



October 11, 2023

Pro West Trucking Ltd.
1637 Cliveden Avenue
Delta, BC V3M 6V5

Pro West Trucking Ltd. (CTC Decision No 08/2023) – Decision Notice

Overview

1. In Pro West Transport Ltd. (CTC Decision No 08/2023) (the “Decision”), I determined that Pro West had failed to comply with s. 9 and s. 40 of the *Container Trucking Act* (the “Act”) when it failed to comply with the Commissioner’s 2022 Order/Amended Order by the April 27, 2023, deadline. I also determined that Pro West had failed to pay its directly employed operators (“Company Drivers”) and independent operators (“IOs”) in accordance with s. 23(2) of the Act. In addition, I found that Pro West had improperly deducted business costs from certain IOs’ wages in violation of s. 24 of the Act and section 2 of Appendix E to Schedule 1 of the Container Trucking Services license (“CTS License”). While Pro West demonstrated that it had paid the eleven (11) Company Drivers the sum of \$21,663 following the auditor’s report, I ordered Pro West to pay its IOs the sum set out in paragraphs 17 and 38 of the Decision. I proposed to impose an administrative fine in the amount of \$50,000.00 and a four-week license suspension for Pro West’s breach of s. 40 of the Act for the reasons set out in paragraphs 122-131 of the Decision.
2. Consistent with s. 34(2) of the Act, I advised Pro West that I would consider its written response to the proposed penalty if it was received within 7 days. Pro West provided a written response to the proposed penalty dated July 17, 2023 (“Submission #1”) which included a question about the orders made in the Decision. In Submission #1 Pro West stated that it generally disagreed with the Decision and its recitation of facts but did not go into any further detail. I responded to Pro West’s request for clarification of the orders made in the Decision, and I invited Pro West to provide a more fulsome response. Pro West provided a written response to the Decision and my findings more generally on July 31, 2023 (“Submission #2”).

Licensee Response

3. Pro West asks that I exercise my discretion and not impose the proposed penalty or in the alternative only issue a monetary penalty.
4. Pro West submits that the Commissioner should only base a penalty on the two-month period of the audit as there was no finding that Pro West breached the Act, Regulation, or its CTS Licence during any other period. In Submission #1, Pro West argues that its prompt payment of Company Drivers following the auditor’s request, the relatively small dollar amount of the improper deductions, and what it considers to be a live issue involving the definition of “trip splitting,” should not attract such a “draconian” penalty.

5. In Submission #1, Pro West cites to AMK Carrier Inc. (CTC Decision No. 3/2020), Embassy Transportation Inc. (CTC Decision No. 4/2023), Harbour Link Container Services Inc. (CTC Decision No. 10/2021), and PTG Transport Ltd. (CTC Decision No. 11/2021) as cases where licensees who have underpaid drivers, made impermissible deductions, and failed to produce records have had lesser penalties imposed.
6. In addition, Pro West argues that the detrimental and disproportionate effect on its drivers and its own finances and operations should weigh against imposing a suspension. Pro West estimates the proposed suspension would result in its drivers losing \$14,000 to \$15,000 in income over the period of the suspension, would cost “millions of dollars of revenue to Pro West” and likely cause Pro West to lose customers to other licensees.
7. In Submission #2, Pro West reiterates its position that the Commissioner does not have the statutory authority to issue the 2022 Order/Amended Order and argues that the reasoning in the Decision is flawed because an order to “self-audit” is not an order to comply with the *Act* because the *Act* “does not say anywhere that licensees must conduct self-audits.”
8. Pro West also argues that the Commissioner is barred from issuing any administrative penalty because the time limit to issue a penalty has expired. Section 34(1) of the *Act* states that “if the commissioner is satisfied that a licensee has failed to comply with this Act or the terms and conditions of the licensee’s licence, the commissioner may, in accordance with this Part and within 6 months after becoming aware of the licensee’s failure to comply” impose a penalty.
9. Pro West submits that the six-month time limit started no later than when Pro West was provided with a copy of the January 10, 2022, Audit Report underlying the Decision. It also says that the Decision is clear that the then-Commissioner concluded Pro West had breached the *Act* when he issued his 2022 Order on July 27, 2022. Alternatively, Pro West argues that the six-month time limit began no later than January 6, 2023, when I advised that I would be issuing a decision based on the two-month audit and Pro West’s decision not to follow the 2022 Order/Amended Order.
10. Pro West also submits that any delay that it has occasioned should not affect the severity of the penalty. It argues that at least four months of delay fall at the feet of the Commissioner due to the failure of the Commissioner to return payroll records in accordance with s. 32(5) of the *Act* and the amount of time the Commissioner took to respond to its serious concerns raised on August 19, 2022, with the extrapolation method proposed by the Commissioner. It also submits that it is not obligated to keep electronic records and that delays arising because it kept only physical records exist should not be factored into penalty.
11. Pro West invites the Commissioner to reconsider the MNP evidence which suggested that the OBCCTC’s proposed extrapolation method was not statistically sound and that the cost of complying with the 2022 Order/Amended Order was excessive. It argues that it should not be penalized for not complying with the 2022 Order/Amended Order because it was impossible to do so. Pro West also suggests that it was not clear the 2022 Order/Amended Order was final.

12. On August 9, 2023, counsel for Pro West advised the OBCCTC that it had issued the payments to the drivers and provided the requested payroll documents pursuant to the orders contained in the Commissioner's Decision.

Consideration of Licensee's Response

13. At the outset, I emphasize that the proposed penalty is the result of Pro West's failure to comply with the 2022 Order/Amended Order by the April 27, 2023, deadline as stated in para 121 of the Decision. While Pro West was ordered to repay some of its drivers, I did not penalize Pro West for breaches of sections 23(2) and 24 of the Act or s. 2 of Appendix E to Schedule 1 of the CTS License.
14. Since the proposed fine and suspension are not predicated on the underpayment of wages to drivers during the Audit Period or on any delays that occurred during the audit process, when the then Commissioner was aware of these failures to comply is not relevant. I note that the Act does not impose a time limit on when the Commissioner can order repayment of wages.
15. Because the fine and suspension were proposed as result of Pro West's failure to comply by April 27, 2023, with the 2022 Order/Amended Order issued under s. 9 of the Act, April 27, 2023, is when I became satisfied and aware that Pro West had failed to comply with s. 40 of the Act. Therefore, in accordance with s. 34(1), a penalty must be imposed within 6 months of April 27, 2023.
16. While Pro West advised the Commissioner it would not comply with the 2022 Order/Amended Order in correspondence dated August 19, 2022, and January 30, 2023, the deadline to comply with the 2022 Order/Amended Order was not until April 27, 2023, and any penalty imposed for not following an order prior to that deadline would be arguably premature.
17. It was not until the April 27, 2023, deadline passed that I could find that Pro West had contravened the 2022 Order/Amended Order. Pro West's cooperation since the initiation of the audit on November 5, 2020, has changed over time. The Decision notes that Pro West was initially cooperative with the auditor but on December 13, 2021, took an uncooperative tone by refusing to assist in the audit process, only to reengage following the 2022 Order and then retreat again following the 2022 Amended Order. It was open to Pro West revert back to its cooperative stance and complete the tasks assigned in the 2022 Order/Amended Order prior to the deadline.
18. Pro West was given every opportunity to comply with the 2022 Order/Amended Order to determine the amount owing to its drivers. It did not, and I am therefore unable to ascertain the total amount owed to Pro West drivers and can only order payment for the Initial Audit Period. To have the six-month time period start at any point prior to April 27, 2023, would mean that I would not have all the information before me in order to make a decision and assess the appropriate penalty.
19. I do not find Pro West's citations to previous penalties issued in cases involving underpayment of wages, improper deductions, and failure to produce records helpful, in part because the reason for the penalty in this case is the failure to follow the 2022 Order/Amended Order.

20. I note that license suspensions were proposed in Supersonic Transport Ltd. (CTC Decision No 24/2018) and Can. American Enterprises Ltd. (CTC Decision No. 12/2020) for the licensees' failure to comply with orders requiring them to bring themselves into compliance. In Safeway Trucking Ltd./Coast Pacific Carrier (CTC Decision No. 04/2022), then-Commissioner Crawford noted that license suspensions "may be a useful penalty when a licensee has failed to comply with an order and the term of the suspension is pegged to compliance with the order" and went on to say that he was "not convinced that licence suspensions are generally deterrent or corrective" (para. 112). I adopt the first part of this analysis. I agree that a licence suspension may be appropriate when a licensee has failed to comply with an order and there is a concern that the non-compliance is ongoing. This is in part because the licensee should not be able to continue to operate while deliberately ignoring an order to bring itself into compliance and because the suspension is intended to bring the licensees into compliance. However, I would add that if a financial penalty alone were applied to a licensee who has failed to comply with an order involving bringing itself into compliance by paying the regulated rates, the licensee could simply weigh the cost of the fine versus the cost of complying with the order and make a business decision not to comply with the order.
21. In this case, I don't know the exact quantum of the funds owing due to Pro West's refusal to comply with the 2022 Order/Amended Order and I categorically reject Pro West's argument that the proposed penalty is disproportionate to the relatively a small amount of money owed to the drivers during the Audit Period for the simple reason that Pro West has refused to assess or cooperate in an assessment of the full amount owing. Pro West's actions have made it practically impossible to consider the totality of the harm suffered by drivers or the extent to which the licensee has been enriched, both of which are relevant to penalty: Smart Choice Transportation Ltd. (OBCCTC Decision No. 21/2016). In my view, to credit Pro West with the relatively low amount owing the auditor was able to discover despite Pro West's lack of cooperation would be inconsistent with the purposes of Act, the fact that I am not able to determine the exact amount owing because of Pro West's actions weighs in favor of a heavier penalty that includes a suspension.
22. I consider that a defined suspension along with an administrative penalty is more appropriate than an open-ended suspension or a license cancellation. Section 34(6)(a) permits a suspension for up to one year, which suggests that the legislature expected suspensions to be imposed for a specific length of time. I consider suspensions to be a general deterrent or corrective for the simple reasons outlined in Pro West's submission – there will be impacts to a licensee's business if it is denied access to the marine terminals for a period of time – and this should be weighed by any other licensee who is factoring in the cost of not adhering to an order.
23. I also consider this suspension will deter Pro West specifically. While the Act permits the Commissioner to issue a license suspension for a period of up to one year, I find that a four-week suspension is sufficiently long to disrupt Pro West to such a degree that it may be dissuaded from a further violation. A shorter suspension would not necessarily disrupt a company's operations as it could simply contract out its business to another licensee for the duration of the suspension and treat the suspension as a cost of doing business.

24. I also consider that a four-week suspension is a significant enough interruption – albeit not a fatal one – to demonstrate to Pro West that it needs to engage in remedial activities (to bring itself into compliance).
25. Financial hardship, and by extension the hardship suffered by drivers, is not generally a consideration when making decisions regarding proposed penalties. See Dayal Transport Systems Inc. (CTC Decision No. 08/2019). However, I am aware that the licence suspension will impact Pro West’s drivers and note there are avenues available through the OBCCTC to allow those drivers continue to work for other licensees for the duration of the suspension.
26. Regarding Pro West’s invitation for me to reconsider the MNP evidence, I dealt extensively with Pro West’s reliance on MNP’s statement at paragraph 123 of the Decision and Pro West has not said anything to convince me that my assessment was incorrect. Furthermore, I am not aware of any statutory authorities that provide exemptions from compliance because the task is onerous or costly.
27. Finally, the Decision deals extensively with the validity of the 2022 Order/Amended Order and Pro West has not made substantially new submissions. Here I will address only Pro West’s suggestion that the *Act* does not explicitly state that a licensee must conduct a “self-audit.” Setting aside Pro West’s interpretation of the term, I agree that the *Act* does not expressly say that directions to “self-audit” may be given; however, the power to require the licensee to take steps to bring itself into compliance need not be expressed. Section 27(2) of the *Interpretation Act* provides:

27 (2) If in an enactment power is given to a person to do or enforce the doing of an act or thing, all the powers that are necessary to enable the person to do or enforce the doing of the act or thing are also deemed to be given.
28. The Commissioner has regularly issued directions to licensees to “self-audit.” See KD Truckline Ltd. (CTC Decision No. 03/2018), Safeway Trucking Ltd. (CTC Decision No. 05/2018) and Can American Enterprises Ltd. (CTS Decision No. 12/2020). In Pro West Trucking Ltd. (CTC Decision No. 06/2017), I note that Pro West conducted two separate self-audits during that audit process. A proper exercise of the power to require a licensee to self-audit is to ensure that the errors the Commissioner has identified will be addressed by the licensee so that drivers will be properly compensated retroactively and in the future. I find that directions to “self-audit” (to come into compliance with the minimum rates) are consistent with the principal object of the *Act* – to ensure stability in the drayage sector by ensuring licensees pay the regulated rates.

Conclusion

29. Having carefully considered Pro West’s submission and for the reasons outlined above and, in my Decision, I impose a penalty of \$50,000.00 and a four-week license suspension.
30. In the result, I hereby order Pro West to pay an administrative fine in the amount of \$50,000.00. Section 35(2) of the *Act* requires that this fine be paid within 30 days of the issuance of this

Decision Notice. Payment should be made by delivering to OBCCTC a cheque payable to the Minister of Finance.

31. I hereby order that Pro West's 2022 CTS License be suspended for a four-week period between 12:00pm Friday, October 20, 2023, and 12:00pm November 17, 2023.
32. Finally, I note that Pro West may request a reconsideration of this Commissioner's Decision Notice by filing a Notice of Reconsideration with the Commissioner not more than 30 days after Pro West'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,
 - f. signed by the applicant or the applicant's counsel.

Despite the filing of a Notice of Reconsideration, the above orders remain in effect until any reconsideration application is determined.

This Decision Notice along with the Commissioner's Decision will be published on the OBCCTC website.

Dated at Vancouver, B.C. this 11th day of October 2023



Glen MacInnes
Commissioner