



**EURO ASIA TRANSLOAD INC. ("EURO ASIA")**

**AND**

**SKYWEST TRUCKING LTD. ("SKYWEST")**

Audit Period: April 2011 to June 2012

Final Recommendations Received: March 8, 2013

Decision Date: March 18, 2013

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**Facts**

In an effort to improve its container loading operations, Euro Asia hired additional employees at its container yard to implement a "pin-to-pin" loading system. The intent of this system was that Independent Operators could arrive at the yard with a container, drop it off on its chassis and immediately pick up a loaded container on another chassis, without waiting.

Independent Operators claimed by Euro Asia and Skywest were initially paid the minimum rates of remuneration contemplated under the TLS Licence Agreement. However, they were subsequently invoiced for "loading fees" in support of the pin-to-pin system. As an alternative to paying loading fees, Independent Operators could elect to purchase non-voting shares in Skywest.

Loading fees were charged (and/or shares sold) to over 70 Independent Operators. In the aggregate, during the Audit Period those charges amounted to approximately \$700,000, for an average of \$10,000 per driver.

**Issue**

The fundamental issue arising from this audit is: Did Euro Asia and Skywest wrongfully offset the minimum rates of remuneration by charging Independent Operators loading fees or requiring Independent Operators to purchase shares in Skywest in lieu of paying loading fees?

**Proceedings and Recommendation**

On December 3, 2012, following the investigation by the Dispute Resolution Office, the Appointee's Delegate submitted his findings and recommendations to Port Metro Vancouver.<sup>1</sup> The Appointee's Delegate found that imposing loading fees (or shares in lieu) was a breach of the TLS Licence Agreement.

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<sup>1</sup> The Appointee's Delegate directs and oversees the work of the investigators from the Dispute Resolution Office.

After reviewing the evidence, Port Metro Vancouver issued a notice of pending sanctions to the companies. Port Metro Vancouver advised that, subject to consideration of any written submissions the companies chose to provide to Port Metro Vancouver, each company's TLS Licence would be suspended for the greater of 21 days and the date upon which full restitution was made to the drivers.<sup>2</sup>

The companies were each represented by Mr. Tanjit Kalhar. He submitted that the loading fees were only charged in relation to non-port (or "off-dock") work and that he had documentation to support this contention. Pursuant to Section 5 of the TLS Licence Agreement, the Appointee's Delegate agreed that, in the circumstances, it would be prudent to meet with Mr. Kalhar and his counsel to review the documents. On March 8, 2013, following this meeting, the Appointee's Delegate provided a supplemental report confirming his initial findings and recommendation.

### **Decision**

After reviewing the additional documentation submitted by the companies, Port Metro Vancouver found that the supplemental report provided by the Appointee's Delegate was well founded. On March 18, 2013, Port Metro Vancouver notified Euro Asia and Skywest that, effective March 25, 2013, their TLS Licences would be suspended for the greater of 21 days and the date upon which full restitution is made to the Independent Operators.

#### *Downloading Business Costs*

The accounting documentation reviewed respecting the manner and application of charging the loading fees was incomplete and inconsistent. However, the objective of the companies related to all such charges was consistent. The companies wished to offset the cost of improving the efficiency of their overall container loading operations – operations which, in great part, function in a manner integrated with the movement of containers into and out of the port. As a result, the arrangement to pass their business costs along to Independent Operators amounted to a breach of the obligation to remunerate those Independent Operators in accordance with the TLS Licence Agreement.

#### *Obligation to Keep Accurate Records*

In breach of section 7.1 of the TLS Licence Agreement, the companies failed to maintain complete, accurate and up to date records. This failure resulted in undue delay and required significant costs in terms of time and resources expended by both the Dispute Resolution Office and Port Metro Vancouver. Ultimately, the onus is on TLS Licence holders to ensure that they can produce documentation sufficient to demonstrate their compliance with the minimum rates of remuneration.

#### *Sanction*

In addition to full restitution, the significant magnitude of the discrepancy created between the required trip rates and what was earned by the Independent Operators might have been grounds for termination of the Licences. However, based on the documentation provided, Port Metro Vancouver has not concluded, as a fact, that the companies had a clear intent to

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<sup>2</sup> The companies were directed to reimburse the Independent Operators for all loading fees or, in the case of shares in lieu of loading fees, give the Independent Operators the opportunity to sell back their shares at their original price (minus any dividends that were paid).

circumvent the obligations of the TLS Licence Agreement. The representatives for the companies voluntarily disclosed the objective behind the loading fees. The companies may have held the honest (yet erroneous) belief that, because the loading fees were intended to finance a loading system that would ultimately benefit not only their economic interests, but the interests of the Independent Operators as well, such charges were not a breach of the TLS Licence Agreement. Therefore, Port Metro Vancouver determined that the appropriate sanction was the longer of 21 days and the date upon which full restitution is made.