June 25, 2024

KD Truckline Ltd.
669 Derwent Way
Delta, B.C. V3M 5P7

Commissioner's Decision
KD Truckline Ltd. (CTC Decision No. 11/2024)

INTRODUCTION

1. KD Truckline Ltd. ("KD") is a licensee within the meaning of the *Container Trucking Act* (the "*Act*").

2. Kimberley Transport Ltd. ("Kimberly") is a company involved in moving containers within the Lower Mainland and is not a licensee within the meaning of the *Act*.

3. Protek Driver Services Ltd. ("Protek") is a service provider that supplies drivers to transport companies, including KD and Kimberly.

4. KD, Kimberly and Protek are each owned by Mr. Thomas Johnson.

5. 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 ("Rate Order"), and a licensee must comply with those rates. In particular, 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.

6. Under section 6.3 of the CTS licence, licensees are prohibited from subcontracting container trucking services to any party who is not a licensee.

7. Under section 31 of the *Act*, the Commissioner may initiate an audit or investigation to ensure compliance with the "Act, the regulations and a licence" whether or not a complaint has been received by the Commissioner.

8. As part of the random audits initiated by the Commissioner, an auditor was directed to audit KD's records to determine if its directly employed operators (also known as company drivers) were being paid the required minimum rates.

9. KD has been issued one previous administrative penalty of $1,500 in 2018 for insufficient record

keeping: see KD Truckline Ltd. (CTC Decision No. 03/2018). In 2019, the OBCCTC investigated KD after a driver complained he was not paid the regulated rates to and from the rail yards or overtime. An audit report found KD was compliant with the *Regulation* and no Commissioner's Decision was issued.

AUDIT REPORT

10. On June 21, 2023, the auditor advised KD that an audit had been initiated for the period of May 2019 to June 1, 2023 ("Audit Scope"). The auditor randomly selected and requested driver records for pay periods in May and October of 2019, March and October of 2020, June and December of 2021, April and October 2022 and May 2023 ("Audit Period").

11. KD provided payroll records and trip sheets by the deadline. KD did not provide electronically generated records of container trucking services hours and trips for May 2023 and explained that it was still recording drivers' hours manually after previous attempts to introduce an electronic system failed because drivers failed to clock in and out at the correct times.

KD and the Disputed Containers

12. KD owns a fleet of trucks and currently has thirteen truck tags assigned under its CTS licence.

13. Protek supplies KD with company drivers who then perform container trucking services on behalf of KD.

14. The auditor reviewed the payroll records for the company drivers and noted that KD pays two different rates to its drivers based on its interpretation of whether the work falls under the *Act* (what KD considers "CTS Work") or not. KD maintains that the following are not captured by the *Act*:

    1. Containers (empty and laden) owned by CP Rail and CN Rail moved between facilities within the Lower Mainland as part of what KD calls the "domestic repositioning program."
    2. Containers (empty and laden) moved between facilities within the Lower Mainland on behalf of its client Clarke Transport.

    (collectively the "Disputed Containers")

15. KD advised the auditor that the Disputed Containers did not involve "marine goods" and were not related to the Port of Vancouver and were therefore not "furnished" or "approved" for the marine transportation of goods at the time they were used. In support of its position, KD explained that these containers did not have a booking number generated and assigned by an ocean carrier which is necessary for a container to be accepted onto a ship owned by an ocean carrier.

16. The auditor confirmed with KD that a "booking number" is different than a container number. While a container number contains four letters followed by six numbers and is printed on the container, a booking number is a non-standardized sequence of numbers and/or letters generated by the shipping company. The booking number is used to track the payor of the freight, the shipper of the freight, the destination of the freight, and all other customs and related information. A booking number is extinguished by the ocean carrier after the container reaches its destination and the ocean carrier is no longer responsible for the container.

17. KD maintains that when a container no longer has a booking number and is not actively being used by ocean carriers to transport goods, the shipping company can "release" the container to licensees like KD to be used for the shipment of "domestic goods."

18. The auditor was not persuaded that the absence of a "booking number" changed the ability of the Disputed Containers to be used for the marine transportation of goods. The Disputed Containers may not have been actively used by an ocean carrier at the time, but the auditor understood there was nothing stopping those containers from going back on a ship with a new booking number. Based on the above, the auditor determined the Disputed Containers fit the regulatory definition of a "container" and that KD was required to pay its drivers who moved them in accordance with the Rate Order.

19. KD paid its drivers either an hourly rate of between $24.00 and $26.00 or an hourly rate of between $14.33 and $18.66 along with a "safety bonus" of between $7.34 and $9.34 per hour during the Audit Period when they moved the Disputed Containers. KD failed to explain why it had two different rates but said that the safety bonus was paid to some of its drivers on each day that the driver was free of accidents or violations. The auditor determined that KD's hourly rate was less than the minimum regulated rate regardless of which pay structure was used.

20. In addition, the auditor noted KD paid eleven drivers in accordance with the Rate Order for drivers with less than 2,340 hours of CTS experience. KD explained that upon hiring a new driver it determines how many CTS experience hours that driver has and then only counts the hours it deems to be CTS Work towards the 2,340 threshold and adjusts the rate when the driver reaches 2,340 hours. KD does not count the drivers' hours moving Disputed Container as CTS experience.

21. The auditor attempted to contact each of the eleven drivers who were paid the lower regulated rate during the Audit Period. She confirmed that four drivers did not have previous CTS experience and one driver, Mr. H. Sangha, had 8 months experience with another licensee that was not accounted for.[1] Six drivers could not be contacted. Based on the absence of any supporting documentation from KD regarding the other drivers' previous experience and the auditor's inability to contact them directly, the auditor found that KD was unable to substantiate that seven of the drivers did not have previous experience.

22. Having determined that the Disputed Containers were subject to the Rate Order and that KD was unable to demonstrate that seven of the eleven drivers had not worked for a previous licensee (did not have more than 2,340 hours of container trucking hours), the auditor added the hours worked by each driver when moving the Disputed Containers and concluded that seven of the drivers should have been paid in accordance with the Rate Order for over 2,340 hours. The auditor also determined that KD had not properly accrued the CTS hours for eleven drivers during the Audit Period because it did not include their hours moving the Disputed Containers.

23. The auditor was unable to determine whether the safety bonus should be included in the hourly rate calculations based on the information provided; therefore, she calculated the total amounts owed to

[1] Discussed in audit calculations attached to Audit Report.

KD drivers for the Audit Period with and without the safety bonus as follows:

	May-23	Oct-22	Apr-22	Dec-21	Jun-21	Oct-20	Mar-20	Oct-19	May-19	Totals
Total Outstanding	- 4,288.92	- 6,604.74	- 3,527.70	- 5,061.79	- 4,007.87	- 6,981.19	- 6,294.51	- 6,247.40	- 5,838.19	- 48,852.30
Total Outstanding if safety bonus is excluded	- 11,007.03	- 14,880.79	- 7,991.90	- 11,383.77	- 9,109.37	- 15,046.84	- 12,694.13	- 10,592.93	- 10,292.16	- 102,998.91

Kimberly Transport

24. Kimberly owns a fleet of trucks and Protek supplies Kimberly with company drivers who then perform container trucking services on behalf of Kimberly.

25. Kimberly moves containers owned by CP Rail and CN Rail and on behalf of its client Clarke Transport throughout the Lower Mainland but does not move containers to and from marine terminals. According to KD, Kimberly does not move containers on behalf of KD.

26. KD stated that Protek dispatches the same drivers to both KD and Kimberly as well as other independent companies.

27. The drivers dispatched to KD and Kimberly were paid directly by Protek. If the drivers were dispatched to both KD and Kimberly in a pay period, Protek issued one wage statement and one pay cheque for the combined work.

28. On January 4, 2024, the auditor prepared an audit report ("Audit Report") that concluded the following:

    a) KD paid the regulated rates except when the drivers were moving Disputed Containers.
    b) The Disputed Containers meet the regulatory definition of a container and the movement of those containers within the Lower Mainland is captured by the *Act.*
    c) KD did not pay its drivers in accordance with the Rate Order when they moved the Disputed Containers.
    d) KD did not account for the hours moving the Disputed Containers for KD when calculating the drivers' CTS experience.
    e) KD was unable to demonstrate that it properly accounted for the previous CTS experience for six drivers when they were hired.
    f) Kimberly moved containers like the Disputed Containers but did not move containers on behalf of KD.
    g) The auditor was unable to determine conclusively whether the safety bonus was included in the hourly rate paid to drivers who moved the Disputed Containers.

LICENSEE RESPONSE

29. KD was provided with the Audit Report and an opportunity to respond to it. KD's response contains voluminous exhibits and while I have read and considered KD's submission in its entirety, I summarize it below. Where I have quoted KD's submission, I have reproduced it as written.

30. It does not appear that KD disputes that the Disputed Containers have identification numbers consistent with containers "furnished or approved by an ocean carrier for the marine transportation of goods" or that they move through marine terminals. KD's argument is that the Disputed Containers are not captured by the *Act* and/or do not meet the regulatory definition of a container because they are not "furnished" or "approved" for the marine transportation of goods when they travel between two facilities in the Lower Mainland. Alternatively, KD argues that if the Disputed Containers are captured by the *Act*, it would be unfair to require KD to pay its drivers the minimum regulated rate for moving them during the Audit Period. Finally, KD argues that the "safety bonus" was in in fact a part of the driver's hourly rate.

Domestic Repositioning Program

31. KD's submission relies heavily on the terms "Domestic Repositioning Program" ("DRP") and "domestic repositioning" without providing a clear explanation of them. These terms are not used in the *Act*, *Regulation*, CTS licence, or the Audit Report. However, KD appears to use them interchangeably to describe containers that are owned or used by shipping companies for the marine transportation of goods but are "leased"[2] out temporarily to Canadian shippers (including railways) who load the containers within Canada and transport by them rail to the Lower Mainland to be unloaded and used until such time as the containers are returned to the control of the shipping line where they can be used again for the marine transportation of goods or sold to third parties. During the period when a Canadian shipper "leases" the container from an ocean carrier to move goods within Canada (by truck and/or rail) the container is referred to by KD as being involved in "domestic repositioning" or part of a "DRP."

32. While not explicitly stated, I infer from its submission that KD takes the position that other containers owned by CN and CP, like those used for "domestic repositioning," move goods only within Canada and are not captured under the *Act* for the same reasons.[3] KD explains that even though it is not required to pay the regulated rate for CN and CP container moves, it does pay the regulated rate when the CP and CN containers "originate from the Montreal Port, having arrived there from an overseas location and come from the Port of Montreal to a Vancouver rail yard…"[4] and they are "furnished and approved for the Marine transportation of Marine goods as the commodity dictates as such."[5]

Containers Do Not Fit the Regulatory Definition

33. KD maintains that the Disputed Containers are not covered by the *Act* because their movements have no connection to the marine transportation of goods as they do not transit through a marine terminal, "are not in [the 'ocean carriers'] control"[6] or "sourced from Shipping Lines"[7] and "at no time did the Customer or Carrier engage in the movement of goods overseas."[8] Therefore, the Disputed Containers

[2] The transaction between the ocean carrier and the Canadian shipper is unclear but I have chosen to rely on the term "lease" for the purposes of this decision.
[3] KD submission para 45.
[4] KD submission para 35.
[5] KD submission para 36.
[6] KD submission para 59.
[7] KD submission para 65.
[8] At para 14 of the KD's submission, KD refers me to exhibit 5 but I fail to see how exhibit 5 is supporting evidence.

are not "furnished" or "approved" in accordance with the regulatory definition of "container."

34. According to KD, before any container is "furnished" or "approved" for the marine transportation of goods, a "booking number" must be issued by an ocean carrier and an "inspection report" issued at interchange "per the CSC Act"[9] for the container. KD included a shippers' declaration form as evidence that an ocean carrier requires a "booking number" and "inspection report" before accepting a container for the marine transportation of goods (reproduced below in part):[10]

Container Number (prefix/ number/ suffix)	**Size/Type**	**ISO Code**	**Max Gross Weight**	**Tare Weight**	**Material (Steel/ Aluminum etc)**	**Booking Number**	**CSC Plate (CSC approval reference)**	**CSC best before (next examination date)**

35. In support of its position that containers are "released" from the control of ocean carriers to other parties, KD attached an email from Tim McGee, Director of Canadian Operators for OOCL Shipping Lines,[11] stating that container CBHU8151854 was the responsibility of an unidentified customer until it was returned to the marine terminal. KD asserts that there is no "booking number" assigned to the container while the container is outside of the shipper's control (released by the shipper) and the containers are no longer "furnished" or "approved" by the ocean carrier for the marine transportation of goods.

36. KD argues that Safety Approval Plates (CSC Plates) affixed to the Disputed Containers "do not automatically award the containers for the shipping of Marine Goods"[12] as it says the Commissioner has previously ruled. According to KD, "the mere presence of a CSC plate is not absolute in terms of meeting the safety requirements"[13] as its only valid for 5 years and "can only be extended by an authorized surveyor or way of a complete inspection and certification, not a Shipping Line."[14] Furthermore, KD asserts that each shipper must have a container inspected at an interchange to "determine a container's ability to be shipped per the CSC Act"[15] just prior to being delivered to a marine terminal because of the period of time the container was out of the ocean carrier's control. In other words, KD argues that an ocean carrier cannot determine a shipping container is "approved" while that container is outside its control.

[9] Where KD refers to "CSC Act," I have inferred KD means the *Safe Containers Convention Act*, R.S.C, 1985, c.S-1.
[10] KD submission tab 83.
[11] KD submission tab 53.
[12] KD submission para 81.
[13] KD submission para 74. KD continues at paragraph 76 and refers me to exhibit 81, but I fail to see that relevance of this document to a regulatory requirement.
[14] KD submission para 96.
[15] KD submission para 172. KD's submission tab 49 includes a copy of the International Convention for Safe Containers Regulations which set out that in Regulation Maintenance and Examination 2(d) that containers must first be examined within 5 years of manufacturing date and every subsequent 30 months. For containers with the letters "ACEP" inspection shall be performed in connection with a major repair, refurbishment, or on-hire/off-hire interchange and in no case less than once every 30 months.

37. KD emphasizes that in order for a container to be used for the marine transportation of goods, it must have a "booking number" or an "inspection report" assigned or there is "no possible way a port terminal will accept it otherwise."[16]

38. KD also submitted a letter from Bob Kirk, the terminal manager for Clarke Transport, confirming that KD moves containers via CN Rail and CP Rail as part of its "domestic repositioning program." Furthermore, Mr. Kirk explained that containers with the prefix CTHU or CTHC are "dry vans" owned by Clarke Transport and not "containers."

39. Finally, without identifying any specific containers among the Disputed Containers, KD submits that 53-foot containers are loaded with "domestic" goods and do not meet the definition of a container.

Purpose of the *Act* Does Not Include Disputed Containers

40. KD asserts that when the *Regulation* – especially its definition of "container" – is read in the context of the *Act*, the Disputed Containers were not intended to be captured. Specifically, KD argues that section 16(1) of the *Act* and section 2(1) of the *Regulation* only require companies performing container trucking services that access marine terminals in the Lower Mainland to have a licence and do not capture "containers transporting domestic products and give(s) the Rail lines the ability to transport the units out of province for other purposes that [than] Marine shipping,"[17] similar to the exclusion of long haul services under section 16. KD argues that the reason the *Act* does not explicitly exempt containers that move by rail is "rail is simply not there as it's clearly not a truck."[18]

41. KD states that the consultation that created the 2014 Joint Action Plan ("JAP")[19] only involved the port industry and if the *Act* was intended to cover container movements beyond the port, "Crane trucks, large Domestic carriers, containers used for construction sites, local rental container, CN and CP"[20] would have been consulted too as they would have been affected by its implementation.

42. KD also asserts that the exclusion of the Disputed Containers from the scope of the *Act* is supported by the Hansards debates:

> ***C. Trevena:*** *I just want to go back for a moment. Sorry to jump here but still on section 22. I just missed a question on 22(d) in my anticipation of getting on to costs of fuel and the import of that. Section (d). I wonder if the minister could provide a bit more detail. You've got: "for the purposes of paragraph (b) (i), specify which container trucking services or which parts of the container trucking services constitute a trip to which a rate established under paragraph (b) is to apply."*
> *I wonder if the minister could give some examples, some detail of what this paragraph means in relation to the trips that are going to be taken and the geographical issues we've been talking about.*

[16] KD submission paras 67-69.
[17] KD submission para 163.
[18] KD submission para 165.
[19] Joint Action Plan was the precursor to the creation of the *Container Trucking Act*.
[20] KD submission para 133.

> ***Hon. T. Stone:*** *This section, section (d), is here to, again, ensure that as the regulation is developed on rates, through the regulation we are as specific as we possibly can be as to what actually constitutes a move. As the member knows well, there are all kinds of moves — you know, truck moves in Metro Vancouver — that have nothing whatsoever to do with the drayage sector. The moves never touch the port in any fashion. This section will ensure that there's maximum clarity on what actually constitutes a move within the drayage sector.*
>
> (emphasis added)[21]

43. Furthermore, KD submits that if the government intended to include containers beyond those that move to and from a marine terminal, the "legislators would have simply referred to the CSC Act when defining a container."[22]

Previous Audits, Communications and Decisions

44. KD submits that previous audits, communication from the OBCCTC and Commissioner Decisions have indicated that "the OBCCTC was satisfied that DRP 40- and 53-foot container moves" like the moves of the Disputed Containers, are not captured by the *Act.* In the alternative, if the Commissioner finds that the Disputed Containers are now captured by the *Act*, KD argues it would be unfair to penalize KD or to require it to pay the regulated rates given the assurance it says it previously received from the OBCCTC.

45. KD submits that it understood that when it asserted similar containers were not covered by the *Act,* it had to meet – and did meet -- the test set on the OBCCTC website which cites Forfar Enterprises Ltd. (CTC Decision No 20/2016):

> *Containers which are identified by a 4 letter identification code consistent with containers, "furnished or approved by an ocean carrier for the marine transportation of goods" are to be presumed to be "containers" as defined in the Regulation. Where containers are so identified, the onus lies with the licensee to rebut this presumption.*

46. KD suggests that emails up to April 15, 2018 between an OBCCTC auditor and another licensee, Dispatch Go Transport Ltd., confirmed that containers involved in DRP were outside the scope of the *Act.*

47. KD submits that it relied on the Disputed Containers being excluded from the *Act* based the findings in Canadian National Transportation Ltd. (CTC Decision No. 02/2019) ("CNTL") when the then-Commissioner found the following:

    - The movement of retail containers was not to be considered container trucking services for the purpose of the audit as it represents the movement of containers which are not furnished or approved by an ocean carrier for the marine transportation of goods.
    - The movement of empty overseas containers was not considered container trucking services for the purpose of the audit because it was determined that the moves were associated with a movement of a container by rail and therefore were not off-dock moves directly related to on-dock moves.

[21] KD submission para 167.
[22] KD submission paras 131.

48. KD states that the auditors in 2019 raised questions about container moves involving CN, CP and Clarke Transport being within the scope of the *Act* and KD satisfied the auditor that those moves did not attract an off-dock rate. KD further submits that this was confirmed when the then-Deputy Commissioner advised KD on November 19, 2019 that it was compliant with the *Act*. KD also suggests that prior correspondence with the OBCCTC during the audit process confirms that the OBCCTC previously ruled that containers similar to the Disputed Containers were outside the scope of the *Act*. One letter from Clarke Transport dated August 17, 2019 provided to the OBCCTC stated that KD moved containers via CN and CP "as part of the CN Domestic Reposition program" and containers with the prefix CTHU and CTHC are "dry vans, not containers."

49. KD acknowledges that the Commissioner warned the industry not to rely on the CNTL decision based on its unique circumstances but argues that warning was limited to CN's unique pay structure – not to when the Rate Order applies. This limited warning, KD argues, is consistent with an email dated June 4, 2019 from then-Commissioner Crawford in response to KD's concerns that its DRP work with CN may be captured. KD states the Commissioner recited the CNTL findings above and confirmed that containers owned by CN were retail containers "owned by CN (not an ocean carrier)" and therefore outside the scope of the *Act.*

50. KD also submits that then-Commissioner Crawford's November 22, 2019 bulletin on the inclusion of open top containers reinforced the industry's understanding that containers that did not transit through a marine terminal were not captured by the regulatory regime and relies on the Commissioner's observation that the *Act* applies to "marine containers that transit through the Port of Vancouver" and "only domestic containers, not used for the marine transportation of goods… should be excluded from the *Regulation.*"[23]

51. KD states it was further reassured by the then-Commissioner "that nothing had changed since our last call or since your last audit" via a May 5, 2020 email.

Hours of Work

52. KD maintains that it reviews the resumes of each driver and asks each driver for proof of hours worked and establishes their hours worked accordingly.

53. KD attached the resume of the driver Mr. H. Sangara who advised the auditor he worked for another licensee as evidence that he had not worked 2,340 hours when hired by KD. The driver's application states he worked for another licensee between November 2021 and April 2022 and noted he drove "Container Trucks to Ports." KD says the driver was unable to establish the hours he worked for the other licensee then estimated that he worked 500 hours based on his short tenure and KD credited the hours to the driver.

54. KD maintains that it was appropriate not to accrue the hours each driver has worked performing work it deems non-CTS Work because the Rate Order specifically states that only container trucking services hours are included in the 2,340 hours.

[23] KD submission para 108-109.

Safety Bonus

55. KD maintains that its drivers are paid on an hourly basis and the hourly rate plus the "safety bonus" are together the drivers' hourly rate of pay.

56. KD states that some legacy profiles and forms have inadvertently continued to identify a "safety bonus" but states that "no safety bonus [is] removed for accidents." KD provides an August 24, 2023 email from ICBC regarding a driver's at fault accident and maintains the driver was paid both the hourly rate and the safety bonus regardless.

57. KD says it does not review Protek's payroll records and is only provided a summary of the electronic funds transfer and that is why it did not correct the error sooner. Once the safety bonus identifier was brought to KD's attention, it was removed from the drivers' payroll profile.

Electronic Records

58. KD states that it has introduced an electronically generated record keeping system that is compliant with section 6.7 and 6.10 of its CTS license and a miscommunication resulted in the documents not being delivered to the auditor. KD reached out to the auditor after receiving the Audit Report and shared some samples of the database. KD says it was advised to submit the information in its response and heard nothing further from the auditor.

59. In its response to the Audit Report, KD provided a timesheet for Mr. Palwinder Singh for the period of May 4, 2023 showing container movements it says are electronically generated and an undated document showing a container movement using a system called Port Pro which it says is integrated with Quickbooks or Simply Accounting payroll systems.

DECISION

60. The first issue that needs to be decided is whether the Disputed Containers fall within the scope of the *Act.*

61. KD appears to argue that because the container trucking services prescribed in section 2 of the *Regulation* are services that require access to a marine terminal, and not all container trucking services require such access, those that do not require access do not attract a regulated rate.

62. A similar argument was raised in Can. American Enterprises Ltd. (CTC Decision No. 12/2020) – Decision Notice when the licensee argued that section 2 of the *Regulation* meant it was not required to pay the regulated rate to a driver who performed an off-dock move because that move did not transit through a marine terminal. The then-Commissioner dismissed the reasoning based on the following:

> *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.*
>
> (para. 11)

63. I agree with this analysis set out in Can. American and find that KD's interpretation is equally incorrect. Section 2 of the *Regulation* only means that a person who performs "container trucking services that require access to a marine terminal" ("on-dock") are required to have a licence. A person who performs "on-dock" container trucking services is required to pay the regulated rate for "one or more container trucking services" (including "off-dock") in accordance with section 22 of the *Act.* What KD is arguing is that section 2 of the *Regulation*, which is explicitly for the purposes of section 16(1), also applies to "one of more container trucking services" contemplated in section 22 of the *Act.* I disagree. Section 2 of the *Regulation* only establishes the type of the container trucking services that require a licence, it does not prescribe which container trucking services require licensees to pay a regulated rate. Section 22 of the *Act* requires licensees (those who perform on-dock work) to pay a regulated rate when they move a container between facilities in the Lower Mainland ("off-dock trip") as well as when they perform an "on-dock" move. If a company requires access to a marine terminal to move a container, they need a licence. The *Act* and *Regulation* and CTS licence require that anytime a licensee moves a container between facilities in the Lower Mainland, they must pay the regulated rate.

64. This interpretation is consistent with the Hansard debates cited by KD. The regulatory scheme excludes trucking moves "*that have nothing whatsoever to do with the drayage sector"* by not requiring companies who only perform off-dock trips to be licensed. However, those off-dock trips performed by companies that require on-dock access (licensees) cannot be said to have nothing "whatsoever to do with the drayage sector." Importantly, paying the regulated rates for off-dock container trucking services contributes to the stability of the "drayage sector." A key finding the Ready/Bell Report was that the 2014 labour dispute arose in part because drivers were not paid a regulated rate for "off-dock" work and this led to disruption at the port:

> *Currently, off-dock trips are not regulated. The issues arising from off-dock terminal operations, such as appropriate rate of pay for off-dock moves, communication barriers, dry runs, and increased costs, raise the further question of whether it is appropriate to bring off-dock trips into full alignment with the rate regulations and the TLS.*
>
> *It is apparent from conversations with stakeholders that several container movements take place outside the ports. There is considerable variation in these off-dock trip rates, and it appears that off-dock rates are much lower than the MOA rates. It was reported to us countless times in the course of our discussions with drivers and the union representatives that off-dock trip rates may be at least 50% lower than average trip rates, with some rates as low as $50.00 per container, and even as low as $15.00-$20.00 per container. It is also reported that rampant undercutting of rates occurs for off-dock container movements.*
>
> *Simply put, the current off-dock rates do not have any industry benchmarks. These off-dock rates*

> *are not economical and are often below cost. Without adequate compensation this is a significant concern as it directly impacts independent owner-operators, especially those who spend considerable time moving containers at off dock facilities.*[24]

65. Furthermore, the relationship between off-dock trips involving "containers" and the "drayage sector" is that the containers moved off-dock are the same containers that are used on-dock. Conversely, truck moves in Vancouver such as those involving "flat bed trailers," "utility trailers" or "car trailers" have nothing "whatsoever to do with the drayage sector" and are not captured by the *Regulation* as they do not involve metal boxes that will ever require access to a marine terminal. While I do not fully understand KD's statement that government would have included the "CSC Act" in the definition of "container" if it intended to capture containers that do not transit through a marine terminal, I find that regulatory definition is not confined to containers that move through a marine terminal.

66. I note that Kimberly performs container trucking services ("off-dock") within the Lower Mainland but does not perform container trucking services at a marine terminal ("on-dock"). Based on my understanding of these facts and the application of the *Act*, Kimberley is not required to have a licence and therefore is not subject to the regulated rates set out in the *Act*. I will address the relationship between KD and Kimberly as it relates to s. 6.3 of the CTS licence below.

67. KD appears to agree that the starting point for determining if a metal box meets the regulatory definition of "container" is set out in Forfar and the Disputed Containers have indices identified in that decision. However, it argues it has rebutted the presumption that the Disputed Containers are "containers" because it has demonstrated that they were outside the control of an "ocean carrier" based on the lack of a booking number and their being used to move "domestic goods" within Canada as part of the DRP. Furthermore, KD maintains that the Disputed Containers did not transit through an interchange necessary to inspect the container as required before an ocean carrier can legally approve it for the marine transportation of goods. For the following reasons, I am not persuaded that the movement of containers that are used for the marine transportation of goods are outside of the *Act* when those same containers are used to move goods to or from destinations within the Lower Mainland.

68. I do not find the Disputed Containers' involvement in what KD calls DRP or "domestic repositioning" rebuts the presumption that they are "containers" or means they are not moved to or from a "facility." KD does not dispute the auditor's finding that the Disputed Containers can and do travel on an ocean carrier; however, it argues that when those same containers are used by third party shippers (i.e. non ocean carriers) on an interim basis to move goods within Canada (often via rail), they are no longer "furnished" or "approved" by an ocean carrier for the marine transportation of goods and therefore are not "containers" that move between "facilities."

69. In Simard Westlink Inc. (CTC Decision No. 4/2024) (Reconsideration), I rejected a similar case-by-case approach to determining when a container is a "container" for the reasons set out in the Reconsideration and summarized there as follows:

[24] Recommendation Report, September 25, 2014 s. c) Rate of Pay ii) off dock.

In my opinion, the Act requires licensees to pay regulated rates for movements of containers that can and/or do travel through a marine terminal, containers that are "furnished or approved by an ocean carrier for the marine transportation of goods." I do not believe that the purpose of the Act (ensuring stability in the Lower Mainland drayage industry as a whole) would be served by an interpretation that requires determining whether a container move is directly, indirectly or wholly unrelated to a marine terminal on a case-by-case basis. Rather, such reading would compromise the ability of the OBCCTC to effectively audit and enforce rates. It would also be inconsistent with my interpretations of "container," "facility," and "prescribed" as compared to "specified" container trucking services, set out above.

70. I adopt the analysis in Forfar and Simard: the indices of a container – not its contents or incidental use -- are paramount in determining if it is a "container." This is consistent with the rule that an enactment must be construed as always be speaking: s. 7(1) of the *Interpretation Act*. The contents of a container do not assist in determining whether it is a "container": the Joint Action Plan, the precursor to the *Act*, recommended inclusion of "all moves of containers (whether full or empty)."[25]

71. I have reviewed some of the trip sheets KD provided to the auditor and agree that those containers involved have the indices of a "container" and that drivers were not paid the regulated rate for those containers. I also note that there are some containers identified by the prefix CTHU. I note Mr. Bob Kirk stated that containers with the prefix CTHU and CTHC are "dry vans" and it is unclear to me if KD provided this information to the auditor. It appears from the working papers attached to the Audit Report that the auditor may have calculated the regulated rates for these moves without the benefit of Mr. Kirk's correspondence.

72. In so far as KD maintains that the Disputed Containers do not meet the regulatory definition of "container" based on a lack of other indices that KD argues are critical, I have addressed each issue below.

Booking Number

73. I am not persuaded that a "booking number" is necessary to establish that an ocean carrier has "furnished" or "approved" a container for the marine transportation of goods. From my understanding of the Audit Report and KD's submission, the booking number is generated by the shipper as part of its contract with its customer to move a container from one location to another and is extinguished upon the container's arrival at that second location. I find that the creation of a booking number is an administrative process used by the shipper and the ocean carrier to track a container during a specific journey rather an indication of the character of the metal box. To say a shipper will not "approve" a container without booking number is like saying a "shipper" will not "approve" a container without being paid to move the container. This would be a very narrow interpretation of the regulatory definition of "container" and would be inconsistent with the broad remedial approach required by s. 8 of the *Interpretation Act.*

74. I agree with the auditor's finding that there are very few barriers to the same container being issued a new booking number and being used for the marine transportation of goods because the capability of the container has not changed.

[25] Joint Action Plan, March 26, 2014.

Inspection Report

75. I also do not accept that an "inspection report" generated by an interchange facility prior to a container's being loaded onto an ocean carrier is a necessary indicator of whether a container is a "container." Other than KD's mere assertion that the "CSC Act" mandates inspections prior to the expiry of the CSC Plate, I was provided no evidence that the Disputed Containers were required to be inspected before the expiry of their CSC plate. This appears to be inconsistent with other portions of KD's submission that indicate CSC plates expire in either 30 months or 5 years and "can only be extended by an authorized surveyor or way of a complete inspection and certification, not a Shipping Line."[26] Furthermore, KD's included shippers' declaration form appears to require a shipper to report the container's CSC best before date (next examination date) and does not ask when it was last examined or if it has an "inspection report." KD does not direct me in its submission to the section of the "CSC Act" it relies on to suggest that a container must be inspected before the expiry of the CSC Plate, but I can find no statute that requires "inspection and certification" by a surveyor at an interchange prior to boarding an ocean carrier even if a container's CSC plate has not expired. Furthermore, the "interchange reports" do not on their face demonstrate that the containers involved were inspected by an "authorized surveyor." Likelier than not, containers are checked at various stages of their journey (including interchanges) to ensure they are suitable for continued use or confirmation of how they were handed off, but the container's having an CSC expiry date that post-dates its transit by ocean carrier is sufficient indication that the container is furnished or approved by an ocean carrier for the marine transport of goods.

Previous Decisions

76. I reject KD's submission that containers that do not travel through a marine terminal on any specific trip have always been outside the scope of the *Act* or that that OBBCTC's "perception of what a container is has drastically changed." On September 29, 2023, the Court dismissed Simard Westlink Inc.'s stay application (*Simard Westlink Inc. v. Office of the BC Container Trucking Commissioner* 2023 BCSC 2007) and rejected Simard's argument that the Simard Decision was a new interpretation related to the application of the *Act* to "domestic moves." The very same issue of excluding container movements from a rail yard to a customer was rejected by then-Commissioner MacPhail in Forfar in 2016.

77. Even if I accepted KD's submission that previous Commissioners have made conflicting decisions, and although consistency is important, there is no rule of law that an administrative tribunal must follow prior decisions: see *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 para 129. Of course, the facts before a decision-maker and possibly evolving policy will also inform decisions.

78. KD alternatively appears to submit – without using the legal term – that it should be able to rely on something akin to the defense of "officially induced error" because it argues that it relied on information it received from the OBCCTC. The concept of "officially induced error" was dealt with in *Regina v. Cancoil Thermal Corporation and Parkinson,* 14 OAC 225 at page 303:

> *The defence of "officially induced error" is available as a defence to an alleged violation of a*

[26] KD submission para 96.

> *regulatory statute where an accused has reasonably relied upon the erroneous legal opinion or advice of an official who is responsible for the administration or enforcement of the particular law. In order for the accused to successfully raise this defence, he must show that he relied on the erroneous legal opinion of the official and that his reliance was reasonable. The reasonableness will depend upon several factors including the efforts he made to ascertain the proper law, the complexity or obscurity of the law, the position of the official who gave the advice, and the clarity, definitiveness and reasonableness of the advice given.*

79. If KD relied on any decision or statement by a prior Commissioner or the OBCCTC, I do not consider that reliance was reasonable.

80. Commissioner Crawford's June 4, 2019 email lacks any clarity or assurance that KD's practices were consistent with the *Act*. Additionally, the Commissioner's warning in the same email exchange that he does not interfere in the audit process makes it unreasonable for KD to rely on anything the Commissioner may have said before the Commissioner was presented with all the facts necessary to make a decision.

81. I am also not persuaded that the then-Commissioner's warning to the industry not to rely on the findings of CNTL in the decision itself was related only to the calculation of wages and not to the question of what constitutes a container or container trucking services. In an April 17, 2020 bulletin, the then-Commissioner notes that some licensees have cited CNTL "when arguing they are not required to pay off dock rates (trips, hourly or the PMR) for moves to and from CN or CP intermodal terminals." He acknowledges the confusion created by the CNTL decision despite his warning and clarifies that the *Act* and *Regulation* provide that "any move to and from these facilities [CN and CP Intermodal] qualify as an off-dock move" and that licensees must pay the required off-dock rate. The Commissioner goes on to state that "this was understood by licensees and treated as such by OBCCTC auditors prior to the CNTL decision."

82. I am not persuaded that the November 19, 2019 bulletin assists KD as it specifically states that open top containers share the same indices as other containers that transit through a marine terminal, similar to the Disputed Containers. The bulletin does not assert that a container transiting through a marine terminal at some point later turns into a "domestic container." It only says that containers not used for the "marine transportation of goods" are outside the scope of the *Act*. Again, KD urges me to interpret this as meaning each container must be considered in terms of not what it is generally "furnished" or "approved" for, but rather what it is immediately being used for, regardless of what it may subsequently by used for. I do not accept KD's interpretation of the November 19, 2019 bulletin and it is not consistent with subsequent bulletins in any event.

83. In a February 28, 2022 industry advisory, Commissioner Crawford continues to reinforce that containers are "approved" if "they have been or will be transported on the ocean, are owned by, furnished by, accepted by, or will be accepted for use by, an ocean carrier" (emphasis added). In the May 18, 2022 industry advisory, Commissioner Crawford also states that when determining if a container move is covered by the *Act* it matters not that a non-licenced company dispatched the container, it only matters if the licensee moved the "container" between facilities.

84. The Commissioner has expressly told licensees more than once how to calculate the off-dock rates. He has been clear that, for licensees, container moves to and from the rail yards are off-dock moves, regardless if a non-licensed company dispatches the container - and must be paid the regulated rate. I note these bulletins were issued after KD's correspondence with the Commissioner in 2019.

85. I am also not persuaded the correspondence between an auditor and Go Transport supports KD's interpretation that the OBCCTC has determined similar "domestic container" moves are exempt from the *Act.* Go Transport failed to pay the regulated rates and this failure to pay the regulated rates appears to be acknowledged in Go Transport Ltd. (CTC Decision No. 22/2018) and an administrative fine was issued. I do not find the correspondence and the subsequent Commissioner's Decision provides the definitive advice KD says it does.

86. I am not clear what I can discern from the-then Deputy Commissioner's November 18, 2019 Audit Completion Letter advising KD that an auditor had determined that a "spot audit" over a two-month period (February 2018 and February 2019) had determined that it was compliant with the regulated rates. I am unable to determine if the containers involved in the spot audit were "retail containers" (i.e. owned by CN or CP) or containers with the prefix CTHU and CTHC which are "dry vans, not containers" and were deemed outside the scope of the *Act*. It seems odd that that auditor would need to assess if the containers were "containers" if the mere fact that the container arrived via rail en route to a customer in the Lower Mainland was the test applied by the then-Commissioner. As there was no Commissioner's Decision issued, I am unable to understand what facts were before the Commissioner to establish that KD was compliant, but it appears to me that the auditor considered whether the containers involved in that audit met the regulatory definition of "container" and concluded they did not.

87. Since I am unaware of the facts underlying the 2019 Audit Completion Letter, I am equally unclear what I can infer from then-Commissioner Crawford's email dated May 5, 2020 in which he states nothing has changed "since your last audit." My review of the email shows KD was "taken aback by the fact that the [United Truckers Association] was claiming all off-dock work was illegal" and asked a series of "questions and hypotheticals" including: "If the truck completing an off-dock work is a Kimberly truck, is Protek required to pay the TLS rates?" The question has to do with a non-licensee (Kimbely) moving a container. I do not find that the Commissioner was advising KD about what should happen when a licensee moves a container or providing any substantive response to KD's questions.

88. At various points KD has reached out to the OBCCTC seeking assurance that it is compliant after correspondence appears to have prompted some consternation that it perhaps was not. I find KD's doing so telling. KD likely knew, or ought reasonably to have known, that the correspondence suggested that its actions were in breach of the *Act*. However, I am now urged to accept that KD was deceived by auditor requests for information, terse email responses from the Commissioner, decisions that found another licensee in breach of the *Act*, and the findings of a "spot audit" over the plain meaning of bulletins and industry advisories. I do not find that the clarity, definitiveness and reasonableness of bulletins and industry advisories was undermined by any comments made in correspondence with the OBCCTC.

89. While I do not agree that OBCCTC sanctioned KD's DRP interpretation, even if I were to accept that KD was misled in some way – which I do not -- any confusion on the part of KD as to whether CNTL was

applicable to its business model should have reasonably been cleared up by the April 17, 2020 bulletin.

Hours of Work

90. Based on the above, any hours of work related to the movement of the Disputed Containers should have been counted toward the CTS hours of the eleven drivers who were paid the lower regulated rate during the Audit Period.

91. The 2,340 hour threshold is based on the average number of hours worked by a driver working full time for a one-year period. I have reviewed the auditor's work sheet and calculations attached to Audit Report and it appears that some of the KD drivers were paid the lower rate over audit months that were more than a year apart. Reviewing their pay statements, including their hours worked, they appear to have worked full time. Drivers who have worked full time for one year will generally be entitled to the higher rate. I agree with the auditor that the following drivers should have been paid the higher rate after one year of their employment with KD:

Driver	Audit Month	Audit Month
J. Singh	December 2021	May 2023
J. Mann	June 2021	May 2023
G. Khalon	April 2022	May 2023
P. Singh	October 2020	October 2022
M. Kular	October 2020	October 2022
H. Singh	March 2020	December 2021

92. KD says it reviews the driver's resume to determine previous employment, but I was provided only one resume, and I cannot tell from the Audit Report if KD supplied others. I am unclear how KD calculated only 500 hours for Mr. Sangha since his application says he worked 6 months for a previous licensee and he advised the auditor he worked 8 months for the previous licensee. Even if I accept KD's evidence, half of 2,340 hours (the equivalent of a year's work based on a 45-hour work week) would be significantly more than the 500 hours KD credited. I accept that KD's accounting of hours is an estimate, but it does not appear to be based on any identifiable assumptions and therefore I find it to be incorrect. However, based on the information before me, I am unable to determine the proper number of CTS hours that should have been assigned to Mr. Sangha.

93. I am also unable to determine if and when the five other drivers were entitled to the higher rate given that their periods of employment appear to be less than a year. Without sufficient evidence that they worked for another licensee, I am not prepared to accept they were entitled to the higher rate during their periods of employment.

94. KD has not only failed to credit all CTS hours to the drivers paid the lower rate, it has also failed to have a system in place to determine the number of hours a driver should be credited upon hiring and to track a driver's CTS hours during employment with KD.

Safety Bonus and Hourly Rate of Pay

95. Safety bonuses are common in the industry and more often than not they are found to be discretionary even if the licensee exercises its discretion and does not deduct the amount for an at fault accident.

96. In Damco Distribution Canada Inc. (CTC Decision No. 11/2020), the Commissioner determined that the payment of a safety bonus was not a "benefit" that could be included in the driver's wages because it was only paid when a driver avoids a "preventable accident" during the pay period.

97. My review of the calculations attached to the Audit Report confirms that those drivers who received an hourly rate plus a safety bonus when performing container trucking services still received significantly less than the regulated rate.

98. As an example, Mr. J. Mann drove a tagged truck (Unit 310) for KD on May 25, 2023 and his timesheet shows the following:

Container	Origin	Destination	Hours	Hourly Rate Paid	Regulated Hourly Rate	Hourly Difference
MSMU535833	CN	Clarke	2.5	$23.48/hr	$28.88/hr	-$5.40
FFAU386056	CN	Clarke	1.5	$23.48/hr	$28.88/hr	-$5.40
BBUU8010579	Vanterm	Clarke	2	$27.62/hr[27]	$28.88/hr	-$1.26
MSDU7536166	CN	Clarke	2	$23.48/hr	$28.88/hr	-$5.40
Total			**8**	**$196.12**	**$231.04**	**- $34.92**

99. In three instances, Mr. J. Mann was paid $15.65 per hour and $7.83 per hour as a safety bonus for a total of $23.48 per hour –$5.40 per hour less than the regulated rate at the time ($28.88 per hour). It is worth noting that the hourly rate recorded on KD's wage statement was less than the minimum wage in BC at the time ($16.75 per hour). Regardless of whether the safety bonus is included in the hourly rate, KD paid significantly less than the regulated rate to drivers who performed container trucking services. Mr. Mann received approximately 15% less than he was entitled to receive.

100. KD has been contradictory in its explanation of the identification of a "safety bonus" on wage statements back to 2019. KD told the auditor how a safety bonus was paid out and then provided a response to the Audit Report that appears to resile from the fact that a safety bonus program was in place at all. I find it unlikely that KD would not be aware of the "safety bonus" line item/description on its employee's paycheques for nearly four years and that no employee would have inquired about that line item on their wage statement over that period of time. However, the absence of the line item on some of the pay statements would be consistent with KD's explanation that some legacy profiles were not updated.

[27] KD's hourly rate for this move was consistent with the lower regulated rate, but given that Mr. Mann had worked for KD over a year by this time and appeared to have worked full time and given that KD had improperly characterized "non-CTS" work, it is likely he would have been entitled to $28.88 an hour by this point if properly paid.

101. The Audit Report did not provide any information as to how the drivers understood the "safety bonus" listed on their wage statement or if they understood that a preventable accident would result in their losing compensation and therefore I am unable to conclude that the "safety bonus" was a benefit and not part of the hourly wage.

102. I must find, however, the presence of the "safety bonus" line item separate from the driver's hourly wage on some of the wage statements is inaccurate information and a breach of Appendix D s. 4(f) of the CTS license.

103. As an aside, I note that three of the containers moved on May 25, 2023 were to a railyard and these containers have indices consistent with a "container"[28] which are furnished and/or approved for the marine transportation of goods. It is unclear to me how KD could still maintain as late as 2023 it was not required to pay the regulated rate after receiving repeated warnings as outlined in this Decision.

Electronic Records

104. Despite KD's assertion that it has an electronically generated record-keeping system in place and despite its having been advised to provide evidence of such in its response, I have only been provided a sample of a report –not the electronic data covering the entire month of May 2023 as was requested.

105. It is KD's responsibility to demonstrate that it is compliant with the *Act* and despite KD's opportunity to refute the Audit Report, I am unable to determine if KD has complied with section 6.7 and/or s. 6.10 of its CTS license based on the limited information provided. I will order KD to provide the electronic records for the Audit Period since December 1, 2022 to the auditor in order the determine if KD is compliant with section 6.7 and/or 6.10 of the CTS licence.

Kimberly Transport

106. Section 6.3 of the CTS license prohibits a licensee from entering any Subcontract for Container Services with any party that is not a licensee.

107. Based on my understanding of the Audit Report and KD's submission, Kimberly performs container trucking services between off-dock facilities only and does not move containers on behalf of KD. I was provided no evidence that KD entered an arrangement with Kimberly to move containers on its behalf and therefore do not find that there was a breach of section 6.3 of the CTS licence.

Protek

108. Based on my understanding of the Audit Report and KD's submission, Protek supplies drivers to various companies including KD but does not own trucks or perform container trucking services and therefore KD does not subcontract container trucking services to Protek.

109. I do not understand from KD's submission that it is suggesting Protek is the employer of the drivers

[29] Section 1 of the *Act* adopts the definition of "employee" from the *Employment Standards Act.*

and KD is somehow absolved of its obligations under the *Act* to the drivers of its vehicles. This appears to be supported by KD's submission that it reviews the resumes of each driver when determining the appropriate rate of pay.

110. Regardless, I find the definition of "trucker" in section 1(b) of the *Act* which references the definition in the *Employment Standards Act* to be broad enough to capture the drivers who work for KD since they are "persons an employer allows, directly or indirectly, to perform work normally performed by an employee" as defined in the *Act.*[29] The work performed on behalf of KD would normally be performed by an employee and I find it logical to conclude that KD directed the work of the drivers. Therefore, KD is required to pay the regulated rates to truckers as set out in section 22 of the *Act* and is required to provide the information regarding truckers in accordance with Appendix D of the CTS licence.

Conclusion

111. For the reasons set out above, I find the following:

a) The Disputed Containers have the indices of a container and are furnished or approved for the marine transportation of goods and therefore fit the regulatory definition of "container."
b) Those Disputed Containers moved between facilities within the Lower Mainland are engaged in off-dock trips to be paid at the regulated rate.
c) The safety bonus was an erroneous entry on some KD driver wage statements, and I accept that it was included in the hourly wage.
d) In spite of the inclusion of the safety bonus in their wages, KD paid its drivers up to $5.40 per hour less than the regulated rate to move the Disputed Containers identified in the Audit Report.
e) The auditor concluded that KD underpaid its company drivers during the Audit Period by a total of $48,852.30 even when accounting for the safety bonus as part of the hourly rate.
f) KD improperly paid Mr. J. Singh, Mr. Mann, M. Kular, Mr. G. Khalon and Mr. H. Singh the lower rate after they had performed over 2,340 hours of container trucking services.
g) KD improperly assigned Mr. Sangha 500 hours of work for working between 6-8 months with another licensee.
h) KD failed to count the hours worked by the eleven drivers moving the Disputed Containers towards the 2,340 hours.
i) KD failed to keep accurate payroll records and instead erroneously identified the hourly rate paid to its drivers.
j) I am unable to determine if KD has complied with section 6.7 and/ or 6.10 of its CTS licence based on the sample report it provided in its submission.
k) KD did not identify any containers amongst the Disputed Containers with the prefixes CTHU and CTHC owned by Clarke or the prefix of the 53-foot containers which is says do not meet the regulatory definition of a "container."

112. KD underpaid its drivers up to $5.40 per hour and its non-compliant practices strike at the core of the Commissioner's mandate – to promote stability by ensuring licensees pay the regulated rate. The size of underpayment is significant on an hourly basis alone and occurred over a four-year period. KD

[29] Section 1 of the *Act* adopts the definition of "employee" from the *Employment Standards Act.*

has been significantly enriched at the expense of its drivers.

113. Despite repeated bulletins, industry advisories and decisions, KD insists that the containers identified here as Disputed Containers are not containers, or at least that those bulletins, industry advisories and decisions should not apply to KD. Respectfully, if something looks like a duck, walks like a duck, and quacks like a duck, it is a fair inference that it is a duck. For the reasons outlined in this Decision, I am satisfied that the Disputed Containers meet the definition of "container" because they have the indices of a container and circulate through marine terminals. While KD submits that certain containers do not have the indices of a container (i.e. CTHC, CTHU or 53-foot containers), it did not indicate if any of these containers were amongst the Disputed Containers or sufficiently rebut the auditor's finding that the Disputed Containers are "containers."

114. For the reasons also outlined in this Decision, I do not find that Commissioner Crawford provided KD with any reasonable assurance that the movement of the Disputed Containers was outside the scope of the *Act*. KD's insistence it that relied on its interpretation of Commissioner Crawford's email responses to containers KD identified as "domestic containers" ignores his subsequent warning to the industry on April 17, 2020 along with the successive bulletins and industry advisories about the definition of a container. While the Audit Period only covered eight months over a four-year period, it was determined that KD underpaid its drivers by a significant amount ($48,852.30). While I accept that this number may be somewhat lower given that I could not determine if five of the drivers were entitled to the higher rate as the auditor concluded, this should not significantly impact the amount KD owes its drivers.

115. This case also illustrates the importance and purpose of the record-keeping requirements of the *Act* and licence. While I found that the "safety bonus" was a part of the driver's hourly rate on a balance of probabilities, the inaccuracy of the payroll records does instill a reasonable doubt as to whether KD treated the "safety bonus" as a benefit as opposed to a component of the hourly rate. Furthermore, KD's failure to keep accurate records showing why it paid some of its drivers the lower rate meant I was unable to ascertain the number of CTS hours each driver had previously worked. The responsibility to keep accurate records rests with the licensee, and KD's drivers may have suffered the consequences of underpayment because of the lack of proper record-keeping.

Proposed Penalty

116. 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.

117. 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 licence, and the Commissioner is tasked under the *Act* with investigating and enforcing compliance.

118. In keeping with the above-described purpose of the legislation the factors which will be considered when assessing the appropriate administrative penalty include the following as set out in Smart Choice Transportation Ltd. (OBCCTC Decision No. 21/2016):

- The seriousness of the respondent's conduct;
- The harm suffered by drivers as a result of the respondent's conduct;
- The damage done to the integrity of Container Trucking Industry;
- The extent to which the licensee was enriched;
- Factors that mitigate the respondent's conduct;
- The respondent's past conduct;
- The need to demonstrate the consequences of inappropriate conduct to those who enjoy the benefits of having a CTS licence;
- The need to deter licensees from engaging in inappropriate conduct; and
- Orders made by the Commission in similar circumstances in the past.

119. In this case, KD significantly underpaid its drivers for at least eight months over a four-year period based on its own definition of a container. KD argues that it was given some assurance that it was compliant with the *Act*. However, I find that KD took great efforts to hear what it wanted to hear and failed to take the prudent steps when it heard what it didn't want to hear – including, for example, seeking out legal advice or adjusting its practices. Ultimately, it is the licensee's responsibility to be compliant with the *Act.* Instead, KD significantly underpaid its drivers – thereby enriching itself by nearly $50,000 over an eight-month period -- and contributed to the very undercutting that the *Act* was intended to stop. KD has likely enriched itself in excess of an estimated $200,000 based on my understanding that it adopted the same erroneous approach to compensating its drivers during the Audit Scope.

120. KD was issued an administrative penalty in 2018 for improper record-keeping and I find that the administrative penalty was not sufficient to cause KD to remedy this issue. I am not persuaded that KD understands the importance of proper record-keeping, given its response that it does not review the pay statements of its employees and given how long the inaccuracies were present. Clearly, the previous administrative penalty was not sufficient.

121. Considering all the Smart Choice factors present in this case, I propose an administrative penalty of $20,000.00 in accordance with s. 34(2) of the *Act.* This proposed penalty is consistent with similar penalties where licensees have failed to maintain proper payroll records and where it has been determined that a licensee has been significantly enriched as a result of failing to pay the regulated rate. See: Smart Choice, referenced above; White Hawk Transport Ltd. (CTC Decision No. 11/2017); Gantry Trucking Ltd. and TSD Holding Inc. (CTC Decision No. 14/2017); Aquatrans Distributors Inc. (CTC Decision No. 06/2018); Butterworth's Industries Inc. (CTC Decision No. 04/2017); PTG Transport Ltd. (CTC Decision No. 11/2021); Simard Westlink Inc. (CTC Decision No.04/2024) (Reconsideration of CTC Decision No. 09/2023).

122. Should it wish to do so, KD has 7 days from receipt of this notice to provide the Commissioner with a written response setting out why the proposed penalty should not be imposed;

123. If KD provides a written response in accordance with the above, I will consider its response, and I will provide notice to KD of my decision to either:

a) refrain from imposing any or all of the penalty; or
b) impose any or all of the proposed penalty.

124. Pursuant to section 9 of the *Act*, I order KD to:

a) Provide the requested electronic payroll records for the month of May 2023 to the auditor.
b) Determine when each driver who was paid the lower rate during the Audit Scope was entitled to be paid at the higher rate based on the findings set out in this Decision.
c) Review its payroll records for the Audit Scope (excluding the months included in the Audit Period) to determine the compensation owed to each driver based on the findings set out in this Decision.
d) Provide the OBCCTC with its calculations in (b) and (c) no later than August 15, 2024.

123. Upon confirmation from the auditor that KD has properly calculated the wages owed to its drivers for the Audit Scope, I will issue an order for payment.

CONCLUSION

125. In summary, KD has been found to have violated the *Act* and its CTS license by paying up $5.40 per hour less than the regulated rate during the Audit Period. KD has also breached its CTS licence by producing inaccurate records and failing to maintain and provide payroll records recording container trucking hours worked, which has affected the OBCCTC's ability to determine if KD has properly paid its drivers.

126. I have determined that it is appropriate to propose the imposition of a $20,000.00 penalty.

Dated at Vancouver, B.C., this 25th day of June 2024.

Glen MacInnes
Commissioner