Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

International Union of Operating Engineers, Local 115,

applicant,

and

Schnitzer Steel BC, Inc.,

employer.

Board File: 28877-C
Neutral Citation: 2012 CIRB **640**
April 24, 2012

The Canada Industrial Relations Board (Board) was composed of Mr. Graham J. Clarke, Vice-Chairperson, and Messrs. John Bowman and David P. Olsen, Members.

Parties' Representatives of Record

Mr. John MacTavish, for the International Union of Operating Engineers, Local 115; Mr. Earl G. Phillips, for Schnitzer Steel BC, Inc.

These reasons for decision were written by Mr. Graham J. Clarke, Vice-Chairperson.

I–Introduction

[1] On July 26, 2011, the International Union of Operating Engineers, Local 115 (IUOE) filed a certification application with the Board for a unit of employees working at Schnitzer Steel BC, Inc. (Schnitzer). According to certain documents on file, Schnitzer does business as "Amix Recycling" in British Columbia (BC).

[2] Schnitzer's parent company has operations in the U.S. northwest.

[3] The IUOE sought to represent the following group of Schnitzer employees:

> All employees at and from 12301 Musqueam Drive, Surrey, BC (including those at the Studio) excluding security staff, office staff, line haul drivers, supervisors and those above supervisors.

[4] In its August 3 and 8, 2011 submissions, Schnitzer took the position that it was in the scrap metal recycling business. It argued that the Board did not have jurisdiction over its operations.

[5] In its August 16, 2011 response, the IUOE did not dispute to any great extent the overall facts in this case, but did argue that those facts demonstrated that Schnitzer carried out an interprovincial transportation undertaking, which clearly fell within the Board's jurisdiction.

[6] In order to ensure it had a proper record, the Board, pursuant to section 16(*k*) of the *Code*, asked one of its Industrial Relations Officers (IRO), Mr. Ken Chiang, to carry out an investigation. Mr. Chiang produced his IRO Report on November 30, 2011.

[7] The IUOE, by letter dated December 6, 2011, agreed with most of the facts as described in Mr. Chiang's report, but did provide additional submissions about Schnitzer's hauling of material for third parties from BC to Alberta. Schnitzer did not make any additional comments on the IRO Report.

[8] On March 6, 2012, the Board held a videoconference to hear the parties' legal arguments about jurisdiction. Each party had a fixed amount of time to present its constitutional law analysis.

[9] After deliberation, the Board has concluded that Schnitzer's undertaking falls within provincial jurisdiction. The IUOE's certification application is accordingly dismissed for the reasons which follow.

II–Facts

[10] Schnitzer has operations in Surrey and Chilliwack, BC.

A–Surrey Yard

[11] The Surrey yard is located at 12301 Musqueam Drive. The scrap metals which Schnitzer purchases are brought to Surrey for initial processing.

[12] For safety reasons, the metals are tested for radiation before being accepted at the Surrey yard. Suppliers are paid once the scrap metal has been weighed and received by the yard.

[13] Schnitzer processes the scrap metal in various ways, such as separating the metallic from the non-metallic materials. It also separates ferrous from non-ferrous metals. These processes increase the value of the scrap metal that Schnitzer then sells to its customers.

[14] Another process at the Surrey yard compacts the metal into more suitable sizes for transport to steel mills, foundries and other recyclers.

[15] Schnitzer also provides "roll off bins" to various companies which deposit their scrap metal in them. Schnitzer will then collect the bins, process the scrap metal and pay the companies for their contributions. Schnitzer also processes old cars and later sells their metal components.

[16] The Surrey yard has a dispatcher who dispatches Schnitzer's highway truck drivers (line haul drivers) for their regular trips between BC and Alberta. These highway drivers bring back scrap metal to Surrey for processing. The drivers, as well as the trucks and trailers they use, operate out of the Chilliwack depot.

B–Chilliwack Depot

[17] The Chilliwack depot at 42255 Arnold Road houses Schnitzer's truck maintenance facility, as well as a small retail sales outlet selling both processed metal as well as new steel, pipes, plates, etc.

[18] No metal processing occurs at the Chilliwack depot.

[19] Some of Schnitzer's trucks and trailers are stored at the Chilliwack depot. There is also a dispatcher in Chilliwack for those drivers who deliver roll off bins to various companies for scrap metal collection.

C–Alberta Operations

[20] Schnitzer has two Alberta transfer yards, one in St. Albert (near Edmonton) and the other in Fort McMurray. Schnitzer's Alberta-based employees gather scrap metal from the surrounding area and process it slightly for easier transportation back to the Surrey yard.

D–Transportation Activities

[21] Beyond the transport of scrap metal from Alberta back to the Surrey yard, Schnitzer also sends scrap elsewhere for further processing.

[22] For example, some metal will be transported from Surrey to Tacoma, Washington, where Schnitzer's parent has a specialized processing plant. This U.S. plant can perform functions that Surrey is not equipped to perform.

[23] Similarly, Schnitzer will transport some scrap metal by barge to other Washington-based processing plants. While Schnitzer recently purchased certain operations from Amix Salvage & Sales Ltd. (Amix Salvage), it did not purchase its barge business. Amix Salvage continued to own the barges, but leased them to Schnitzer for its use.

[24] The Board will comment further on the distinction between Schnitzer and Amix Salvage later in these reasons.

[25] Schnitzer's trucks/trailers sometimes travel empty when en route to its Alberta transfer yards. They then bring scrap metal back to Surrey for processing.

[26] There are roughly 18–20 weekly trips between BC and Alberta. On occasion, Schnitzer contracts with other companies to transport excess scrap metal back to BC when it does not have enough truck capacity itself.

[27] Depending on the season, Schnitzer may haul items for third parties, from BC to Alberta, on 5–10 of its 18–20 weekly interprovincial trips. The Appendices to the IRO Report illustrate the number of interprovincial trips for third parties from December 2010 to November 2011:

Month	**Number of trips from BC to Alberta**
December 2010	0
January 2011	0
February 2011	0
March 2011	4
April 2011	13
May 2011	14
June 2011	27
July 2011	35
August	24
September 2011	22
October 2011	24
November 2011	1
Total	164

[28] The IUOE also emphasized in its written argument for the Board that, from March to November, 2010, there had been 154 third-party trips from BC to Alberta.

[29] The IRO Report described four customers who used Schnitzer to transport items. One of these customers used Schnitzer just three times in March, 2011. That was the extent of that business relationship.

[30] A second customer used Schnitzer to haul glass from Surrey, and sometimes Abbotsford, to Quesnel, BC. None of these trips crossed a provincial or national border.

[31] A third customer used Schnitzer to haul lava rocks from Nazko, BC to Edmonton. The fourth customer had Schnitzer haul mostly aggregates (rocks, gravel, crushed rocks, etc.) from Nazko to Edmonton.

[32] The one-way inter-provincial trips for these third parties were as frequent as 35 in July, 2011 to a low of zero from December, 2010 to February, 2011.

[33] Schnitzer hauled third-party material to Alberta as a way to defray the cost of sending empty trucks from Chilliwack to the Alberta transfer yards. Schnitzer suggested it did not solicit this work, which arrived via word of mouth, and would not detour significantly to assist a third party.

[34] The IUOE, in its December 6, 2011 response to the IRO Report, disputed the suggestion that Schnitzer did not solicit third parties for hauling work. It filed extracts from Amix Recycling's website which mentioned its "Highway Transport Division" and suggested it could provide, *inter alia*, the following services: "Amix is now offering flat deck and End dump Service from the Lower Mainland of BC to Northern points of British Columbia and Alberta."

[35] Another page from the Amix Recycling website discussed the role of its "Logistics Coordinator":

> Amix is expanding again and would like to announce our new Highway Transport Division. Amix is now offering flat deck and end dump service from the Lower Mainland of BC to Northern points of British Columbia and Alberta.
>
> Shawn Melwicks is our new Logistics Coordinator for Amix Recycling. Shawn has an extensive background in the transportation field. His knowledge enables him to provide the right transportation options for our customer's needs while reducing their transport costs.
>
> Contact Shawn for any of your flat deck/end dump needs. He would be happy to present you with a cost effective service that would be beneficial to your company.
>
> (emphasis added)

[36] The IUOE also filed a decision from the British Columbia Human Rights Tribunal (BCHRT) in *Salway* v. *Amix Salvage and Sales Ltd.*, 2011 BCHRT 31 *(Salway).* In that case, Amix Salvage had argued that it was governed federally due to its transportation activities.

[37] In order to avoid confusion over the use of the term "Amix", some background information is useful. During argument, counsel for Schnitzer confirmed the comment in the IRO Report (page 5), that his client had purchased some, but not all, of the business of Amix Salvage. As mentioned above, that portion of the business dealing with barge transportation was not purchased.

[38] Schnitzer does business in BC using the Amix brand name. Thus, its scrap metal business is called Amix Recycling. But it is a different entity from Amix Salvage.

[39] At the hearing, the IUOE did not contest Schnitzer counsel's description of the legal distinction between Amix Recycling (Schnitzer) and Amix Salvage.

[40] The parties' pleadings both referred to previous decisions involving Amix Salvage. Schnitzer, in its August 31, 2011 submission in support of provincial jurisdiction, appended a one-page February 11, 2010 decision from an inspector under the *Canada Labour Code* who concluded:

> Based on information provided to me, I have determined that AMIX SALVAGE & SALES LTD. is not subject to federal jurisdiction for the purposes of labour legislation. This means that the *Canada Labour Code*, Part III, does not apply to your company.

> Instead, provincial labour laws apply to your company because it is engaged in transportation of the company's own goods across provincial borders...
>
> (emphasis in original)

[41] By contrast, the IUOE referred to *Salway*, *supra*, as a non-binding, but nonetheless relevant, decision, about the pertinent facts the Board needed to consider. In *Salway*, *supra*, the BCHRT had accepted Amix Salvage's argument that its operations fell within federal jurisdiction.

> [7] Amix states that it operates a salvage and recycling business, which includes a commercial trucking division.
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> [8] Amix has provided an affidavit from Herbert Gaidosch, its Driver Compliance Manager. Mr. Gaidosch states that Amix employs approximately 200 employees at its two facilities in Surrey and Chilliwack, British Columbia. Of these employees, approximately 30 are truck drivers employed in Amix's commercial driving division. Mr. Gaidosch states that the commercial driving division transports salvaged and other materials by truck and trailer within British Columbia, from British Columbia to Washington State, and from British Columbia to other provinces and territories, including Alberta, Saskatchewan and the Northwest Territories.
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> [9] Mr. Gaidosch states that Amix transports material for salvage and recycling and also contracts with a number of independent third parties to transport materials on behalf of these third parties. For example, if Amix is sending a truck and trailer to Alberta to pick up materials for salvage, it may contract with a third party to transport materials belonging to that third party on the way to pick up the materials for salvage. Materials transported for third parties include gravel, crushed glass, lava rock, cement blocks and roofing materials belonging to third parties. Mr. Gaidosch states that approximately 20% of the trucks and trailers leaving Surrey and Chilliwack are transported on behalf of third parties. Of these, approximately 75% are transported outside of British Columbia, usually to Alberta.
>
> [10] Amix has also provided an affidavit from one of its project managers, James Newton. Mr. Newton states that Amix has been transporting materials for salvage and recycling from Washington State to British Columbia since 2005, and has been transporting materials for salvage and recycling from other provinces to British Columbia since 2007.
>
> (emphasis added)

[42] The BCHRT concluded that Amix Salvage engaged in regular and continuous interprovincial trucking, and therefore fell within federal jurisdiction:

> [23] On the materials before me, I conclude that a "regular and continuous" part of Amix's operations includes interprovincial trucking. That trucking is a usual, not exceptional, part of its operations. Therefore, I find that Amix's business is an interprovincial undertaking within the meaning of s. 92(10). As such, its business is subject to exclusive federal jurisdiction.

[43] Schnitzer pointed out during argument that whatever Amix Salvage may have pleaded before another tribunal, Schnitzer, as a different legal entity, had no involvement. Schnitzer asked the Board to decide the case based on the facts as set out in the IRO Report, and not on what might have been pleaded by a different company with different legal counsel.

[44] Schnitzer also argued that an important distinction existed for the extraprovincial trips. A distinction had to be made between Schnitzer's own extraprovincial trips, as part of its metal recycling business, and those made for third parties from BC to Alberta.

[45] Schnitzer further indicated that its trucks are specialized for its scrap metal business and it can only haul third-party freight that could be carried by a dump truck. It cannot provide general haulage services.

III–Issues

[46] What is the core undertaking being carried out by Schnitzer?

IV–Analysis and Decision

[47] The main disagreement between the parties concerned the type of business in which Schnitzer is engaged. The IUOE argued that Schnitzer is an interprovincial transportation undertaking which falls within the Board's jurisdiction under section 2(*b*) of the *Code*:

> 2. In this Act,
>
> "federal work, undertaking or business" means any work, undertaking or business that is within the legislative authority of Parliament, including, without restricting the generality of the foregoing,
>
> ...
>
> (*b*) a railway, canal, telegraph or other work or undertaking connecting any province with any other province, or extending beyond the limits of a province,

[48] The IUOE argued there are two types of interprovincial transportation for third parties. The first involved Schnitzer's transportation of third-party scrap metal from Alberta to its Surrey yard. The IUOE viewed this service as constituting a transportation undertaking for third parties. In addition, the hauling of material for third parties from BC to Alberta added even more extraprovincial trips to the equation.

[49] Schnitzer, on the other hand, characterized its business as being that of a scrap metal recycler, a purely provincially-regulated business. The fact that it carried out occasional interprovincial trips for third parties did not impact that overall characterization. In its view, the hauling of scrap metal back to its Surrey yard involved the hauling of its own product. The transfer of title had already taken place when Schnitzer took possession of the material.

[50] The parties both accepted that provincial competence over labour relations is the rule. Federal competence is the exception.

[51] The Supreme Court of Canada (SCC) referred to that situation in *Consolidated Fastfrate Inc.* v. *Western Canada Council of Teamsters*, 2009 SCC 53 at paragraphs 27–28:

> [27] The basic rule in the division of powers over labour relations is that the provinces have jurisdiction over industries that fall within provincial legislative authority and the federal government has jurisdiction over those that fall within federal legislative authority: see *Labour and Employment Law: Cases, Materials, and Commentary* (7th ed. 2004), at p. 85. However, as the jurisprudence makes clear, federal jurisdiction has been interpreted narrowly in this context. In *Toronto Electric Commissioners* v. *Snider*, [1925] A.C. 396, the Judicial Committee of the Privy Council held that the s. 92(13) provincial head of power over "Property and Civil Rights" in the provinces includes labour relations. It is only where a work or undertaking qualifies as federal that provincial jurisdiction is ousted.
>
> [28] In *Northern Telecom Ltd.* v. *Communications Workers of Canada*, [1980] 1 S.C.R. 115, Dickson J. (as he then was) summarized the principles that govern federal-provincial jurisdiction over labour relations, at p. 132:
>
> > (1) Parliament has no authority over labour relations as such nor over the terms of a contract of employment; exclusive provincial competence is the rule.
> > (2) By way of exception, however, Parliament may assert exclusive jurisdiction over these matters if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject.
> >
> > ...

> (5) The question whether an undertaking, service or business is a federal one depends on the nature of its operation. [Emphasis added.]
>
> Under s. 92 of the *Constitution Act, 1867*, therefore, provincial jurisdiction is the norm. Federal jurisdiction extends only to those classes of subjects expressly excepted from the provincial heads of power and those enterprises deemed integral to such federal works and undertakings. As I will discuss, s. 92(10)(a), itself a limited carve-out, provides for such a federal exception. The question in this case is whether the nature of the operations of Fastfrate are subject to provincial or federal jurisdiction.

(emphasis added)

[52] In *NIL/TU,O Child and Family Service Society* v. *B.C. Government and Service Employees' Union*, 2010 SCC 45, [2010] 2 S.C.R. 696 (*NIL/TU,O*), the SCC summarized the applicable tests to decide whether an employer fell into federal or provincial jurisdiction:

> [1] NIL/TU,O Child and Family Services Society ("NIL/TU,O") provides child welfare services to certain First Nations children and families in British Columbia. It has a unique institutional structure, combining provincial accountability, federal funding, and a measure of operational independence.
>
> [2] None of the parties dispute that child welfare is a matter within provincial legislative competence under the *Constitution Act*, *1867*. NIL/TU,O does not challenge the constitutional validity of the *Child, Family and Community Service Act*, R.S.B.C. 1996, c. 46, as it applies to Aboriginal people. Nor is the issue whether the federal government can enact labour relations legislation dealing with "Indians". It clearly can. The issue in this appeal is whether NIL/TU,O's labour relations nonetheless fall within federal jurisdiction over Indians under s. 91(24) because its services are designed for First Nations children and families.
>
> [3] For the last 85 years, this Court has consistently endorsed and applied a distinct legal test for determining the jurisdiction of labour relations on federalism grounds. This legal framework, set out most comprehensively in *Northern Telecom Ltd.* v. *Communications Workers of Canada*, [1980] 1 S.C.R. 115 and *Four B Manufacturing Ltd.* v. *United Garment Workers of America*, [1980] 1 S.C.R. 1031, and applied most recently in *Consolidated Fastfrate Inc.* v. *Western Canada Council of Teamsters*, 2009 SCC 53, [2009] 3 S.C.R. 407, is used regardless of the specific head of federal power engaged in a particular case. It calls for an inquiry into the nature, habitual activities and daily operations of the entity in question to determine whether it constitutes a federal undertaking. This inquiry is known as the "functional test". Only if this test is inconclusive as to whether a particular undertaking is "federal", does the court go on to consider whether provincial regulation of that entity's labour relations would impair the "core" of the federal head of power.
>
> [4] The "core" of whatever federal head of power happens to be at issue in a particular labour relations case has never been used by this Court to determine whether an entity is a "federal undertaking" for the purposes of triggering the jurisdiction of the *Canada Labour Code*, R.S.C. 1985, c. L-2. Since in my view the functional test conclusively establishes that NIL/TU,O is a provincial undertaking, I do not see this case as being the first to require an examination of the "core" of s. 91(24).

(emphasis added)

[53] The SCC in *NIL/TU,O*, *supra*, also described the "presumption of provincial jurisdiction":

> [18] In other words, in determining whether an entity's labour relations will be federally regulated, thereby displacing the operative presumption of provincial jurisdiction, Four B requires that a court first apply the functional test, that is, examine the nature, operations and habitual activities of the entity to see if it is a federal undertaking. If so, its labour relations will be federally regulated. Only if this inquiry is inconclusive should a court proceed to an examination of whether provincial regulation of the entity's labour relations would impair the core of the federal head of power at issue.

[54] Accordingly, the Board needs to examine first the "functional test" to see if it can determine Schnitzer's habitual activities and daily operations. Is Schnitzer properly characterized as an interprovincial transportation undertaking, as the IUOE suggests, or is it a provincially-regulated scrap metal recycler?

[55] The Board will only consider the second "core impairment" test, if the functional test proves inconclusive.

[56] In order to consider the functional test, the Board examined two related questions it has applied for transportation undertaking situations: i) is Schnitzer carrying out a transportation undertaking?; and ii) are its extra-provincial trips sufficiently "regular and continuous" in order to bring it within federal jurisdiction?

[57] The Board used a similar analytical focus in *Pioneer Truck Lines Ltd.*, 1999 CIRB 31 (*Pioneer Truck*), at paragraph 17:

> [17] Before turning to the "regular and continuous" test, the Board must first be satisfied that the operation in question is in fact a transportation operation. The employer, in this case, has argued that the core activity of Pioneer Truck is "more akin to construction than to interprovincial trucking."

[58] For the following reasons, the Board finds that the normal and habitual activities of Schnitzer are that of a scrap metal recycler rather than as an interprovincial transportation undertaking.

[59] First of all, there is a difference between a business which transports its own property across provincial boundaries, compared with a business which transports third-party goods.

[60] For example, a retailer like The Bay could transport its own merchandise across provincial boundaries for display and sale at its many retail outlets. But that transportation component would not impact its characterization as a provincially-regulated retail business.

[61] This Board's predecessor, the Canada Labour Relations Board, described this situation in *Burns Foods (Transport) Ltd.*, (1990) 81 di 114, at page 115:

> When one envisages someone transporting their own commodities, even if it is interprovincial transportation, the first reaction in a constitutional sense is that the operation would be provincial. Companies like Sears, Eatons, Canadian Tire, etc. constantly haul their own goods across provincial boundaries yet their operations remain provincial.

[62] The work that Schnitzer does collecting and transporting scrap metal to its processing facilities, or sending it to the U.S. for special processing, does not change the characterization of its scrap metal business.

[63] Schnitzer has organized itself to collect and transport scrap metal from a large catchment area to its Surrey yard. It also retains third-party contractors to deliver any excess scrap metal which Schnitzer cannot handle itself. This strikes the Board as being consistent with the nature of a scrap metal business.

[64] While the IUOE suggests that those who provide scrap metal to Schnitzer are purchasing a transportation service for their goods, the Board views it more as customers ridding themselves of scrap metal in exchange for a financial benefit.

[65] The transaction between Schnitzer and its customers has already taken place when Schnitzer collects the scrap metal. From then on, the material belongs to Schnitzer, subject only to it being rejected if radiation concerns arise.

[66] The scrap metal for a business like Schnitzer has to be transported to a central processing facility; the processing facility cannot move to wherever scrap metal may be found.

[67] Secondly, as mentioned, the international transport of scrap metal to its U.S.-based parent company, or related companies, for further processing similarly seems to be a regular function of a scrap metal business. It is transporting its own property to a related organization for specialized processing that cannot be done in the Surrey yard.

[68] The Board does not see how this necessary transportation activity as part of a scrap metal business transforms Schnitzer into a transportation undertaking.

[69] Thirdly, the Board acknowledges that the IUOE has raised an important wrinkle in the analysis of this case, since Schnitzer does not dispute that it provides some interprovincial transportation services to third parties. Nonetheless, despite these services, the Board has concluded that they do not change Schnitzer's fundamental characterization as a scrap metal business.

[70] The evidence in the IRO Report was that Schnitzer had only four customers who used these services. Moreover, no extraprovincial transportation for third parties occurred from December, 2010 to February, 2011. It is a seasonal activity.

[71] Even if the Board assumed, for the sake of argument, that these third-party trips could transform a scrap metal business like Schnitzer into an interprovincial transportation undertaking, the trips would still need to be regular and continuous. The evidence suggests to the Board that these trips for third parties are better described as sporadic.

[72] In *Pioneer Truck*, *supra*, at paragraph 16, the Board indicated that it would use a qualitative rather than quantitative approach when considering "regular and continuous". Schnitzer's trips for third parties are limited and only used when it is in the company's interest. This self-serving leveraging of its specialized equipment does not convince the Board that it engages in regular and continuous transportation services at the whim of third parties.

[73] Fourthly, the Board has considered the IUOE's reliance on the facts which Amix Salvage, a different entity, had provided by way of affidavit to the BCHRT in *Salway*, *supra*. The decision in *Salway*, *supra*, does not persuade the Board that a subsequent entity, Schnitzer, must therefore operate an interprovincial transportation undertaking.

[74] Neither party suggested that the BCHRT's conclusions were binding on this Board.

[75] The parties did not put before the Board any significant details of the commercial transaction whereby Schnitzer acquired parts of Amix Salvage's scrap metal business. Comments in the IRO Report (page 5), and those made by Schnitzer's counsel at the hearing clarifying that it was not the same entity as Amix Salvage, were not contested.

[76] The Board heard no evidence that Schnitzer had been involved in the pleading of *Salway*, *supra*. Schnitzer's legal counsel for the current case appears to be different from the counsel retained by Amix Salvage to plead the *Salway* case.

[77] The Board would be hesitant to accept as fact statements made in another hearing, by a different entity (Amix Salvage), in the absence of evidence that Schnitzer had been involved in that case.

[78] In addition, the Board asked for an IRO Report for the very purpose of obtaining the relevant constitutional facts. The facts now before the Board set out how Schnitzer operates and provided details on the third-party extraprovincial trips. Evidently, intraprovincial trips for third parties are irrelevant to the issue before the Board. These are the uncontested facts on which the Board must base its decision.

[79] Fifthly, the IUOE presented extracts from the Amix Recycling website which suggested that it was getting into the business of transportation for third parties. During argument, Schnitzer suggested the website was out of date.

[80] In any event, mere intentions, without factual support, are not enough to allow the Board to conclude that Schnitzer has been transformed into a transportation undertaking. There was no evidence suggesting that the intentions expressed on the website, such as third party transportation services using flat-deck trucks, had in fact become reality. It is similarly not clear how much of this potential business would be interprovincial.

[81] In *Certen Inc.*, 2003 CIRB 223, the Board stated the following about the relevance of "future plans" to its decisions:

> [112] The Board does not for a moment doubt the good faith and sincerity of the respondents, Bell and Nexxia, with respect to future business plans. However, the Board does not render decisions based on conjecture, unless there are compelling business reasons to do so. The respondents presented the Board with no concrete facts, dates or implemented business plans on which to anticipate the development of Certen's operations in the foreseeable future. This situation is distinguishable, for example, from the forward looking situation that was presented to this Board in the Air Canada matter, where the legal merger of Air Canada and Canadian was complete, but the functional integration of the work performed by the various bargaining units depended on the Board's decision for implementation.
>
> (emphasis added)

[82] This is not to say that the issue of Schnitzer's proper characterization could not arise in the future if it follows through with more extraprovincial activities. In that scenario, the Board might have to consider whether Schnitzer's overall undertaking had changed, or whether its interprovincial transportation "division" should be severed and considered a separate undertaking for labour relations purposes.

[83] An employer's undertaking may be divisible if it carries out two distinct activities which fall in different jurisdictions; see, for example, *J.C. Fibers Inc.* (1994), 94 di 1 (CLRB no. 1057); and *Saskatoon (City)* v. *Public Service Alliance of Canada et al.* (1998), 229 N.R. 207 (F.C.A.). The Board does note that the IUOE sought to exclude "line haul drivers" from its proposed bargaining unit. Those drivers are individuals who cross provincial borders in the course of their work. They also work out of Chilliwack and are not covered by the IUOE's proposed bargaining unit which was limited to the Surrey location.

[84] The current facts before the Board do not require it to guess if future changes could have an impact on the current conclusion.

[85] Given the rule in favour of provincial jurisdiction in these cases, and given the Board's determination that Schnitzer's undertaking, despite sporadic third-party extraprovincial transportation activities, is properly characterized as a scrap metal business, the Board has concluded it does not have jurisdiction over the IUOE's certification application.

V–Conclusion

[86] The Board, in applying the required "functional test", has concluded that Schnitzer, despite providing to certain third parties occasional interprovincial transportation services, is properly characterized as being a metal recycling business.

[87] A metal recycling business, even though it transports scrap metal across borders to its processing facilities, does not thereby transform itself into an interprovincial transportation undertaking. This is the same reality with retail stores which transport their own merchandise interprovincially.

[88] Accordingly, the IUOE's certification application must be dismissed purely on jurisdictional grounds, without any need to examine the merits of its proposed bargaining unit.

[89] This is a unanimous decision of the Board.

Graham J. Clarke
Vice-Chairperson

John Bowman
Member

David P. Olsen
Member