September 15, 2023

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

Simard Westlink Inc. (CTC Decision No 09/2023) – Decision Notice

Overview

1. In Simard Westlink Inc. (CTC Decision No 09/2023) (the "Decision"), I determined that Simard Westlink Inc. ("Simard") had failed to comply with sections 16(1)(b)(i) and (ii) and 23(2) of the *Container Trucking Act* ("*Act*") and sections 6.15, 6.16, 6.20 and 6.21 of its Container Trucking Services license ("CTS License") on March 15, 2023 by using untagged trucks to move containers between facilities in the Lower Mainland, paying two drivers less than the regulated rates, and using the services of an independent operator ("IO") not on the IO List. I ordered Simard to pay the drivers the sum set out in para 51 of the Decision and determined that this was an appropriate case to issue a penalty for the reasons set out in paras 54-64. I proposed to impose an administrative fine against Simard in the amount of $12,000.00.

2. Consistent with s. 34(2) of the *Act*, I advised Simard that I would consider its written response to the proposed penalty if it was received within 7 days. Simard provided a written response via email dated September 1, 2023.

Licensee Response

3. Simard maintains that the Impugned Containers and the Additional Impugned Containers identified in the Decision are containers that do not require access to a marine terminal and are therefore not subject to the requirements of the *Act*, *Regulation* or its CTS License.

4. Simard argues that finding the Impugned Containers and the Additional Impugned Containers are captured by the *Act* is inconsistent with a statement in a previous decision that "company drivers who move CN Rail and CP Rail 53-foot retail containers from the railway's intermodal terminals for 'domestic repositioning' or marine containers from East to West" across Canada were not covered by the *Act.* See Simard Westlink Inc. (CTC Decision No. 01/2020) para 37.

5. Simard seeks confirmation that licensees are required to pay the rates set out in the Rate Order even when they are not accessing a marine terminal and that unlicensed companies performing container trucking services who do not require access to the marine terminal are not required to pay those same rates.

6. Simard argues it is being targeted based on the Commissioner's allegedly new interpretation of "domestic repositioning" or "domestic moves" while other licensees are not, to its knowledge, being penalized.

7. Simard further submits that the calculations set out in the Decision for Mr. Brar and Mr. Sunghee do not account for the following:
    a. Mr. Sunghee earns benefits in the amount of $1.89 per hour which when added to his hourly rate of $26.99 per hour equals $28.88 per hour.
    b. Mr. Brar was deducted $445.98 + $22.30 GST for 535.2 liters of fuel.
    c. Mr. Brar is not entitled to a fuel surcharge because his fuel cost was $0.875 per litre.
    d. Mr. Brar is not entitled to payment for a move between Purolator and Western Canada because it was a bobtail move.
    e. Mr. Brar was paid wait time payments that were not included in the Decision calculation.
    f. Based on the above, Mr. Brar is only owed $278.44 based on the Rate Order.

8. Simard also maintains that there is a difference between 40-foot containers and 53-foot containers and that 53-foot containers are not used for the marine transportation of goods.

9. Simard disagrees with Commissioner's reasoning in the Decision that an escalating administrative penalty is warranted because previous decisions involving Simard were based on a misunderstanding of the *Act* when it was first passed, or on an error in calculating wages, or were the result of the fact that the *Act* is unclear and open to interpretation. It argues that given its cooperation in each of those prior audits and the unintentional nature of the previous breaches, an escalating fine is unnecessary to deter future breaches.

10. Finally, Simard argues that the Commissioner has applied a new interpretation in the Decision by finding "domestic container movements" are subject to the *Act* and, since Simard is the first licensee to be subject to this new interpretation, a warning would be more appropriate than a penalty to serve as a general deterrence. Simard submits there is no need for the Commissioner to specifically deter Simard as it will accept the final result of its judicial review, which is currently before the courts.

Consideration of Licensee's Response

11. At the outset, I disagree with Simard that the Decision applied a new and different approach to determining whether a specific container movement is covered by the *Act*. At paras 44 and 58-59 of the Decision, I summarized bulletins and a decision issued by previous Commissioners, all of which are consistent with the approach applied in the Decision. More recently, I addressed the use of untagged trucks in Tri-R Transport Ltd. (CTC Decision No. 03/2023), Goodrich Transport Ltd. (CTC Decision No.06/2023), and Ferndale Transport Ltd. (CTC Decision No. 07/2023).

12. Similarly, Simard Westlink Inc. (CTC Decision No. 01/2020) ("Simard 2020") does not assist Simard. That decision relies on Canadian National Transportation Ltd. (CTC Decision 02/2019) ("CNTL") which determined "the movement of retail containers was not considered container trucking services for the purpose of the audit" because the containers were not "furnished or approved by an ocean carrier for the marine transportation of goods" (para 13). It is not clear in the Simard 2020 decision whether the Commissioner considered the work outside of the scope of the *Act* because the containers were owned by a railway and were for that reason determined not to meet the definition of a "container" or because the audit involved "domestic repositioning moves" that did not touch a marine terminal. It is most likely, based on previous decisions and bulletins of the OBCCTC, that the then-Commissioner determined the containers in question did not meet the regulatory definition, after which point the origin and/or

destination of the container would not matter. If I am wrong and the then-Commissioner did accept Simard's position that only containers travelling to or from a marine terminal are captured by the *Act*, I reject that position for the reasons outlined in the Decision.

13. In this case, I understand that some of the containers are owned by a railway, but similar containers owned by the same railway have a CSC Plate indicating that they are approved by an ocean carrier for the marine transportation of goods and CP Rail's own website says it uses marine containers (containers furnished or approved for the marine transportation of goods). I do not know what specific information was in front of the auditor or the then-Commissioner in the Simard 2020 decision, but, based on the information before me now, I am not prepared to accept that all containers owned by a railway are not "containers" as defined in the *Regulation*. Rather, the evidence as summarized in the Investigation Reports suggests that the containers in question do qualify as "containers" under the *Regulation.* As set out in Investigation Report #1, the Impugned Containers are owned by ocean shipping companies or companies that supply containers to shipping companies, had recently travelled on the ocean, and had CSC Plates. As set out in Investigation Report #2, containers owned by CP Rail (with a prefix CPPU) are affixed with a CSC Plate and are shipped on the ocean. I have not been provided any evidence to the contrary, other than mere assertions, from Simard.

14. Simard's use of the term "domestic moves" or "domestic repositioning" does not assist in determining whether a container is covered by the legislative scheme. As I understand Simard's use of the term, "domestic moves" or "domestic repositioning" are container movements within the Lower Mainland that do not require access to a marine terminal or are not directly related to the marine transportation of goods. In my view, to interpret "container" in the fashion advocated by Simard is not consistent with the exercise of interpreting the legislation purposively. Moreover, I can find no exclusion in the definition of "container" or "container trucking services" or "off-dock moves" for containers "furnished" or "approved" for the marine transportation of goods that do not travel through a Lower Mainland marine terminal. Simard's interpretation would lead to a payment of different off-dock rates – presumably lower – for the same container moved within the Lower Mainland depending on whether the specific move was directly to or from a marine terminal. Such an impractical interpretation would undermine the legislation's intent to regulate the rates paid by licensees to drivers for container work in the Lower Mainland.

15. Simard argues that it is commonplace that a trucking company who accesses a marine terminal in the Lower Mainland for which it requires a license has both tagged and untagged trucks. Simard further notes that, for such a company, following the Commissioner's logic, all container moves in the Lower Mainland regardless of source, contents or ultimate destination would be subject to the *Act* and be required to use tagged trucks. This is in fact the case. The OBCCTC has, through Industry Advisories, Bulletins and Commissioner Decisions,[1] communicated to the industry that that licensees who are using untagged trucks to perform off-dock work need to bring themselves into compliance. In July of 2022 the OBCCTC opened tag applications "to focus on tagging trucks that are currently performing untagged, off-dock container trucking services."[2]

[1] See OBCCTC Bulletins: "Off-Dock Rate Payments & Use of Tagged Trucks," March 6, 2018"; "Off-Dock Regulation and Tag Management Policy Review," May 7, 2019; "Off-Dock Rates and Truck Tag Requirements," April 17, 2020; "Off-Dock Drayage Insights Report Published," September 16, 2020; "Unlicensed, Untagged Off-Dock Drayage Activity," November 29, 2021. See also Industry Advisory "Licence and Truck Tag Requirements," February 28, 2022.

[2] Commissioner's Bulletin "CTS Licence Truck Tag Management Policy: Additional Truck Tag Applications Being Accepted," July 4, 2022.

16. Licensed companies not moving containers between facilities the Lower Mainland (e.g. long haul companies) or moving containers that do not meet the regulatory definition of "container" (e.g. out of dimension loads) are not subject to the requirement to use a tagged truck or to pay in accordance with the Rate Order. Non-licensees moving containers who never access a marine terminal are not subject to the Rate Order.

17. I reviewed in the Decision the reasons for the initial inclusion of off-dock rates for licensees -- to ensure drivers who access the marine terminal have a stable income which comes from having regulated rates for both on-dock and off-dock moves. I specifically noted that licensees have exclusive and stable access to a marine terminal and the cost of that exclusivity is to pay off-dock rates for its drivers while they perform off-dock work. See Decision para 39.

18. Regarding its most recent submission that 53-foot containers are not "suitable for transportation by ship," and therefore do not meet the definition of "container" set out in the *Regulation*, Simard does not identify which of the Impugned Containers or Additional Impugned Containers are 53-foot containers or explain how those containers or comparable 53-foot containers were identified in the Investigation Reports as being on ocean carriers or as displaying CSC Safety Plates approving them for ocean shipping. It only asserts that 53-foot containers are not "suitable for container shipping." I am not prepared to accept that 53-foot containers are excluded from being used in the marine transportation of goods. Nor am I prepared to accept that the Impugned Containers and the Additional Impugned Containers were not suitable for marine transportation in the face of the evidence to the contrary. While I understand that 53-foot containers are less commonly used than 40-foot containers, I also understand that they can be used in the marine transportation of goods; indeed, they appear to be being used more frequently as the industry evolves. I note that 60-foot containers have recently begun being used for the marine transport of goods as well. If any of the Impugned or Additional Impugned Containers were 53-foot containers, they were nevertheless identified as being on an ocean vessel in close proximity to the dates they were observed being moved in the Lower Mainland, or similar containers were observed with a CSC Safety Plate permitting the container to be used on an ocean carrier or were described as being used for marine transportation. Simard has not provided anything to rebut this evidence.

19. While Simard provided some limited information about the calculations for Mr. Sunghee and Mr. Brar, it did not provide the supporting documentation necessary to verify and confirm the information. I note that even Simard's calculation acknowledges that there was an underpayment of a driver compared against what is owing per the Rate Order. I will suspend my order in the Decision that Simard pay the outstanding sums to Mr. Sunghee and Mr. Brar for 45 days from the date of this Decision Notice so that Simard can provide supporting documentation to the OBCCTC to confirm its calculations.

20. Simard has not been singled out for off-dock activity. As set out above, the OBCCTC has for years communicated with the drayage sector about off-dock activity and has recently been actively working to ensure that licensees are compliant. Amendments to the 2022 CTS Licence were made to curb untagged off-dock activity by licensees which included preventing licensees from subcontracting out container trucking services work to non-licensees to avoid paying rates lower than the regulated off-dock rates. Other licensees have subsequently been investigated and have been penalized for using untagged trucks. See for example Goodrich Transport Ltd. (CTC Decision 06/2023) and Ferndale Transport Ltd. (CTC Decision 07/2023), mentioned above.

21. I do not accept Simard's argument that I should exercise my discretion and impose no penalty. Even if I were to accept that Simard's prior contraventions of the *Act* were mere oversights and/or misinterpretations of the legislative scheme, I do not find such a rationale is sufficient to avoid a penalty in this case. Penalties are in place, in part, to motivate a licensee to take greater care to comply with the *Act*. I also acknowledge that while the exact amount owing to the drivers is still in question, even if I accepted Simard's calculations, there was still an underpayment of a driver on March 15, 2023.

22. Nor am I persuaded by Simard's suggestion that it is unnecessary to impose an administrative penalty in this case because it undertakes to comply with the final outcome of any judicial review. Such a statement could be made in response to any proposed penalty but neglects the statutory obligation of the Commissioner to assess the appropriate penalty when a breach has occurred. In this case, I find that $12,000.00 is an appropriate penalty for the reasons set out in the Decision.

Conclusion

23. Having carefully considered Simard's submission and for the reasons outlined above, and in my Decision, I will impose a penalty of $12,000.00.

24. In the result, I hereby order Simard to pay an administrative fine in the amount of $12,000.00. 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 in the amount of $12,000.00 payable to the Minister of Finance.

25. I suspend my order that Simard pay Mr. Sunghee and Mr. Brar any monies for 45 days pending receipt of documentation required to confirm the calculations submitted by Simard.

26. The order made at para 52 of the Decision stands, as does the notice to Simard at para 53 regarding retention of its payroll records.

27. Finally, I note that Simard may request a reconsideration of the Commissioner's Decision Notice by filing a Notice of Reconsideration with the Commissioner not more than 30 days after Simard'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 the 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 15th day of September 2023

Glen MacInnes
Commissioner