



June 8, 2021

Aheer Transportation Ltd.  
8970 River Road  
Delta, BC V4G 1B5

## **Commissioner's Decision**

### **Aheer Transportation Ltd. (CTC Decision No. 05/2021)**

### **(Application for Reconsideration of (CTC Decision No. 01/2021))**

#### **I. Introduction**

1. On May 20, 2021, the Office of the British Columbia Container Trucking Commissioner ("OBCCTC") received an application on behalf of Aheer Transportation Ltd. ("Aheer") pursuant to section 38 of the *Container Trucking Act* (the "Act"). The application seeks reconsideration of the administrative penalty proposed in Aheer Transportation Ltd. (CTC Decision No. 01/2021) (the "Original Decision") and ordered in the subsequent Decision Notice. On April 29, 2021, the Companies had requested pursuant to section 39(2) of the *Act* that the Order requiring payment of the administrative penalty made in the Decision Notice be suspended until the outcome of the reconsideration. I agreed to suspend the Order pending the outcome of this reconsideration.
2. In the Original Decision, I determined that Aheer had failed to comply with the *Act*. Specifically, Aheer failed to pay its independent operators ("I/Os") correct trip rates and for all trips completed. Aheer also paid its I/Os and company drivers a hybrid of trip and hourly rates that included paying its company drivers an incorrect trip rate. An administrative penalty of \$60,000.00 was proposed and Aheer was given time to make submissions setting out why the proposed penalty should not be imposed.
3. Aheer seeks a reconsideration of the Original Decision and responds to the penalty ordered in the Decision Notice by setting out why I should reduce the amount of the penalty.
4. Aheer argues that there is no basis for the quantum of the penalty and that I have failed to consider the financial impact and hardship of the penalty.

#### Failure to provide any basis to justify the quantum of the penalty

5. Aheer argues that the imposition of an escalating penalty in this case (\$60,000.00) is not appropriate because Aheer's first penalty (\$50,000.00 imposed in 2018) was unjustified and significantly larger than other first time penalties imposed on other licensees at that time and therefore should not be the starting point to assess the current penalty.
6. Aheer also argues that the violations identified in Aheer's first audit for which it was penalized \$50,000.00 are different than the violations identified here and therefore an escalating penalty is unjustified because there is no continuing non-compliance.

7. Aheer believes that the penalties imposed by OBCCTC Commissioners have not been consistent and argues that licensees are entitled to expect certainty around penalty amounts. Aheer argues that the Commissioner is required to make rules of practice and procedure and that the absence of such means that licensees are unsure under which circumstances they may be penalized or how much they could be penalized for particular violations.
8. Aheer further submits that it was cooperative during the audit, any delays during the audit were not deliberate, it did not engage in meritless disputes as I found in the Decision Notice and did not engage in any form of fraudulent, deceptive, dishonest or bad faith behaviour with respect to compliance with the *Act*. On these bases, Aheer submits that the penalty should be significantly reduced. Aheer concludes its arguments by reiterating that the quantum of penalty must be proportionate to the wrongdoing and that the \$60,000.00 is disproportionate to the findings of non-compliance in this case.

#### Failure to consider the financial impact and hardship of the penalty

9. Aheer argues that, in the alternative, if the penalty is imposed, its financial viability will be negatively impacted and requests that, on this basis, I reconsider the quantum of the penalty, noting that I have done so in previous decisions.

## **II. Decision**

#### Justification for penalty quantum

10. Aheer seeks to reduce the size the proposed penalty by arguing that the first penalty imposed on Aheer was too high and therefore should not be the basis for assessing an escalating penalty. Aheer states that no rational basis or justification was provided in the 2018 decision to support the \$50,000.00 penalty levied in that case.
11. The penalty levied in CTC Decision No. 17/2018 was reconsidered, and Aheer's arguments ultimately dismissed, in CTC Decision No. 23/2018. The reasons for the imposition of the penalty in that case were extensively canvassed in those decisions and will not be dealt with again here. The findings of non-compliance in that case were not identical to the findings of non-compliance in this audit, but Aheer has been assessed an escalating penalty because of repeated failure to comply with the *Act*.
12. It does not matter if the nature of Aheer's non-compliance is not the same in each of the three decisions against Aheer, although I note that the findings of Aheer's first audit (failure to pay the regulated rates) were in fact similar to the findings here, and that the 2018 case is similar to both in the sense that all involve contravention of legislation protecting truckers. Aheer has not cited any authority for its submission that a statutory decision maker may only impose escalating penalties in circumstances where the same violation has occurred, and I do not accept its submission.
13. A wide range of actions are prohibited by the *Act*, *Container Trucking Regulation* and CTS Licence because trucking companies have historically employed a variety of schemes intended to reduce driver compensation and negatively impact driver working conditions. If the Commissioner only imposes escalating penalties in circumstances where an identical violation has occurred, licensees may simply employ different schemes to avoid penalty escalation. This is not consistent with the objectives of the *Act*.

14. Aheer's first audit resulted in a finding of non-compliance (incorrect rate payments). Its second audit also resulted in a finding of non-compliance (the mistreatment of a trucker because of a complaint) and the levying of a significant penalty. Aheer's most recent audit resulted in more findings of non-compliant rate payments. In this case, the penalty amount was determined based upon a consideration of all the relevant factors, including Aheer's conduct in the most recent audit, prior findings of non-compliance and a prior administrative fine. The penalty is an escalating penalty in recognition of Aheer's repeated failure to comply with the *Act* and is thus a \$10,000.00 increase over the previous penalty.

#### OBBCTC approach to penalties

15. Aheer argues that the penalties imposed by OBBCTC Commissioners have not been consistent and is of the view that I should publish guidelines respecting penalties for various violations of the *Act*. Aheer argues that section 6 of the *Act* requires me to provide guidance on the penalties I impose, and the lack of such guidance defeats the purpose of the *Act*. I do not agree that I am required to make rules regarding penalty amounts or that Aheer is without guidance on the OBBCTC's approach to penalties without such rules.
16. Section 6 allows the Commissioner to make rules of practice and procedure respecting applications, audits, complaints, reconsiderations, submissions and hearings. It does not contemplate rules of practice and procedure respecting penalty amounts and it would not be appropriate for me to make rules for assessing penalties. Nor is it necessary or appropriate for me to assign set monetary amounts to violations.
17. Contraventions of the *Act*, *Regulation*, and Licence are not considered in isolation. I have noted in a previous decision that "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.***"<sup>1</sup> The factors to be considered in a particular case vary, as do their particular relevance and weight.
18. I will also not assign a set penalty amount to each violation because doing so could aid in the financial planning of those who intend to violate the *Act* and CTS Licence and could induce licensees to be non-compliant where the cost of a penalty is relatively low compared to the financial benefit of non-compliance. Penalties are intended to deter licensees from non-compliant activity and should not be viewed as a cost of doing business. It is important that penalties are sufficiently high and the risk of incurring penalties sufficient to deter non-compliance.
19. Penalties have escalated overall since 2015 for good reason. The *Act* and *Regulation* were enacted in 2014, and financial penalties issued in response to audits in the initial years of the regulatory regime were small in order to give licensees time to adjust their practices to reflect the requirements of the new statutory framework. The regime has now been in place for more than six years, and licensees are expected to know the requirements of the *Act*, the *Regulation* and CTS Licence. It has also become apparent that the size of the penalties historically has not been high enough to deter non-compliance, which is still rampant in the sector.

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<sup>1</sup> Safeway Trucking Ltd. and Coast Pacific Carrier Inc. (CTC Decision No. 14/2020), paragraph 21.

20. Aheer has been a licensee since 2015 and has been audited before. In this case, the penalty amount was determined based upon a consideration of the relevant penalty factors which have been outlined in several decisions including Olympia Transportation Ltd. (CTC Decision No. 02/2016) and Smart Choice Transportation (CTC Decision No. 21/2016). The factors considered here included the seriousness of the non-compliance, the amount by which Aheer was enriched by its non-compliance (\$73,390.72), Aheer's use of a payment method that it ought to have known was prohibited, the meritless disputes Aheer engaged in during the course of the audit, Aheer's past conduct and the need to deter other licensees from similar behaviour. Based on these considerations, I find the penalty amount to be reasonable and proportionate. Aheer has not made any submissions or offered any new evidence to change my mind.
21. Aheer is incorrect to say that the only decision out of this office describing considerations relevant to penalty is Olympia Transportation Ltd. (CTC Decision No. 02/2016). There are many.<sup>2</sup>
22. Aheer continues to cite sections of the audit report in support of its argument that it was cooperative with the auditor, complied with her instructions, and amended its practices as required. Aheer also cites the conclusions of a previous auditor during a previous audit in support of its argument that its cooperation should be considered when assessing the size of the penalty.
23. A licensee's conduct during a previous audit is not a factor that will be considered when assessing a penalty for a different audit. Licensees should also already be aware that cooperation during an audit "is not a factor which generally outweighs findings of non-compliance to the degree it negates or dramatically reduces a penalty."<sup>3</sup>
24. Aheer's conduct during the audit was discussed in the Decision Notice, where I acknowledged the auditor's comments around its cooperation; however, I also noted that Aheer only paid the majority of the money the auditor found owing and only amended its practices after a prolonged period of engaging in meritless disputes regarding off-sets and trip rate payment requirements to rail terminals, both of which had been previously ruled on and dealt with in bulletins and that Aheer ought to have been aware of.<sup>4</sup>

#### The financial impact and hardship of the penalty

25. Aheer argues that if the penalty is imposed, it will impact its financial viability and requests that I reconsider the quantum of the penalty on this basis, noting that I have done so in previous decisions. Aheer advanced similar arguments in response to the Original Decision, and in the Decision Notice I stated that:

Financial hardship is not generally considered when proposing penalties. On one occasion, I reduced the size of a proposed penalty to safeguard the employment of drivers, and I have allowed licensees to pay penalties in installments where they have provided evidence of their inability to pay the applicable penalty in one lump sum by the specified deadline. In each case, I considered evidence provided by the licensee as well as the licensee's compliance history, the

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<sup>2</sup> See for example, Smart Choice Transportation Ltd. (CTC Decision No. 21/2016), Gulzar Transportation Inc. and Jet Speed Transportation Inc. (CTC Decisions No. 12/2019 & No. 06/2020).

<sup>3</sup> Safeway Trucking Ltd./Coast Pacific Carrier Inc. (CTC Decision No. 11/2020) – Decision Notice, paragraph 22.

<sup>4</sup> Aheer Transportation Ltd. (CTC Decision No. 01/2021) – Decision Notice, paragraph 8.

severity of the non-compliance in question and the potential impact of the penalty on driver employment.<sup>5</sup>

26. Aheer was invited in the Decision Notice to provide evidence to support its assertion that payment of the penalty will impact the financial viability of the company and, by extension, its employees.<sup>6</sup> Aheer has not provided any evidence. Instead, it simply asserts that the penalty will impact its financial viability. In the absence of any evidence on the magnitude of the impact of the penalty and its effect on drivers, I cannot adjust the size of the penalty on this basis.

### **III. Conclusion**

27. In summary, the application for reconsideration of Aheer Transportation Ltd. (CTC Decision No. 01/2021) is dismissed and the penalty proposed in the Original Decision is confirmed and imposed. Section 35(2) of the *Act* requires that this fine be paid within 30 days of the issuance of the Decision Notice. Aheer must pay the penalty by no later than 30 days from the date of this reconsideration.

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

Dated at Vancouver, B.C., this 8<sup>th</sup> day of June, 2021.



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Michael Crawford, Commissioner

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<sup>5</sup> Aheer Transportation Ltd. (CTC Decision No. 01/2021) – Decision Notice, paragraph 14.

<sup>6</sup> Aheer Transportation Ltd. (CTC Decision No. 01/2021) – Decision Notice, paragraph 16.