



May 5, 2023

Simard Westlink Inc.  
16062 Portside Road  
Richmond, BC V6W 1M1

### **Commissioner's Decision**

#### **Simard Westlink Inc. (CTC Decision No 05/2023)**

#### **Introduction**

1. Simard Westlink Inc. ("Simard") is a licensee within the meaning of the *Container Trucking Act* (the "Act").
2. Section 16(1)(b) of the *Act* states that a licensee must carry out the container trucking service in compliance with:
  - (i) this Act and the regulations,
  - (ii) the license, and
  - (iii) if applicable, an order issued to the person under the Act.
3. Under sections 22 and 23 of the *Act*, minimum rates that licensees must pay to truckers who provide container trucking services are established by the Commissioner, and a licensee must comply with those statutorily established rates. Section 23(2) states:

A licensee who employs or retains a trucker to provide container trucking services must pay the trucker a rate and a fuel surcharge that is not less than the rate and fuel surcharge established under section 22 for those container trucking services.

4. The calculation for the fuel surcharge ("FSC") is set out in the Commissioner's Rate Order as follows:

In each calendar month, if the reference price of diesel for an independent operator is more than \$1.05, a licensee must pay the independent operator a fuel surcharge.

"reference price of diesel" means the lower of the following:

- a) the average retail price per litre, including taxes, of diesel in Vancouver as reported by Kalibrate (formerly the Kent Group) for the month immediately before the date on which a fuel surcharge is calculated, rounded down to the nearest \$0.05.

b) if an independent operator obtains diesel at a discount from the ordinary retail price for the purposes of providing container trucking services, the amount paid per litre by the independent operator, rounded down to the nearest \$0.05.

Fuel surcharge formula:

In each calendar month, if the reference price of diesel for an independent operator is more than \$1.05, a licensee must pay the independent operator a fuel surcharge, calculated as a percentage in accordance with the following formula:

$$\frac{(A-\$1.05)}{\$0.05} \times B \times 2\%$$

where:

A = the reference price of diesel, in dollars;

B = the minimum compensation payable by the licensee to the independent operator in that month, as determined by the required rate payment (exclusive of the positioning movement rate), in dollars.

5. The Office of the BC Container Trucking Commissioner (“OBCCTC”) posts a monthly FSC percentage on its website using an independent consulting firm’s (“Kalibrate”) average fuel price (the “Kalibrate Rate”) to determine the “reference price of diesel in dollars.
6. The OBCCTC does not post an FSC percentage based on a discounted fuel rate because the discount rate an IO receives can vary.
7. Under section 31 of the *Act*, the Commissioner may conduct an audit or investigation to ensure compliance with the *Act*, the *Container Trucking Regulation* (the “*Regulation*”) or a licence.
8. Simard has been the subject of two other decisions. In 2016, the Commissioner found that it had underpaid drivers by a total of \$79,989.31 which were repaid and exercised his discretion not to issue a penalty. See *Simard Westlink Inc.*, CTC Decision No. 07/2016 (“Simard #1”). In 2020, the Commissioner found that Simard had underpaid its drivers by \$33,596.02. Simard was ordered to compensate the drivers and to pay an administrative fine of \$2,000.00 (“Simard #2”). See *Simard Westlink Inc.*, (CTC Decision Notice, No. 01/2020).
9. In June of 2022, the union representing Simard drivers (“Teamsters”) filed a complaint on behalf of two Independent Operators (“IOs”) (“Complainant #1” and “Complaint #2”) who claimed they had been paid an FSC based on a discounted fuel rate and not the Kalibrate Rate posted on the OBCCTC

website. The Commissioner directed an auditor to audit Simard's payroll records to determine if Simard has paid its drivers the proper fuel surcharge rates. The auditor was directed to audit the periods of April 1-30, 2022 and May 1-31, 2022 (together, the "Audit Period").

### **Audit Findings**

10. The auditor was directed to audit the periods of April 1-30, 2022 and May 1-31, 2022 (together, the "Audit Period") to ensure the proper calculation for FSC was being applied.
11. Simard provides its IOs access to its fuel fleet card ("Fleet Card") which permits its IOs to receive fuel at a discount price. The auditor noted Simard has sent out a bulletin following the 2020 audit requiring all Simard IOs to use the Fleet Card and stating that the FSC would be calculated using the discounted rate provide to the IOs via Simard's Fleet Card ("Discount Memo").
12. The auditor reviewed Simard's fuel pay statements for those IOs who use the Fleet Card and compared the statements to their wage statements. Simard was found to have properly calculated the FSC when it used the Fleet Card's discounted fuel rate to determine the "reference price of diesel" as part of the equation in the Rate Order. The auditor then reconciled the fuel statements of each driver who used the Fleet Card along with each driver's wage statements and found there were no discrepancies.
13. Despite the instructions contained in the Discount Memo, Complainant #1 and Complainant #2 (collectively the "Complainants") did not use the Fleet Card during the Audit Period. The auditor found that Simard paid the Complainants an FSC as if they had used the Fleet Card discount. Simard agreed this was its practice.
14. As part of her investigation, the auditor requested a copy of the Complainants' fuel statements for the Audit Period. The auditor received and reviewed the Complainants' fuel statements and noted that the Complainants appeared to have paid a significantly lower price for fuel during the Audit Period than the rates published by Kalibrate for the same period.
15. The Complainants confirmed that they had obtained their fuel at a discounted rate during the Audit Period, but they could not articulate what the discount rate was as the fuel card they were using was supplied by a third party. A representative of the third party refused to disclose the discounted fuel rate to the auditor. As a result, despite knowing that the Complainants received a fuel discount, the auditor was unable to determine the "reference price of diesel" necessary to perform the calculation.
16. The Complainants were advised by the auditor that without a precise discount amount, she could not determine if the FSC they received from Simard was compliant with the Rate Order.

17. The Complainants then advised the auditor that before receiving the fuel card from the third party provider, they had used their own credit cards, which did not attract a fuel discount, but that Simard had only paid them the FSC based on Simard's Fleet Card discounted fuel price.
18. Complainant #1 provided his fuel statements from November 2019 to April 30, 2020. Complainant #2 did not provide any additional fuel statements beyond those covering the Audit Period. The auditor reviewed the records provided by Simard and the fuel statements provided by Complainant #1 and found that he was underpaid the difference between Simard's Fleet Card discount and the regulated rate in eight pay periods, for a total of \$884.83.

### **Response to Audit Report**

19. On February 24, 2023, the Audit Report was sent to Simard and the union inviting each to provide a response. Only Simard provided a response.
20. Simard confirms that it requires its IOs to use its Fleet Card and pays the FSC based on the discounted rate provided through the Fleet Card. Simard has taken the step to negotiate a fuel discount and apply it to its IOs because of its high consumption of fuel and the need to compete in a competitive market.
21. Simard urges me to consider that the purpose of the FSC is to ensure IOs are shielded from spikes in fuel costs and submits that IOs should not be permitted to be paid an FSC based on the higher Kalibrate Rate if a discounted fuel price is available to or received by the driver. To do otherwise, Simard argues, is to allow these drivers to receive an enrichment not contemplated by the *Act*.
22. Simard argues it should be entitled to calculate the FSC using the discounted priced it offers to drivers even if the IO refuses to use the Fleet Card because determining if a driver receives a fuel discount and how much the discount is would be administratively onerous.
23. While Simard does not identify the auditor or the context of the alleged statement, it suggests that it was simply following an OBCCTC auditor's advice to only pay the FSC based on the discounted fuel price available through its Fleet Card.
24. Simard also advises that additional IOs have recently stopped using Simard's Fleet Card.
25. Simard also challenges the auditor's calculation of the amount owing to Complainant #1 because it states that a significant amount of the work performed during that time was non-CTS work.

## Decision

26. As described above, the circumstances of this case are:
- a. The Complaints state they should be entitled to the FSC based on the Kalibrate Rate because they did not use the discount available to them under Simard's Fleet Card.
  - b. The Commissioner ordered an audit of Simard's FSC calculations during the Audit Period.
  - c. The Auditor determined the drivers who used Simard's Fleet Card received the FSC in accordance with Fleet Card's discount rate.
  - d. The Complainants received an FSC based on a discounted fuel price as though they had used Simard's Fleet Card during the Audit Period even though they refused to use Simard's Fleet Card.
  - e. The Complainants used a third party fuel card during the Audit Period and received a fuel discount but were unable to provide the precise fuel discount they received.
  - f. The third party fuel card supplier refused to provide the auditor with the discounted rate received by the Complainants.
  - g. A Discount Memo was issued by Simard after the completion of the 2020 audit advised IOs to use its Fleet Card and the FSC will be based on the discounted rate provided through the Fleet Card.
  - h. Complainant #1 did not receive a fuel discount between November 2019 and April 30, 2020, but was paid an FSC based on the discount provided by Simard's Fleet Card. The auditor determined the Complainant was owed \$884.83 as a result.
27. Section 34 of the *Act* provides that, if the Commissioner is satisfied that a licensee has failed to comply with the *Act*, the Commissioner may impose a penalty or penalties on the licensee. Available penalties include suspending or cancelling the licensee's licence or imposing an administrative fine. Under section 28 of the *Regulation*, an administrative fine for a contravention relating to the payment of remuneration, wait time remuneration or fuel surcharge can be an amount up to \$500,000.
28. The seriousness of the available penalties indicates the gravity of non-compliance with the *Act*. The *Act* is beneficial legislation intended to ensure that licensees pay their employees and independent operators in compliance with the rates established by the legislation (*Act* and *Regulation*). Licensees must comply with the legislation, as well as the terms and conditions of their licences, and the Commissioner is tasked under the *Act* with investigating and enforcing compliance.
29. The *Act* does not, however, require penalties to be imposed for non-compliance in all cases. Rather, the Commissioner is granted discretion to impose penalties in appropriate cases.

30. In this case, there appears to be a misunderstanding on both the Complainants' and Simard's side about the proper application of the FSC formulae.
31. The Rate Order definition of "the reference price of diesel" is instructive when it comes to determining how a discount is used in calculating the FSC:

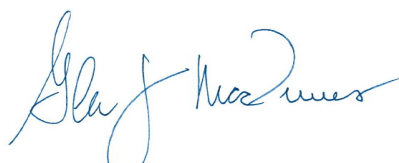
if an independent operator obtains diesel at a discount from the ordinary retail price for the purposes of providing container trucking services, the amount paid per litre by the independent operator, rounded down to the nearest \$0.05. (*emphasis added*)
32. In this case, it is undisputed that the Complainants received a discounted price for diesel during the Audit Period. The Complainants themselves confirmed they received a discount of fuel from the retail price of fuel through a third party provider and the auditor's review of their fuel statements is consistent with this.
33. I find, based on these facts and as per the Rate Order, that the Complainants were entitled to an FSC calculated on the discounted fuel rate they obtained – not on the Kalibrate Rate or Simard's Fleet Card discount. The Complainants obtained a discount from their third party – on the plain language of the Rate Order this is the discounted rate that should be used to calculate the FSC.
34. I do not agree with the Complainants that they should receive the FSC based on the Kalibrate Rate during the Audit Period. To permit the Complainants to pay less than the "ordinary retail price of fuel" but collect a higher FSC based on the Kalibrate Rate would not be consistent with the Rate Order and be an enrichment not contemplated by the Act.
35. For the period when Complainant #1 did not use the Fleet Card or receive any other discount, I find that he is entitled to the FSC as calculated by the auditor. The Rate Order clearly states that "if an independent operator obtains diesel at a discount..." then the discount must be used as part of the calculation. In this case there is no dispute that Complainant #1 did not receive a fuel discount between November 1, 2019 to April 30, 2020. Complainant #1 was therefore entitled to the FSC using the Kalibrate Rate as part of the equation and I accept that calculation resulted in an underpayment of \$884.83.
36. I do not accept Simard's argument that it was only obligated to pay the Complainants an FSC based on the discount provided through its Fleet Card. Nor do I accept Simard's mere assertion that an auditor advised it to pay the FSC at the Fleet Card discounted rate. The Rate Order is clear that where a driver "obtains" a discount, that discount is used to calculate the "reference price of diesel." I agree Simard offered a fuel discount to the Complainants and, if the Complainants had actually used the Fleet Card, the proper calculation would have included the Fleet Card discount. But, in this case, the Complainants did not use Simard's Fleet Card fuel discount and therefore the

proper calculation of their FSC is based either on the actual rate they paid, or the Kalibrate Rate, and not on the one on offer from Simard.

37. Simard also disputes the auditor's calculation of the additional FSC owed to Complainant #1 on the basis that the calculations include non-CTS work. On June 28, 2022, the auditor advised Simard the purpose of the investigation under the *Act* and listed the requested payroll information required for the purposes of conducting the audit "to determine compliance with the fuel surcharge requirement." On February 14, 2023 the auditor required Simard to provide payroll records for Complainant #1 for the period of November 1, 2019 to January 31, 2022. A review of the Complainant #1's payroll records appear that he was consistently paid an FSC – albeit less than was owing – for all hours worked. The payroll records do not identify or distinguish CTS work or non-CTS work. Other than bald assertions, I was provided no evidence or particulars to support Simard's position that the information it provided about the work between November 1, 2019 and January 31, 2022 did not include work covered under the *Act*. Therefore, I accept the auditor's findings that the period of work between November 1, 2019 and January 31, 2022 was CTS work.
38. I understand from Simard's submission that it is concerned it may be too administratively onerous to keep track of IOs who do not receive a fuel discount. I also understand Simard to be suggesting that allowing it IOs to opt out of using the Fleet Card may create an opportunity for driver abuse and additional costs. These explanations may be the genesis of the Discount Memo in the first place. It is unclear to me why the Complainants did not use the Fleet Card since the Discount Memo was issued, but they clearly were not using it and they must be paid in accordance with the actual fuel rate they obtained. This is the case no matter how onerous Simard feels that process may be.
39. The Complainants in this case belong to a union and I understand in an unionized environment that workplace policies can be subject to a collective agreement. Going forward, if Simard will not or cannot enforce its workplace policies (including those found in the Discount Memo) through its administrative and human resources practices, it cannot refuse to pay the regulated FSC based on the way the IOs obtained their fuel.
40. I was not provided with any documentation from Complainant #2 to establish that there was a period of time when he did not receive a discount. It is clear that Simard paid him an FSC based on the Fleet Card discount, but I am unable to determine if a different discounted rate should have been applied due to the lack of information from Complainant 2.
41. I decline to order Simard to pay any additional FSC beyond the amount outlined above to Complainant #1 based on the simple fact I do not have the documentation necessary to calculate the amounts.

42. I am satisfied that Complainant #1 did not use the Fleet Card and did not receive a discount on diesel fuel between November 1, 2019 and January 31, 2022. I find Simard was in violation of section 23(2) of the Act when it paid Complainant #1 the reduced FSC between November 1, 2019 to January 31, 2022. I order Simard to pay Complainant #1 \$884.83 -the difference between the FSC regulated rate and the FSC rate paid by Simard between the period of November 1, 2019 to January 31, 2022 within 30 days of this decision. I am also uncertain how Simard has paid other IOs who have since refused to use the Fleet Card, but it is Simard's responsibility to ensure that it is compliant with the Rate Order and not wait to be told by an auditor or the Commissioner.
43. I provide the following summary of my findings on the proper calculation of the FSC:
- a. An IO who does not receive a discount on diesel when paying for diesel will be paid an FSC based on the Kalibrate Rate that establishes the "reference price of diesel" as set out in the Rate Order.
  - b. An IO who obtains a discount on diesel when paying for diesel will be paid an FSC using the discounted rate the IO obtained to establish "reference price of diesel" as set out in the Rate Order.
  - c. An IO is not entitled to an FSC based on the Kalibrate Rate if the IO obtains a discounted rate when paying for diesel. The discounted rate obtained by the IO must be used to calculate the FSC.
  - d. A licensee is not entitled to pay an FSC less than the Rate Order if the licensee offers its IOs a discount on fuel and IOs do not accept the offer.
44. In these circumstances, while I record the fact Simard has paid a non-compliant FSC by way of this decision, I note Simard's cooperation with the auditor, the fact that its records were organized and readily available, and that it does not appear to have an improper purpose for calculating the FSC in the manner it did. I decline to exercise my discretion to impose a penalty.
45. This decision and the included order will be delivered to the licensee and published on the Commissioner's website ([www.abcctc.ca](http://www.abcctc.ca))

Dated at Vancouver, B.C. this 5<sup>th</sup> day of May, 2023



Glen MacInnes  
Commissioner