the *Regulation*, the Complainant was entitled to be paid no later than 30 days after the end of the calendar month in which he performed the container trucking services. The Companies were non-compliant in 2017 when they failed to pay the Complainant within the prescribed time period, and I do not accept that the penalty should be reduced on the basis that the Complainant was eventually paid despite the Companies' non-compliance.
25. The Companies also argue that the penalty ought to be reduced because the delay in making payment was unintentional. In the Decision Notice, I stated that, in my opinion, the Companies delay in making payment in 2019 was not unintentional. I also stressed that this finding did not affect the size of the proposed penalty and that the Companies' failure to pay the Complainant in 2017, when the services were performed, was the breach for which the Companies were being penalized.⁹

⁷ Safeway Trucking Ltd./Coast Pacific Carrier Inc. (CTC Decision No. 11/2020) – Decision Notice, paragraph 22.

⁸ Safeway Trucking Ltd./Coast Pacific Carrier Inc. (CTC Decision No. 11/2020).

⁹ Safeway Trucking Ltd./Coast Pacific Carrier Inc. (CTC Decision No. 11/2020) – Decision Notice, paragraph 13.

26. The Companies ask that I revisit a number of what they characterize as mitigating factors when making my reconsideration:
1. The Companies provided the auditor with a cheque stub dated May 15, 2019 to demonstrate that the Complainant had been paid and note that the cheque had been mailed to the Complainant using the address the Companies had on file.
 2. Once the auditor confirmed that the cheque had been mailed to the wrong address and secured the correct address, the Companies reissued the cheque and mailed it to the Complainant who confirmed receipt.
 3. The Companies were serious in paying the Complainant.
 4. The current management is committed to ensuring compliance and will ensure that such non-payments are not repeated.
27. I have already discussed these factors in the Decision Notice and to some degree, I have revisited them here. In summary, these factors have been considered in my decision making. The Companies have not made any new submissions, or put forward any new evidence, that would change my mind.
28. In my opinion, the Companies delay in making payment in 2019 was not unintentional, but I stress once again that this finding has not affected the size of the proposed penalty. As I made clear in the Decision Notice, the Companies are penalized for failure to pay the Complainant in 2017, when the services were performed. This is an escalating penalty reflecting the fact that the Companies failure to pay the Complainant in 2017 was the Companies' second failure to comply with the *Act*.

Ability to Pay

29. The Companies also ask that I consider the current economic landscape (impacted by Covid-19), suggesting that the size of the penalty is disproportionate to the Companies' income or ability to pay. They note that despite the economic challenges posed by the pandemic, they have continued to pay their drivers in a timely manner and, while not directly stated, the Companies imply that the imposition of the penalty could impact their ability to pay their drivers.
30. The *Act* is beneficial legislation which is enforced for the sake of drivers. Penalties levied under the *Act* are intended to demonstrate the consequences of non-compliance and correct company behaviour for the betterment of drivers. The imposition of a penalty should not inadvertently affect a driver's employment by forcing licensees into insolvency. On this basis, I have considered financial hardship previously when reassessing penalties. In some cases, licensees have been allowed to pay penalties in installments and, in one case, a penalty was reduced on the basis that the full amount proposed could have led to the licensee's insolvency.¹⁰ However, it is important that licensees demonstrate financial hardship when requesting a penalty reduction or installment payments. Gur-ish Trucking Ltd., for example, was required to provide evidence to support its assertion that it was unable to pay an administrative fine.¹¹
31. In this case, the Companies rely only on the assertion that Covid-19 has impacted their business and do not provide any evidence to support their argument that the payment of the administrative fine

¹⁰ Sunlover Holdings Co. Ltd (CTC Decision No.22/2017) - Decision Notice.

¹¹ Gur-ish Trucking Ltd. (CTC Decision No. 05/2020) (Application for Reconsideration of CTC Decision No. 04/2020).

would impact the financial viability of the Companies or their driver's income and employment status. Out of concern for drivers employed by the Companies, I am prepared to provide the Companies with additional time to submit evidence which demonstrates that the economic impact of COVID-19 on the Companies has resulted in unusual financial hardship with the result that the Companies' cannot pay an administrative fine in the amount of \$15,000.00 in one lump sum.

III. Conclusion

32. In summary, the application for reconsideration of Safeway Trucking Ltd. and Coast Pacific Carrier Inc. (CTC Decision No. 11/2020) and the imposition of the penalty proposed in the Original Decision is deferred pending a review of additional materials.
33. If Safeway Trucking Ltd. and Coast Pacific Carrier Inc. would like to provide documentary evidence demonstrating that the economic impact of COVID-19 on Safeway Trucking Ltd. and Coast Pacific Carrier Inc. has resulted in unusual financial hardship with the result that Safeway Trucking Ltd. and Coast Pacific Carrier Inc. are unable to pay the \$15,000.00 administrative fine in one lump sum within 30 days from the date of my final reconsideration decision, the Companies must provide that evidence by no later than December 21, 2020. Evidence could include but not be limited to financial reports/statements, tax documents or bank account balances demonstrating unusual financial hardship.
34. If Safeway Trucking Ltd. and Coast Pacific Carrier Inc. do not send substantiating materials by December 21, 2020, or if I review the materials provided but do not find them sufficient, then Safeway Trucking Ltd. and Coast Pacific Carrier Inc. will be ordered to pay an administrative fine in the amount of \$15,000.00 within 30 days of the date of my final reconsideration decision.

This reconsideration will be published on the Commissioner's website.

Dated at Vancouver, B.C., this 14th day of December, 2020.



Michael Crawford, Commissioner