BCLRB No. B442/95
(Leave for Reconsideration of BCLRB Nos. B157/95 and B258/95)

BRITISH COLUMBIA LABOUR RELATIONS BOARD

TRI-STAR SEAFOOD SUPPLY LIMITED

(the "Employer")

-and-

TEAMSTERS LOCAL UNION NO. 213

(the "Union")

PANEL: Kate Young, Vice-Chair

COUNSEL: Herb Isherwood, for the Employer

CASE NO.: 23107

DATE OF DECISION: December 14, 1995

DECISION OF THE BOARD

I. APPLICATION

1 The Employer seeks leave to apply for reconsideration of BCLRB Nos. B157/95 and B258/95. The original panel found that the Employer's operation fell under provincial jurisdiction and granted the Union's application for certification. The Employer submits that the original panel's decision is inconsistent with the principles expressed or implied in the Code, arguing that the Board lacks constitutional jurisdiction to certify the Employer's operation.

2 The original panel initially issued a short letter decision on April 26, 1995 (BCLRB No. B157/95). The Employer subsequently requested that the Board issue written reasons in respect of its decision. That request resulted in the original panel's reasons for decision dated July 6, 1995 (BCLRB No. B258/95).

II. THE ORIGINAL DECISION

3 The original panel found that the Employer is in the business of buying and selling, including delivery of, predominantly live or fresh seafood. The Employer delivers its own product to its customers, including customers in the United States. The original panel found that the delivery aspect of the Employer's business was an important and integral part of the Employer's business and that the deliveries had an international aspect which was regular and continuous. The original panel held that:

> …I cannot conclude that the delivery/transportation aspect of the Employer's operation itself encompasses and defines what are the normal and habitual activities of the Employer as a going concern. Taken as a whole, the normal and habitual activities of the Employer's business are the obtaining and marketing of, for the most part, fresh or live seafood. That activity includes deliveries and transportation, which in turn includes on a regular and continuous basis deliveries of product to the United States (and at times delivery of supply from the United States to British Columbia on the return trip). However, neither the deliveries to the United States, nor the deliveries/transportation aspect itself of the Employer's operation, overall encompass or define the normal and habitual activities of the Employer's business. Overall, that activity -- the buying and selling, including delivery, of predominantly live or fresh seafood -- is one of a local, provincial nature. (para. 19)

III. THE EMPLOYER'S ARGUMENT

4 The Employer submits that the original panel misconstrued the appropriate approach to Section 92(10)(a) of the *Constitution Act, 1867* by relying upon the Board decision in *Browning-Ferris Industries Inc.,* BCLRB No. B209/94, a decision which itself mis-construed the appropriate test. The Employer says that on a proper analysis of the *Northern Telecom Canada Ltd.* v. *Communications Workers of Canada,* (1979), 98 D.L.R. (3d) 1, [1980] 1 S.C.R. 115, 28 N.R. 107, test it is clear that the Employer's transportation activities are normal and habitual, and not casual or exceptional, and consequently fall within exclusive federal jurisdiction.

5 Relying on *Regina* v. *Toronto Magistrates, ex parte Tank Truck Transport Ltd.,* (1960), 25 D.L.R. (2d) 161, [1960] O.R. 497 (Ont. Ct.), affirmed [1963] 1 O.R. 272, 36 D.L.R. (2d) 636 (C.A.), and *Pacific Produce Delivery and Warehouses Ltd.* v. *Labour Relations Board,* [1974] 3 W.W.R. 389 (B.C.C.A.), the Employer argues there is no requirement that the interprovincial or international aspect of the business must be part of a business that is fundamentally or at its core a hauling or transportation business in order for the operation to fall under federal regulation. All that Section 92(10)(a) requires is a work or undertaking connecting or extending beyond the province and that the transportation activities are normal and habitual and not casual or exceptional.

6 The Employer says the first step of the appropriate test is whether it is engaged in an activity which connects or extends beyond the province. The second step is to determine whether the international aspect of the business is regular and continuous. In this case, the original panel has found that the Employer is engaged in international transportation, which it found to be fundamental and integral to the Employer's business, and occurring on a regular and continuous basis. Therefore, the Employer argues, its labour relations are federally regulated.

IV. ANALYSIS AND DECISION

7 The original panel found that the Employer is in the business of buying and selling predominantly live or fresh seafood, including packaging and processing as well as a delivery/transportation aspect. From that finding, the original panel concluded that even though the extra-provincial deliveries were important and integral to the Employer's business and occurred on a regular and continuous basis, the business was nonetheless of a local, provincial nature and subject to provincial jurisdiction. Contrary to the Employer's argument, the original panel did not err in its characterization of the Employer's business.

8 Section 92(10) of the *Constitution Act, 1867* gives provincial legislatures jurisdiction over:

> Local Works and Undertakings other than such as are of the following Classes: -
>
> (a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province;

In interpreting the phrase "other works and undertakings" one looks to the types of works and undertakings which are expressly named in Section (92)(10)(a). The "other works and undertakings" referred to in Section 92(10)(a) fall within the same class or kind as are listed in the immediately preceding clause. "Lines of steam or other ships, railways, canals and telegraphs" describes a class of organization or undertakings engaged in transportation and communication. Consequently in order for a local work or undertaking to fall within the federal sphere of authority under Section 92(10)(a) the work or undertaking must be engaged in transportation and communication: See *Canadian Pacific Railway Company* v. *Attorney General for British Columbia ("Empress Hotel"),* [1950] A.C. 122 at p. 142 (P.C.); *Inter-Provincial Paving Company Limited,* (1962), 63 ¶CLLC 1188 (Ont. Labour Relations Board) at p. 1188; *Dominion Dairies Limited,* [1978] OLRB Rep. Dec. 1083 at para. 6; *Ottawa-Carleton Regional Transit Commission,* (1983), 84 CLLC ¶1225, 44 O.R. (2d) 560 (Ont C.A.) at p. 567; *Thomas Brown, et al.* v. *YMHA Jewish Community Centre of Winnipeg Inc. et al.*, [1989] 1 S.C.R. 1532, at p. 1552; and Hogg, Peter W., *Constitutional Law of Canada*, 3rd ed., Carswell, 1992, pp. 22-5.

9 Consequently the first step when applying Section 92(10)(a) of the *Constitution Act* is to characterize the work or undertaking. Section 92(10)(a) has never been held applicable to any work or undertaking which is not of a transportation or communication character. (See *Hogg, supra,* at pp. 22-5)

10 By first determining the nature of the Employer's operation, the original panel properly applied the constitutional principles set out in *Northern Telecom, supra*, and *Browning-Ferris Industries Inc., supra.* In determining whether the Employer was federal, the original panel looked at the nature of the Employer's operation, that is "the normal or habitual activities of the business as those of `a going concern', without regard for exceptional or casual factors" (from *Northern Telecom* at p. 132). Contrary to the Employer's argument, *Northern Telecom* does not require that the original panel determine whether the *extra-provincial trucking aspect* of the Employer's operation is part of its "normal and habitual" activities. Rather, the original panel was required to determine what were the "normal and habitual" activities of the Employer's business as a whole. The original panel concluded that the Employer's normal and habitual activities were the obtaining and selling of fresh or live seafood, which includes an international delivery aspect. The original panel correctly found those activities to be local and provincial and

therefore, subject to provincial jurisdiction.

11 Where a company is not in the business of transportation or communication, it is not federally regulated merely because the company exports its product extra-provincially. For example, department stores, supermarkets, oil companies, and waste management companies which deliver merchandise or product to customers, other outlets, or job sites, including those outside the province do not fall within federal jurisdiction. They are not in the business of transportation and communication. While transportation is an integral part of the business, it is not the entire or even the primary focus of the business: *Browning-Ferris Industries Inc.; Hurdman Bros. Ltd.*, (1982), 51 di 104, 83 CLLC ¶16,003 (Can. L.R.B.); *Sani Mobile S.V.O. Inc.,* (1991), 86 di 125 (Can. L.R.B.); *Maska Manpower Inc.*, (1984), 57 di 193 (Can. L.R.B.) at p. 203; and *Dominion Dairies Limited, supra,* para. 8.

12 There are numerous cases that decide that where an extra-provincial transportation aspect to a business is "regular and continuous", that company falls under federal jurisdiction: for example, *Regina* v. *Toronto Magistrates, ex parte Tank Truck Transport Ltd., supra*; *Pacific Produce Delivery and Warehouses Ltd., supra*; *Re Ottawa-Carleton Regional Transit Commission and Amalgamated Transit Union, Local 279 et al.,* (1983), 44 O.R. (2d) 560 (Ont. C.A.); *Burns Foods (Transport) Ltd.*, (1990), 81 di 114 (Can. L.R.B.) at p. 115; and *Browning-Ferris Industries Ltd.,* [1993] OLRB Rep. Oct. However, in those cases the company in question was a transportation or communication company with an extra-provincial aspect, and not a business whose transportation activities are an aspect of its overall non-transportation or non-communication business. The fact that the Employer engages in the extra-provincial transportation of its own product does not alter the initial constitutional characterization of the business as a seafood business (albeit with an international delivery aspect) of a local, provincial nature.

13 Before getting to the question of whether the Employer's regular and continuous, important and integral extra-provincial deliveries render the Employer federally regulated for labour relations purposes, the original panel correctly ascertained the nature of the Employer's operation to determine if Section 92(10)(a) applied. The Employer did not meet the first constitutional requirement: it was not a company engaged in the transportation or communication business as is required in order to bring itself within Section 92(10)(a).

V. CONCLUSION

14 In order to obtain leave for reconsideration, an applicant must "demonstrate a good arguable case of sufficient merit that it may succeed on one of the established grounds for reconsideration": *Brinco Coal Mining Corporation*, BCLRB No. B74/93 (Leave for Reconsideration of BCLRB No. B6/93), (1994), 20 CLRBR (2d) 44, 93 CLLC ¶16,043. The Employer fails to satisfy this test and, accordingly, its application for reconsideration is denied.

LABOUR RELATIONS BOARD

KATE YOUNG
VICE-CHAIR