



October 30, 2020

Can. American Enterprises Ltd.
126 – 7475 135 Street
Surrey, BC V3W 0M8

Can American Enterprises Ltd. (CTC Decision No. 12/2020) – Decision Notice

A. Overview

1. In *Can American Enterprises Ltd. (CTC Decision No. 12/2020)* (the “Decision”) I found that *Can American Enterprises Ltd.* (“*Can American*”) failed to pay its independent operators (“*I/Os*”) for all trips performed in accordance with section 23 of the *Container Trucking Act* (the “*Act*”)¹ and Appendix E to Schedule 1(1) of its Container Trucking Services Licence. I also found that *Can American* violated section 1(f) of Appendix D to Schedule 1 of its Container Trucking Services Licence when it did not retain a record of each trip completed on each day by its *I/Os*. *Can American* had not yet paid its *I/Os* for unpaid trips performed between March 1 and March 31, 2019 and had not calculated or paid the amount of money owing to its *I/Os* in unpaid trips performed between April 1, 2019 and September 30, 2020.
2. *Can American* was ordered to calculate the amount owing to each of its *I/Os* for unpaid trips (using the methodology provided by the auditor) performed between April 1, 2019 and September 2020 and provide those calculations to the auditor for review by no later than October 14, 2020. *Can American* was also ordered to pay the amount owing to its *I/Os* for unpaid trips performed between March 1, 2019 and September 30, 2020 once the auditor had confirmed *Can American’s* calculations for April 1, 2019 – September 30, 2020. An administrative penalty of \$10,000.00 was proposed.
3. Consistent with s. 34(2) of the *Act*, *Can American* was given 7 days to provide a written response setting out why the proposed penalty should not be imposed. The Company provided a written argument in response to the proposed penalty within the specified timeframe. I have considered the Company’s submission and provide the following Decision Notice.

B. The Company’s Response

4. *Can American* asks that the proposed penalty be reduced or not imposed. *Can American* argues as follows:
 1. The issue is a dispute over the movement of containers from a customer’s facility to the Company’s yard 550 metres away; and within this issue is whether such a container trucking service constitutes prescribed container trucking service or not;
 2. There is no evidence of the nature and extent of harm suffered by the Complainants as a result of this non-payment; furthermore, there is no evidence that other *I/Os* have filed complaints

¹ My reference to section 25 of the *Act* at paragraph 25(b) of the Decision should in fact be section 23 of the *Act*.

with the OBCCTC regarding this issue; there is no evidence that only the three complainants were being made to perform these container trucking services; the other I/Os continue to perform such services without any issues or concerns;

3. There is no evidence that such a non-payment has damaged the integrity of the container trucking industry;
4. There is no evidence of any enrichment of the Company; as far as the Company's position is concerned, this arrangement or performance of service is not only beneficial to the Company, but the ultimate beneficiaries remain the I/Os, who end up having more earning capacity under this arrangement;
5. The Company was audited in 2018, for a different issue, and the Company has not repeated the same issues that were raised in the previous decision of the OBCCTC;
6. There is no need for an element of general deterrence in this case; these are not the circumstances where you make an "example" out of the Company, for the rest of the container trucking industry. The issue of a movement of containers over a short distance, and whether this constitutes prescribed container services remains a contentious issue, and an issue that is unprecedented; and
7. There are no orders made by the OBCCTC having similar facts and circumstances.

C. Consideration of the Company's Response

5. Can American continues to argue that it would not be cost effective to pay its drivers a regulated trip rate for every trip and says that if it were required to do so then it would dispatch its drivers differently resulting in unpaid trips for drivers which, it argues, would result in fewer paid trips per day for drivers, less money earned and more money spent in fuel costs. On this basis it remains Can American's position that payment of regulated rates for every trip in this case would, in fact, be antithetical to the *Act*, the purpose of which is to stabilize the drayage industry by ensuring drivers are not underpaid.
6. In the Decision, Can American was advised that its dispatch/pay model splits trips (thereby not paying a trip rate for all trips) and does not include a Positioning Movement Rate (which was introduced to address the issue of trip rate drivers not being paid for bobtail and empty chassis moves). The legislation requires that an off-dock trip rate be paid for the trips in question and Can American is not entitled to choose when it will pay required rates.
7. Can American's position is contrary to the *Act's* purpose. Can American has not paid its drivers correctly, refuses to correct its non-compliance and argues for a dispatch/pay model that in fact results in less money for its drivers.
8. Can American cites section 2 of the *Regulation* which prescribes the container trucking services referenced in section 16(1) of the *Act* and excludes container trucking services performed by a trucker on behalf of a licensee from section 16(1) of the *Act*. Can American appears to argue that because the container trucking services prescribed in section 2 of the *Regulation* are services that requires access to a marine terminal but do not include container trucking services performed by drivers on behalf of licensees, then not all container trucking services are prescribed and therefore do not necessarily attract a regulated rate. Additionally, Can American argues that since the trips in question are performed by I/Os, they are not prescribed container trucking services are therefore do not attract a regulated rate.

9. Can American's interpretation of the *Act* and the *Regulation* is incorrect. "Container trucking services" are defined in the *Act* as "the transportation of a container by means of a truck." Subsection 16(1) of the *Act* requires persons to hold a licence to carry out prescribed container trucking services in a prescribed area:

16 (1) A person must not carry out prescribed container trucking services in a prescribed area unless

- (a) the person holds a licence issued to that person that gives the person permission to carry out container trucking services in the specified prescribed area, and
- (b) the person carries out the container trucking service in compliance with
 - (i) this Act and the regulations,
 - (ii) the licence, and
 - (iii) if applicable, an order issued to the person under this Act.

10. Section 2 of the *Regulation* defines both "prescribed container trucking services" and the "prescribed area":

2 (1) The container trucking services prescribed for the purposes of section 16(1) [licence required] of the Act are container trucking services that require access to a marine terminal, but do not include

- (a) container trucking services performed by a trucker on behalf of a licensee, using a truck with a truck tag issued by the commissioner, or
- (b) transportation of a container to or from a location outside the Lower Mainland.

(2) The area prescribed for the purposes of section 16 (1) of the *Act* is the Lower Mainland.

11. Section 2 of the *Regulation* does not prescribe which container trucking series attract a rate and which do not. Rather, the section establishes that the only type of container trucking services requiring a **licence** (emphasis added) are "container trucking services that require access to a marine terminal". Therefore, any person (trucking company) engaged in on-dock trucking requires a **licence** (emphasis added) and licenced companies are required to pay regulated rates for defined on and off-dock trips. Section 2(1)(a) of the *Regulation* only means that drivers performing container trucking services on behalf of a licensee do not themselves need to be licenced. Since the trips in question are container trucking services defined as off-dock moves under the *Act*, Can American is non-compliant when it does not pay an off-dock trip rate to a driver (including an I/O) for the move.

12. I do not accept Can American's argument that the 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 complainants as a result of its non-payment and no evidence that the non-payment has damaged the integrity of the container trucking industry. The nature and extent of the harm suffered by the complainants is self-evident. At a minimum, 13 I/Os (including the complainants) were harmed financially when they were not paid \$5,536.00 collectively for container trucking services performed in March 2019. Additionally, the full extent of the harm is unknown because Can American has not performed self-audit calculations as ordered. The Company's failure to pay initially and as ordered is a violation of

the Act. Can American has also failed to conduct the self-calculation of unpaid trips performed between April 1, 2019 and September 30, 2020 by October 14, 2020 as I ordered. These violations are damaging to the integrity of the container trucking industry.

13. There is no question that the Company were enriched by at least \$5,536.00 as a result of their actions. That some owner operators did not complain and continue to perform the container trucking services without pay does not support Can American's position. This argument is analogous to suggesting that illegal activity is not illegal if those involved are, willingly or otherwise, complicit.
14. It is concerning that Can American will not accept the finding of non-compliance and elects to advance meritless arguments, seemingly in order to prolong the audit process or simply register its opposition to the Act. In addition to Can American's assertion that drivers have not suffered harm as a result of its failure to comply with the minimum rate requirements, Can American states that its 2018 audit involved a different issue and therefore the penalty quantum in this case should not reflect the fact that this is Can American's second violation for splitting trips between Cascades Recovery and its yard. This assertion is false. As noted in the Decision, this is not Can American's first violation of this kind:

In Can-American Enterprises Ltd. (CTC Decision No. 01/2018), it was determined that Can American failed to comply with the minimum trip rates required under the Act and Regulation. The audit findings there indicated that Can American owed three I/O's adjustments totaling \$7,112.50. The adjustment payments were required because Can American was **splitting trip rates for I/Os who could not complete their deliveries within one day. The trips split in that case included trips between Cascades Recovery and Can American's yard.** Can American paid the money owing to its drivers and was penalized \$1,500.000. (emphasis added)

15. This audit is not unique. Five previous decisions (including Can American's 2018 decision) and one March 2016 bulletin have addressed the practice of trip splitting.² In MDW Express Transport Ltd. (CTC Decision No. 01/2017) the licensee was ordered to comply with the Act and correct its record keeping practices and was penalized for its non-compliance which included trip splitting. In Simard Westlink Inc. (CTC Decision No. 01/2020) the licensee was ordered to perform calculations to determine money owing after refusing to do so and arguing which container trucking services attracted a regulated rate. Can American Enterprises Ltd. (CTC Decision No. 01/2018) was cited in that decision and the licensee was penalized for its non-compliance which included trip splitting.
16. The factors outlined in Smart Choice Transportation Ltd. (CTC Decision No. 21/2016) were applied and weighed in consideration of the proposed penalty. The seriousness of the Company's conduct; the harm suffered by the drivers; the damage done to the industry's integrity; the extent to which the Company was enriched; the Company's conduct during the audit; and the Company's past conduct were all considered. Can American's penalty in this case is larger than those cited in the cases above because of the reoccurring nature of its offences.

² Hap Enterprises Ltd. (CTC Decision No. 17/2016); MDW Express Transport Ltd. (CTC Decision No. 01/2017); United Coastal Logistics Ltd. (CTC Decision No. 25/2018); Simard Westlink Inc. (CTC Decision No. 01/2020).

17. 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, sending a message of general deterrence. There is always an element of general deterrence when issuing a penalty and this case is no different. Licensees should know that 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.

D. Conclusion

18. Can American has not complied with the Order set out in the Decision. It is in breach of the October 14, 2020 deadline. My Order is now revised as follows:

Can American is ordered to calculate the amount owing to each of its I/Os in unpaid trips (using the methodology provided by the auditor) performed between April 1, 2019 and the present and provide those calculations to the auditor for review by no later than November 13, 2020. Once the auditor has confirmed the calculations, Can American is ordered to pay the amount owing to its I/Os for unpaid trips performed between March 1, 2019 and the present no later than 30 days after the auditor has confirmed the calculations.

19. I propose to suspend Can American's licence if it does not comply with the above Order. Can American has until November 13, 2020 to comply with the first part of the Order set out above (presentation of its calculations to the OBCCTC auditor by November 13, 2020) or to respond to the following proposed penalty under section 34 of the *Act*:

that Can American's 2018 Container Trucking Services Licence No. 60052 be suspended effective November 13, 2020 and remain suspended until such time as Can American complies with the first part of the Order set out above.

20. Further, having carefully considered Can American's submission, and for the reasons outlined above and in my Decision, I will not refrain from imposing a monetary penalty.
21. In the result, I hereby order Can American Enterprises Ltd. to pay an administrative fine in the amount of \$10,000.00. 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 \$10,000.00 payable to the Minister of Finance.

22. Finally, I note that Can American Enterprises Ltd. may request a reconsideration of the imposition of the administrative fine 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.
23. Despite the filing of a Notice of Reconsideration, the above order requiring Can American to pay an administrative penalty of \$10,000.00 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 30th day of October, 2020.



Michael Crawford, Commissioner