IN THE FAIR WORK COMMISSION

MATTER NO: **AM2014/1 – Alleged inconsistencies between the National Employment Standards (NES) and Modern Awards**

FURTHER REPLY SUBMISSIONS OF THE AUSTRALIAN MANUFACTURING WORKERS' UNION (AMWU) - VEHICLE DIVISION

INTRODUCTION

1. On 29 September 2014 the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union– Vehicle Division (AMWU) filed submissions in relation to the inconsistencies identified between the NES and the *Vehicle Manufacturing Repair Services and Retail Award 2010* (the Vehicle Award). We subsequently filed reply submissions and a revised draft determination on 16 October 2014 in relation to the shiftworker annual leave accrual inconsistency identified in clause 29.5(b) of the Vehicle Award.

2. The AMWU subsequently appeared at the Full Bench hearing of this matter on 24 October 2014.

3. We continue to rely on the submissions already filed in these proceedings however make these further submissions pursuant to the directions of the Full Bench dated 31 October 2014.

REMOVAL OF THE PROVISION VERSUS VARIATION

4. In the Al Group's submission of 26 September 2014, they stated:

> "*In certain circumstances the operation of this Award clause could be detrimental to the employee as compared to the progressive accrual of annual leave according to the employee's ordinary hours of work. If this is the case, the clause should be deleted.*"

5. We oppose the removal of the provision from the Vehicle Award.

6. We have conceded that the words of the current provision are inconsistent with section 87(2) of the *Fair Work Act 2009* (Cth) (the Act) to the extent that it requires 12-month continuous service before the entitlement is granted. The revised draft determination filed on 16 October 2014 addresses this issue by removing these words.

7. However once these words are removed, the term supplements the NES entitlement by providing a more beneficial entitlement to annual leave for those seven day

shiftworkers who are not engaged as 'regular' seven day shiftworker. It is therefore a necessary provision which must remain in Modern Awards.

8. If the submissions of the Al Group are accepted, and the relevant provision was deleted from Modern Awards, then this would result in a reduction of safety net entitlements, as those employees who only work part of a 12 month period as a seven-day shiftworker would accrue annual leave at the lower rate provided for in section 87(1)(b) of the Act.[1]

9. In considering the submissions of the parties we would submit that the Commission must take into account the history of the provision and the purpose for which it was inserted.

Relevant Case Law

10. The provision providing for additional annual leave for a shiftworker (and pro-rata annual leave for a shiftworker who did not work the entire 12 months as a shiftworker) was first inserted into the *Metals Award* in 1941[2] and in the *Motor Body and Coach Building Interim Award* in 1943.[3]

11. Although the provision was first inserted into these Awards in the early 1940's, the *Locomotive Enginemen's Case*[4] is the first decision we could locate that explained why an additional week of annual leave was awarded to seven day shiftworkers, and confirmed that pro-rated leave would be provided to seven day shiftworkers that worked less than 12 months.

12. In this case, the Court was considering applications to increase the amount of annual leave provided to seven day shiftworkers from 2-3 weeks in relation to various awards, (including the Locomotive Enginemen Award). After taking into consideration various Commission decisions which had increased the amount of annual leave from 2-3 weeks for seven day shiftworker in other Awards, Kelly J noted that "*no principle, rule or practice of the grant of additional annual leave to shift workers generally has been disclosed*".[5]

13. He went on to state the following:

> "*I think the principle of additional annual leave beyond the general prescription has been based by the Court not upon the nature or characteristics of shift worker, but upon the loss by seven-day shiftworkers (without special monetary compensation*

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[1] (AM2014/1 & Ors) Textiles, Clothing & Footwear Union of Australia Submissions in Response dated 15 October 2014 at [17]

[2] Decision in [1941] 45 CAR 701 and Variation [1941] 45 CAR 701 at 775.

[3] [1943] 49 CAR 376. See Annexure 1 of these submissions.

[4] [1948] 64 CAR 509.

[5] Ibid at 519.

therefor) of the regular enjoyment of, and participation in, the religious, family and social opportunities of the traditional Sabbath in our community."[6]

14. Consistent with the principles cited in the Annual Leave case of 1945[7], Kelly J was prepared to increase the amount of annual leave for seven day shiftworkers by one week of 7 consecutive days. Kelly J also noted at that he would order "*proportionate additional leave on the basis of one day for each eight weeks of work as a seven day shift-worker for service as such seven day shiftworker for a lesser period than a year.*"[8].

15. The decision of Kelly J clearly demonstrates that the purpose of the provision was to recognise the unsociable hours worked by these employees through the provision of additional leave to regular seven day shiftworkers. Specific provision was also made to ensure that those who worked less than 12 months received a proportionate amount of annual leave accrual.

16. In light of this case we submit that the provision cannot be deleted. The clause clearly exists to compensate employees that work part of a 12 month period as a seven day shift worker for the inconveniences associated with working this position for an indefinite or "irregular" amount of time. By removing the provision, employees that only work part of a 12 month period as a seven day shiftworker would receive the NES rate of accrual which is less than the entitlement provided by clause 29.5(b) of the Award.

ACCRUAL PROVISION NECESSARY

17. In paragraph [7.3] of their submissions of 15 October 2014, the AI Group have suggested that clause 29.5(b) of the Award is no longer necessary because of the change in how annual leave accrues for shiftworkers. They submit that it was a term which provided a method of calculating the entitlement for employees who were not engaged for the entire 12 month period as a seven day shiftworker in circumstances where the statutory regime nor the Award provided for progressive accrual of Annual leave (hence the requirement for 12 month service).

18. While this may have been the case, the comments from the *Locomotive Enginemen's Case* makes it clear that prorating was specifically provided to cover the scenario where someone is not a permanent "regular seven day shiftworker", i.e. working less than 12 months as a shiftworker and ensured that they did not miss out on the entitlement.[9]

19. As it is dealing with a distinct scenario, and provides a more beneficial entitlement than the NES, it remains a necessary provision.

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[6] Ibid.

[7] [1945] 55 CAR 595

[8] Ibid at 523.

[9] Ibid.

Meaning of 'Regular' shiftworker

20. We also argue that the provision remains necessary given the term 'regularly' is a term that has been judicially considered by the Commission.

21. A 'regular' shiftworker has been determined to be an employee who works 35 Sundays and public holidays per year.[10] We do not concede that 35 Sundays or public holidays is an appropriate number in the context of the Vehicle Award however the case indicates that the word 'regular' has work to do within the clause. If clause 29.5(b) was removed, then it is arguable that employees 'irregularly' working Sundays and Public holidays would never be entitled to the higher shiftworker annual leave entitlement because they would never be considered 'regular' seven day shift workers for the purposes of relevant Award definition and the entitlement under section 87(1)(b) of the Act.

ADDRESSING OTHER SUBMISSIONS OF AI GROUP

22. The AI Group have also submitted at paragraph [7.6] that "*a 7 day shiftworker may have their annual leave calculated by two different rates of accrual from month to month and as a result it is impossible to reach a conclusion that the clause is supplementary to the NES*". We disagree with the analysis of the AIG.

23. This provision is designed to deal with the situation where an employee is an 'irregular' shiftworker; that is an employee who is not permanently engaged as a regular seven day shiftworker and only works part of a 12-month period as a seven day shiftworker. This interpretation is supported by the *Locomotive Engineers Award Case*.[11]

24. An 'irregular' seven day shiftworker would have their annual leave calculated by an additional half day per month (or on a pro-rata basis if time is worked for less than one month). Therefore the scenario contemplated by the AI Group where an employee would have their annual leave calculated by two different rates of accrual from month to month does not arise unless an employer changes a 7 day shift worker roster with regularity. If an employer chooses to place an employee with that much disruption then they must also be prepared for the administrative consequence.

25. The AI Group have also stated at paragraph [7.7] that "*where the clause does not reflect progressive accrual of annual leave based on the ordinary hours of work of a seven day shiftworker, the clause is inconsistent with s 87(2)*".

26. As previously mentioned, to the extent that clause 29.5(b) of the Vehicle Award is inconsistent with section 87(2) of the Act, this can be remedied by the deletion of the words "with 12 months' continuous service" as previously suggested. Once the provision is amended, we submit that the provision is not inconsistent with the

[10] *Re Hospitals Employees Conditions of Employment (State Award)* [1976] AR 275.

[11] Above n 3.

method of accrual under section 87(2) of the Act as the addition of a new sub-clause 29.5(c) in the revised draft determination[12] provides that if an employee works part of a month as a shift-worker, they will accrue leave for the part month proportionate to the leave in (b).

DOES THE PROPOSED VARIATION MEET THE MODERN AWARDS OBJECTIVE?

27. We submit that the proposed variation proposed meets the Modern Awards objective as:

    28.1 Maintaining the provision would ensure additional remuneration is given to employees working on the weekend and public holidays, consistent with section 134(da)(iii) of the Act. Regular shift-workers will fall within the Award definition and access the additional leave entitlement. For those who are engaged for only part of a 12 month period, the additional amount of remuneration provided in subclause 29.5(b) properly compensates employees whose lifestyle is disrupted for working only part of a 12 month period as a shiftworker. This provision therefore supports the modern award objective, particularly at section 134(da)(iii) of the Act.

    28.2 Varying the clause to remedy the inconsistency identified with the relevant NES provision will ensure that the modern award is simple and easy to understand, consistent with the requirement in section 134(g) of the Act.

CONCLUSION

28. For the reasons outlined in these submissions we submit that clause 29.5(b) of the Vehicle Award be varied in accordance with the terms set out in the draft determination filed on 16 October 2014.

21 November 2014

Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU) – Vehicle Division

[12] AMWU – Vehicle Division revised draft determination filed 16 October 2014.

ANNEXURE 1

In the matter of

THE RAILWAY AND TRAMWAY EMPLOYEES AWARD, 1947
(Nos. 380 of 1946; 1 of 1947)

and in the matter of

THE SOUTH AUSTRALIAN RAILWAYS IRONWORKERS ASSISTANTS, ETC., AWARD, 1936
(Nos. 9 of 1928; 89 of 1929)

and in the matter of

THE SOUTH AUSTRALIAN RAILWAYS METAL TRADES GRADES AWARD, 1936
(Nos. 247 of 1926; 39 and 100 of 1928; 89 and 197 of 1929; 81 of 1930; 199 of 1934; 258 of 1935)

and in the matter of

THE LOCOMOTIVE ENGINEMEN'S AWARD, 1948
(No. 265 of 1945).

re THE SOUTH AUSTRALIAN RAILWAYS COMMISSIONER AND THE TRANSPORT COMMISSION, TASMANIA

(Nos. 547, 548, 614, 616 and 620 of 1948).

Variation of award, Railway employees—Annual leave for seven-day shift workers—Commonwealth Conciliation and Arbitration Act 1904-1947 s. 25 (c)—Annual leave for shift workers in other industries—Effect of 40-hour week—Principles governing granting of annual leave—Award varied.

Variation of award, Railway employees, South Australia, Ironworkers assistants etc.—Annual leave for seven-day shift workers—Commonwealth Conciliation and Arbitration Act 1904-1947 s. 25 (c)—Annual leave for shift workers in other industries—Effect of 40-hour week—Principles governing granting of annual leave.—Award varied.

Variation of award, Railway employees, South Australia, Metal trades grades—Annual leave for seven-day shift workers—Commonwealth Conciliation and Arbitration Act 1904-1947 s. 25 (c)—Annual leave for shift workers in other industries—Effect of 40-hour week—Principles governing granting of annual leave.—Award varied.

Variation of award, Locomotive enginemen—Annual leave for seven-day shift workers—Commonwealth Conciliation and Arbitration Act 1904-1947 s. 25 (c)—Annual leave for shift workers in other industries—Effect of 40-hour week—Principles governing granting of annual leave—Award varied.

VARIATION—SOUTH AUSTRALIAN AND TASMANIAN RAILWAY AND LOCOMOTIVE ENGINEMEN'S AWARDS (*re* ANNUAL LEAVE).

The Court.]

The Australian Railways Union, the Boilermakers Society of Australia and the Australian Federated Union of Locomotive Enginemen made application for variation of certain awards operating in the railways industry to which they are parties by increasing the period of annual leave for shift workers in South Australia and Tasmania to not less than three weeks per annum.

HELD that seven-day shift workers are entitled in addition to the annual leave of fourteen days fixed by the Court as a general rule and practice to an additional seven consecutive days annual leave per annum because of the loss to them of the regular enjoyment of and participation in the religious, family and social opportunities of the traditional Sabbath in our community.

1948.
Sydney,
Sept. 2, 3, 6;
Nov. 19.
1949.
Melbourne,
June 23.

Kelly, Foster and Kirby JJ.

On 28th July, 1948, summonses (Nos. 547 and 548 of 1948) were filed on behalf of the Australian Railways Union for orders further varying the above award dated 24th February, 1947,[1] and known as the Railway and Tramway Employees award.

On 23rd August, 1948, a summons (No. 614 of 1948) was filed on behalf of the Australian Railways Union for an order further varying the above award dated 30th June, 1936, as consolidated on 7th July, 1943,[2] and known as the South Australian Railways Ironworkers Assistants, etc., award.

On 24th August, 1948, a summons (No. 616 of 1948) was filed on behalf of the Boilermakers Society of Australia for an order further varying the above award dated 22nd June, 1936, as consolidated on 21st May, 1943,[3] and known as the South Australian Railways Metal Trades Grades award.

On 25th August, 1948, a summons (No. 620 of 1948) was filed on behalf of the Australian Federated Union of Locomotive Enginemen for an order further varying the above award dated 25th May, 1948,[4] and known as the Locomotive Enginemen's award.

These applications came on for hearing before the Court (Kelly, Foster and Kirby JJ.), in Sydney, on 2nd September, 1948.

J. F. Chapple for the Australian Railways Union.

J. O'Toole for the Boilermakers Society of Australia.

G. M. Ridgway and *E. J. Harrison* for the Australian Federated Union of Locomotive Enginemen.

R. R. Robinson for the South Australian Railways Commissioner.

T. V. Barnes for the Transport Commission, Tasmania.

On 19th November, 1948, the following judgments were delivered by the Court:—

Kelly J.:

Summons No. 547 of 1948.

Clause 60 of Part V of the award made on 24th February, 1947,[1] in connexion with disputes numbered 380 of 1946 and 1 of 1947 prescribes that clause 1 of regulation 69 of the South Australian Railways, or any regulation made in lieu thereof, relating to leave of absence shall apply

(1) Serial No. 7371. (2) 50 C.A.R., p. 351. (3) *Ibid.*, p. 111. (4) Serial No. 8565.

to all employees covered by that Part of the award. When promulgating the award Drake-Brockman J. (as he then was) described it as an interim award. He said: "In order to appreciate the actual matters in dispute it is necessary to compare the new claims with existing prescriptions. Owing to the very many occasions the relevant existing awards have been varied there is no document in existence which permits of this being done conveniently and without undue delay. I think therefore it is necessary and desirable for the purpose of expediting the complete settlement of these disputes to issue an interim award which in effect will be a consolidation of all the existing relevant awards, subject to certain exceptions in respect of salaried officers in the Victorian Railways Department." It is evident, therefore, that (subject to the exceptions mentioned) the so-called interim award was not an award in the sense that it settled any of the issues in the new disputes. It is only a convenient consolidation, which might have been made without the occurrence of the disputes, of all "existing prescriptions." In the circumstances I have considerable doubt as to whether this application for variation is competent as a variation of the so-called interim award. In truth the application is one for an alteration of conditions existing prior to the new disputes and the so-called interim award did nothing either to change or to adopt, by way even of an interim settlement of the new disputes, those pre-existing conditions.

The point of the incompetency of the present application was not, however, taken; probably because an alternative application for variation of the appropriate award could with equal facility have been made, had the point been taken and sustained. I think that the Court may treat the application as one for variation of the still existing award and so proceed to deal with it upon its merits.

Clause 1 of South Australian Railways regulation No. 69 deals with the subject of leave of absence for all the employees of the South Australian Railways in a fairly comprehensive form. It provides as follows:—

(a) All employees, except as hereinafter mentioned, shall, on completion of 12 months' continuous service, be entitled to 12 days' annual leave, with pay, each financial year.

(b) For the portion of the year from the date of the termination of 12 months' continuous service until the close of the financial year on June 30th next ensuing, a *pro rata* portion of the annual leave will be granted in continuation of that referred to in sub-clause (a). This adjustment shall be made when the employee first takes his annual leave.

(c) In each succeeding year annual leave shall be granted as for the whole of that year.

(d) Employees whose services are dispensed with before the completion of 12 months' continuous service shall be entitled to annual leave on a *pro rata* basis, subject to the provisions of sub-clause (e) hereof, provided that employees shall not be entitled to claim proportionate annual leave if employed for a lesser period than three calendar months—any fraction of a month in excess thereof to be disregarded.

(e) Sub-clause (d) shall not apply in cases where employees are

dismissed from the service for misconduct, inefficiency or unsatisfactory conduct, or who leave the service of their own accord.

(f) All employees located between Willochre and Marree, inclusive, shall be entitled to two days' extra leave, and employees north of Maree four days' extra leave, if they travel further south than Peterborough when taking their annual leave.

(g) All employees on the Eyre Peninsula lines who cross Spencer's Gulf when taking their annual leave shall be entitled to one day's extra leave if stationed at Cummins and south thereof and two days' extra leave if stationed north of Cummins.

(h) Should an employee after completing 12 months' continuous service resign, be retrenched or dismissed from the service he shall only be entitled to annual leave prescribed herein in proportion to the time worked in that financial year, and where he has already taken out his annual leave for that financial year the proportionate amount of leave to which he is not entitled shall be deducted from his final payment.

The present application is that to the foregoing provisions there should now be added this proviso: that in the case of shift workers the period of annual leave shall be not less than three weeks. It is based upon a claim for comparative justice, the affidavit in support referring simply to the judgment and order of the Court in the *Annual Leave case* of 1945 (1) and to the alleged fact "that since the said judgment was given the Court has awarded one week's additional leave to shift workers in a number of industries."

The respondent, the South Australian Railways Commissioner, opposes the claim upon two grounds, the first being that the additional leisure sought is not justified now that the 40-hour week has been introduced; the second that labour is not available to meet a situation of increased annual leave for shift workers. As to the first, it has been argued that the equivalent of some two hundred hours of additional leisure per annum has been accorded by the grant of the 40-hour week. As to the second, it has been submitted that until the present accumulation of arrears of accrued annual leave has been overtaken, the obligations of the Commissioner in this respect should not be made greater.

It is to be noted that the summons claims the increased period of leave for all shift workers. But the only reference by the Court in its 1945 statement to the allowance of a "quantum of additional leave" was directed to the case of "seven day shift-workers." In other words, the Court contemplated and was prepared to sanction the grant of an extension of leave beyond the general rule of "fourteen consecutive days" (the matter being "left to the discretion and judgment of the single judge or the Court dealing with a dispute or application in any particular industry") in the case of employees whose shifts were so rostered as to require them to work on any of the seven days of the week. But the judgment contains no indication that the Court was prepared to go any further.

The Union's claim for comparative justice has been founded upon

(1) 55 C.A.R., p. 595.

reference made to a number of awards. It, therefore, becomes necessary to examine the awards referred to in order to ascertain what rule or principle in the matter of annual leave for shift workers they can be said to have established or followed. For it is upon that rule or principle that the Union has founded its claim.

The first of the cited awards in order of date is the *Millers and Mill Employees award*, made by Drake-Brockman J. (as he then was) as varied and consolidated on 9th July, 1943.(1) The general prescription of the award was for 'two weeks' holiday on full pay each twelve months," but by sub-clause (a) of clause 16 it was provided that employees "usually engaged on afternoon and night shifts only—that is, when they are not changed to day shifts—for the greater part of any year shall be entitled to three weeks' holiday on full pay each twelve months." That the provision was not accepted by the Court as a general standard may be seen from subsequent awards and most notably from the unanimous judgment in the 1945 *Annual Leave case*.(2) The award was made by consent and not as a result of adjudication.

On 11th December, 1945, an application by the Vehicle Builders Employees Federation of Australia came before O'Mara J.(3) It sought an extension of the annual leave provisions of the *Motor Body and Coach Building Consolidated award*.(4)

Announcing that the order he made could be taken as a settlement of the form in which annual leave would be prescribed in awards operating in industries with which he was concerned, the learned judge prescribed a period of fourteen consecutive days' leave to be allowed annually to an employee after twelve months' continuous service with this single exception: that seven-day shift workers, defined as shift workers who are rostered to work regularly on Sundays and holidays, should be allowed an additional seven consecutive days' leave including non-working time. The order, of course, gave effect in the industry concerned to the Full Court decision in the *1945 Annual Leave case*(2) and His Honour exercised the discretion left to him by the Full Court to fix the "quantum of additional annual leave, if any, to be allowed to seven-day shift workers" (see sub-clause (b) of clause 9 of the Court's statement). It is to be observed that the pre-existing definition of seven-day shift workers and the limitation of the additional leave to them was adhered to and not extended to the other types of shift workers comprehended in clause 17 of the award.

On 21st March, 1946, the *Oven, Stove, Bedstead and Fender Making award*(5) was varied in similar terms. Again, despite the occurrence of other types of shift work, for which provision had been made in the award, in the industry, the additional period of leave—additional to the general prescription—was confined to the seven-day shift workers, those rostered to work regularly on Sundays and holidays.

On 1st May, 1946, Foster J. made a consent order of variation(6) of the *Glass Workers award*.(7) The consenting parties appear to have

(1) 50 C.A.R., at p. 382. (2) 55 C.A.R., p. 595. (3) Serial No. 6902. (4) 49 C.A.R., at p. 393. (5) 56 C.A.R., p. 292. (6) *Ibid.*, p. 435. (7) 25 C.A.R., p. 289.

accepted the principle followed by O'Mara J. in the last two cases mentioned. The general prescription was for fourteen days' leave annually. The additional seven days was again confined to seven-day shift workers, similarly defined.

On 7th May, 1946, an industrial agreement made pursuant to the Act between the Australian Tramway and Motor Omnibus Employees Association and the Municipal Tramways Trust of Adelaide was filed in the Court.(1) It prescribed for traffic men (who were shift workers rostered to work on Sundays and holidays) a period of annual leave of sixteen consecutive days (including Sundays) with payment of fourteen days' wages. In conformity with the Full Court judgment in the *Annual Leave case* this period was extended to twenty-one days with eighteen days' pay to these seven-day shift workers by order of Drake-Brockman J. made on 13th June, 1947.(2) The decision marked the acceptance by Drake-Brockman J. of the principles established by the four other judges of the Court in the Full Court judgment already cited.

The *Agricultural Implement Making award*, 1936, as varied and consolidated by O'Mara J. to 21st March, 1946,(3) contained that judge's usual provision. Again the additional seven days' leave, above the general prescription, was confined to the seven-day shift workers. (See clause 10A.)

The *Engine Drivers and Firemen's (State Electricity Commission) award*, 1942, was the next of the awards referred to by Mr. Chapple on behalf of the applicant Union in support of its claim for comparative justice. By order of 27th June, 1946,(4) O'Mara J. varied this award and included in it a clause securing three weeks' annual leave to employees "on three-shift operation" (see proviso (a) to clause 18). Reference to the shift work provisions of the award suggests that such employees were comparable with those defined in that judge's other awards as seven-day shift workers.

The *Timber Workers award*, 1941, as consolidated,(5) also contained (in clause 17) the usual general prescription of fourteen consecutive days' leave, the only exception being in the case of the seven-day shift workers. Again it is apparent that the award comprehended other types of shift work than "seven-day" shift work. (See clause 15.)

On 27th June, 1946, O'Mara J. incorporated by variation order(6) his usual provisions concerning annual leave in the *Engine Drivers and Firemen's award*, 1940.(7) The seven-day shift workers, to whom alone the additional leave was granted, were far from being the only shift workers comprehended by the award.

The next of the awards referred to by Mr. Chapple is the *Metal Trades award*, 1941, a consolidation of which as varied was by direction given on 13th September, 1946.(8)

(1) 56 C.A.R., p. 782. (2) Serial No. 7743. (3) 56 C.A.R., p. 722. (4) *Ibid.* at p. 711. (5) 57 C.A.R., p. 139. (6) *Ibid.*, at p. 249. (7) 42 C.A.R., p. 619. (8) 57 C.A.R., p. 278.

"Careful consideration has been given," said O'Mara J., referring to the claims of the Unions in respect of annual leave, "to the inclusion of each of the provisions which have been left to the discretion of individual Judges and I have decided that regulation on the lines of the draft is adequate."(1) By clause 20, he prescribed annual leave of fourteen consecutive days as a general standard confining to seven-day shift workers, again defined as shift workers who are rostered to work regularly on Sundays and holidays, the additional period of seven days, including non-working days.(2) On 18th April, 1947, employees of the State Electricity Commission of Victoria were excluded from the operation of clause 20 of the Metal Trades award, by order made by Sugerman J.(3) and brought under the provisions of the State Electricity Commission annual leave regulations. No doubt the purpose was to give effect to the principle of uniformity within the employer's enterprise enjoined upon the Court by the Act, although the reason for the change is not reported.

The *Gas Employees awards* were varied by Foster J. on 19th September, 1946,(4) so that "shift workers after one year of service" received three weeks' annual leave. His Honour alluded to the fact that the counsel for the Metropolitan Gas Company had agreed that seven-day shift workers should have twenty-one days of leave after one year's service and also to the prior decision of Piper C.J. where that judge had said "I think . . . that the equitable method, under all the peculiar circumstances of this industry, is to give effect to the principle already recognized by the Australian Gas Light Company that long service should have some recognition, but to give effect to it by granting extra annual leave after a certain number of years of service." Foster J. accordingly maintained "the classification of workers for annual leave benefit which has long been a feature of these Gas awards."(5) It was thus that the exceptional grant of additional leave to all "shift workers after one year of service" was included. The case was an exceptional one based upon past prescriptions in the particular industry in order to meet its peculiar exigencies.

Next in order of date are the two orders made by Mr. Conciliation Commissioner Mooney in the 1943 awards with respect to the engine drivers and firemen of the Melbourne City Council. They were made on 19th December, 1946.(6) In them the class of "three-shifts workers" was granted an additional week's (in all three weeks') annual leave. The orders were made by consent and not by adjudication.

On 3rd July, 1947, Sugerman J. made three new awards for textile workers.(7) In each of them the additional leave beyond the general standard of fourteen consecutive days was confined to the limited class of "seven-day shift workers, that is shift workers who are rostered to work regularly on Sundays and holidays." There was thus no deviation from what had become established as a general rule applicable to the subject of annual leave, from which departures had been made only on account of exceptional circumstances and by consent.

(1) 57 C.A.R., at p. 283. (2) *Ibid.*, at p. 316. (3) Serial No. 7614. (4) 57 C.A.R., p. 367. (5) *Ibid.*, at p. 370. (6) Serial Nos. 7389, 7390. (7) Serial Nos. 7647, 7649, 7702.

Kelly J.]

It was by consent that Mr. Conciliation Commissioner Stewart in the *Municipal Officers (Melbourne City Council) case* of 1947[1] extended the three weeks' period to all "three-shift workers." Other shift workers, however, remained under the general prescription. The exceptional classification was in accordance with past practice and prescription. It was also pursuant to agreement (filed under Part VI of the Act) that engine-drivers and firemen in the employment of the State of Tasmania and working on shifts were accorded three weeks', instead of two weeks', annual leave.[2]

The *Aircraft Industry award*, 1938 , was varied by O'Mara J., and directed to be consolidated, on 25th July, 1946.[3] Clause 19 indicates the variety of shift work arrangements comprehended. The sole exception to the general fourteen days' prescription was in the case of the seven-day shift workers as previously in other awards defined (see clause 18).

The last of the comparisons invited by Mr. Chapple, as set out in his statement, is with the Federated Millers and Mill Employees Association of Australian agreement with David Ritchie and Son Pty. Ltd. and others, which, however, did no more than to extend to the employees of the employers parties thereto the provisions of the consent award of 9th July, 1943,[4] to which reference has already been made.

Examination of the awards and agreements made or filed in the Court, which have been submitted on behalf of the Union in support of its claim, put it altogether beyond doubt that the general practice and rule of the Court has been to allow a period of fourteen consecutive days of annual leave after twelve months' consecutive service to all employees who are not seven-day shift workers, as defined in the awards of O'Mara and Sugerman JJ., and to allow these latter a period of seven days of annual leave in addition thereto. To claim conformity with that general rule or practice is as far as the applicant Union can take its case in so far as that case is based upon the decisions of the Court and the Conciliation Commissioners as cited in the proceedings before us. It is necessary, however, to go further with one's examination of the Union's claim; for, during the hearing of its application, it extended its ground by references to some further documentary evidence presented by it. Upon examination of the first of these documents—the Queensland Railway award[5]—it appears that the Industrial Court of that State has dealt with the matter of annual leave by inclusion in the award of the following provision—clause 83 (1) (a)—

> "Employees (other than those employed on shift work, where three shifts per day are worked over a period of seven days per week who shall be granted three working weeks' leave of absence on full pay in each year) shall be granted two working weeks' leave of absence on full pay in each year, and, in addition to this, one day's extra leave for each year they have been in the service over eight years, provided that such extra leave does not exceed one working week."

The principle of additional annual leave after a period of service over some years is one which has not been adopted by this Court. Moreover

(1) Serial No. 7695. (2) Serial No. 7578. (3) 57 C.A.R., p. 30. (4) 50 C.A.R., at p. 382. (5) Q.I.G., vol. CLXX, No. 170.

the present application is not aimed at its adoption in the industry covered by this award. The general prescription of two working weeks' leave per annum for all except shift workers working in three shifts per day on seven days a week and of three working weeks' leave for these latter is altogether in line with the rule of this Court. In my opinion the Queensland award supports the present claim no further.

We were next referred to the position in New South Wales. In that State the *Government Railway Act* 1912-1945, according to the information placed before us, provides that every officer in the service shall be entitled to at least two weeks' leave on full pay in respect of each twelve months of actual service, in addition to bank and public holidays observed throughout the State. We were told that by Commissioners' Circular No. 32 of 29th December, 1932, "good conduct leave" up to one week per annum was continued for drivers, firemen, guards, shunters, signalmen, porters-in-charge engaged in safe-working duties, and block porters in the Traffic branch, and fettling gangers and extra gangers in the Permanent Way branch. Whether all of these classifications comprised employees who are seven-day shift workers was not made clear. I think it may be assumed that they did not. It is possible that many of the employees to whom the additional "good conduct leave" had been granted were not seven-day shift workers. But it is significant that, as from 1st January, 1948, the additional "good conduct leave" was extended to all wage employees "who, in their ordinary hours for the fortnight, are engaged on continuous shift work, that is, work carried on with consecutive shifts of employees throughout the twenty-four hours of each day, Sundays and holidays included." Thus the extension was confined to such seven-day shift workers as had not theretofore enjoyed the additional period of leave. The present claim is not one for "good conduct leave"; it is for the prescription of an absolute, not a conditional, additional period of leave for all shift workers. But apart from this, when it goes for support to the position in the New South Wales railways, it cannot be considered without regard to the limitations of the extension of "good conduct leave"—the additional period of leave—to seven-day shift workers as defined.

So far as the Victorian service is concerned, the relevant reference is to sub-clause (a) of clause 30 of Part I of the award.[1] It reads:—

> "30. (a) Subject to sub-clauses (b), (c) and (d) hereof every employee (other than a casual) shall be granted annually the following leave of absence with pay:—
>
> (i) Any employee after completion of five years' service or any employee who has completed one (*sic*) less than five year's service who is regularly on shift work and rostered to work on Sundays and/or holidays specified in clause 29 of this Part—Three weeks.
>
> (ii) Any other employee who has completed at least one year's service—Two weeks."

As I have said, the principle of additonal leave after completion of a number of years of service is not advocated by the summons in this case. Nor is it a principle which the Court has adopted as one of general application. It was not sanctioned by the Full Court in the 1945 *Annual Leave case.*[2] As explained to us the clause gives three weeks' leave to

(1) Serial No. 7371, at p. 46. (2) 55 C.A.R., p. 595

(1) employees of over five years' service, and (2) employees employed regularly on shift work and rostered to work on Sundays and holidays. It seems that "but" should be inserted after "one" in paragraph (i) of the sub-clause.

We have also been told by Mr. Chapple that "the Commissioners have given what they term a liberal interpretation to the words 'regularly on shift work' and that they have granted three weeks' leave to practically all workers other than day workers."(1) Whether "practically all workers other than day workers" includes any shift workers not rostered for work on Sundays and holidays has not, I think, been made clear. But supposing it does, the extension of the additional leave to them, like the "liberal interpretation" of the words "regularly on shift work" would be matters which, though agreed to, are plainly beyond the true interpretation of the award. The principle adhered to in the clause itself is closely akin to the principle of the Court to which reference has already been made. The fact that one employer may choose to "interpret" his obligations "liberally," i.e. to concede more than he is required to grant, should not be used to force a departure from the general rule and practice of the Court when it is called upon to give an adjudication on a claim against other employers bound by the same award. The preponderance from the point of view of comparative justice, which after all is the basis of the claim, is beyond doubt with the large number of prescriptions by the Court which have established or are in line with its general rule and practice. It is by reference to them and to the conduct of employers and employees under them that the so-called principle of uniformity as a guide to relative justice must be sought, and not to the conduct of a particular employer who may be prepared to go further than his award obligations require. It would lead to great instability and confusion and certainly encourage constant dissatisfaction if an arbitration authority were to hold that settlements of disputes might be reopened whenever an employer covered by an award was prepared to grant more than the minimum obligations thereby prescribed. Moreover, in this particular case the Court is unaware of the circumstances which may have prompted the Victorian Commissioners to exceed their award obligations, if they have done so. The circumstances may have been peculiar to the exigencies of the Railways service in Victoria; they may not be equally applicable to the Railways service of South Australia.

An extract from determination No. 50 of 1945 (as amended) of the Public Service Arbitrator indicates that employees of the Commonwealth Railways who work not less than twenty-four hours a week receive three weeks' recreational leave, exclusive of public holidays, in respect of each year of continuous service. The significance of this determination is that it does not distinguish between shift workers and others. In this aspect it cannot be said to support the principle of differentiation which is the basis, not only of the decisions of the Court, but also of the present summons.

Finally, we have had submitted to us an extract from what purports to be a current Railways award of the Western Australian Court of Arbitra-

(1) Transcript at p. 7.

tion whereby the same general prescription of approximately a fortnight's leave—actually "two weeks and two days"—has been accorded to most employees, the exception in this case being in the case of drivers and firemen who have been granted three weeks. We have not been informed of the details of the shift work performed by drivers and firemen in the Western Australian service.

The conclusion which, in my opinion, is inescapable from the evidence and references submitted to the Court is that no principle, rule or practice of the grant of additional annual leave to shift workers generally has been disclosed. On the contrary it seems clear that the norm or rule to be applied here is of a limitation of the additional leave, beyond the general prescription of "two weeks" or "fourteen consecutive days" or a "fortnight," to the case of shift workers whose employment involves working on any day of the week, not excluding Sundays or holidays.

The claims for additional leisure for employees generally have recently received very considerable attention in the 40-hours case. Leisure can, of course, be achieved by weekly as well as by annual recesses. The 40-hour judgment(1) which has operated since the beginning of this year to reduce the standard working hours in industry generally, and has been applied in the industry covered by this part of this award, has brought about a considerable increase in the leisure of the employees here concerned. The additional leisure, made available week by week, was claimed as a boon which would be of great benefit to the employees. It is, in my view, just and proper that the South Australian Commissioner should, in opposing the present further claim, point, as he has done, to the benefit of the 40-hour week, so recently accorded. At the same time the justice of applying the general standard of the Court in the matter of annual leave cannot be denied. The present shortage of labour, the existence of arrears of annual leave, owing for past services, the cost of meeting any added obligations and the voluntary grant of other valuable concessions do not, in my opinion, provide a conclusive answer to the claim for application of that standard.

It is clear, I think, that the principle of additional annual leave, beyond the general prescription, has been based by the Court not upon the nature or characteristics of shift work as such, but upon the loss by seven-day shift workers (without special monetary compensation therefor) of the regular enjoyment of, and participation in, the religious, family and social opportunities of the traditional Sabbath in our community.

I would, therefore, accord to the seven-day shift workers, that is to say, to shift workers who are regularly rostered to work on any of the days of the week, not excluding Sundays and holidays, the benefit of an additional seven consecutive days of annual leave on full pay. But in my judgment there is no justification for extending, on the ground of comparative justice, the additional period to other types of shift workers than these. I would, however, be prepared to include in the order proportionate additional leave on the basis, say, of one day for each eight weeks of work as a seven-day shift worker as above defined.

(1) Serial No. 7703.

Kelly J.]

Summons No. 548 of 1948.

Clause 71 of Part VI of the 'interim award" made in disputes numbered 380 of 1946 and 1 of 1947,(1) prescribes in respect of employees of the Transport Commission, Tasmania (Railways Branch), who are members of the Australian Railways Union or the National Union of Railwaymen of Australia as follows:—

> "71. (a) Officers and employees (including temporary employees and casual employees) shall be granted leave annually as follows:—
>
> Officers—eighteen days.
>
> Foremen in the Way and Works Branch—eighteen days.
>
> All employees other than foremen in the Way and Works Branch—twelve days."

As I have mentioned in the South Australian case (No. 547 of 1948), the "interim award" is merely a convenient consolidation of pre-existing prescriptions.

The Australian Railways Union seeks a variation of the foregoing provision by adding in effect the words "and shift workers" to the words "Foreman in the Way and Works Branch." In other words, it seeks the extension of the additional six days' leave, beyond the twelve days granted to all other employees by the clause, to all shift workers.

The claim of the Union was put forward on the same grounds as those upon which it relied in the South Australian case. For the reasons given in the judgment delivered by me in that case, I am of opinion that a similar order to that which I proposed in that case should be made in this. I do not propose to repeat the results of my examination of the evidence and the references submitted by the Union. In conformity with the form of clause 71 I would be prepared to insert the words "and seven-day shift workers, that is to say, shift workers who are regularly rostered to work on any of the days of the week, not excluding Sundays and holidays" after the words "Foremen in the Way and Works Branch." I would also be prepared to support a provision for proportionate additional leave for this class of shift-workers on the basis of, say, one day for each eight weeks of work as a seven-day shift worker as above defined.

Summons No. 614 of 1948.

Clause 4B of Part 4 of the South Australian Railways Ironworkers' Assistants etc. award, as consolidated on 7th July, 1943(2) prescribed that clause 1 of regulation 69 South Australian Railways or any regulations made in lieu thereof relating to leave of absence should apply to all employees covered by the award. The effect is that, subject to some few extra days granted to employees located in more remote parts of the State, the general prescription of annual leave with pay for all employees is of 12 days, in respect of each financial year.

The application now before the Court is for the addition to clause 4B of the award of a proviso that in the case of shift workers the period

(1) Serial No. 7371. (2) 50 C.A.R., at p. 352.

of annual leave shall not be less than three weeks. It is identical with the application made by the same applicant, the Australian Railways Union, for variation of clause 60 of Part V of the general Railway and Tramway Employees award (application No. 547 of 1948.) Moreover, it is put forward upon exactly the same grounds—the Annual Leave judgment of 1945, the allegation that, since it was given, the Court "has awarded one week's additional leave to shift workers in a number of industries" and that the shift workers, the subject of the application "suffer disabilities substantially similar to the shift workers in those industries in which the additional leave has already been awarded."

In the course of my judgment in the other application mentioned I have examined the evidence put before the Court in support of the Union's claim. I have pointed out that it establishes that the rule and practice of the Court is that a period of two weeks' leave be granted to employees generally with this exception: that seven-day shift workers, that is to say, shift workers who are regularly rostered for work on any of the days of the week, not excluding Sundays and holidays, should receive an additional week's leave. No ground has been shown for a departure from this general rule and exception.

For the reasons given by me in the judgment to which I refer, which I see no occasion to repeat, I would make an order similar to that proposed by me in connexion with clause 60 of Part V of the general award.

Summons No. 616 of 1948.

Clause 5AA of Part 4 of the South Australian Railways Metal Grades award as varied by the late Mr. Conciliation Commissioner Rowlands on 9th January, 1947,[1] prescribes that clause 1 of regulation No. 69 South Australian Railways or any regulation not less advantageous to employees made in lieu thereof shall apply to all employees including (notwithstanding the provisions of sub-clause (e) of the said regulation) employees who leave of their own accord. The result is that generally speaking all the employees of the South Australian Railways Commissioner receive a fortnight's annual leave—the regulation says twelve days—with pay. "Extra leave" is granted to employees located in the more remote parts of the State. No distinction is made as between day workers and shift workers in respect of annual leave.

The Boilermakers Society of Australia now applies for the addition of the following proviso to the clause in the award:—

> "Provided that in the case of shift workers the annual leave shall be not less than three weeks."

The claim has been advanced upon grounds similar to those put forward in the Australian Railways Union applications, judgments in connexion with which I have handed down to-day. For the reasons already expressed in respect of those applications, I am prepared to grant the application insofar as seven-day shift workers, that is to say, shift workers who are regularly rostered for work on any of the days of the week, not excluding

(1) Serial No. 7397.

Sundays or holidays, are concerned. As I have said a departure from the general rule and practice of the Court is not, upon the evidence and submissions put to us, warranted.

Summons No. 620 of 1948.

No satisfactory explanation has been offered to the Court of the delay in bringing for adjudication a claim made in a dispute which occurred in 1945. The affidavit in support of the present application states that the dispute was referred to the Court by order made under section 19 (d) of the Act of 1904-1946 on 30th July, 1946. We have not been told why the claimant Union did not pursue its claims earlier, or, if it encountered difficulties in doing so, what they were. Now, more than a year after the reference, the matter with which the Court is now concerned has been brought before it by a summons taken out by the applicant Union on 26th August, 1948.

Other matters in issue in the dispute were dealt with by Mr. Conciliation Commissioner Stewart on 25th May, 1948. He then issued an award(1) including therein clause 41 in terms of previous provisions dealing with the subject of annual leave. The provisions are as follows:—

> "(a) The subject of annual leave shall be at the discretion of the employer except in the case of employees of the Victorian Railways Commissioners to whom the provisions of sub-clause (b) hereof shall apply.
>
> (b) (i) Subject to paragraphs (ii), (iii) and (iv) hereof, every employee (other than a casual) shall be granted annually the following leave of absence with pay:—
>
> (1) Any employee after completion of five years' service or any employee who has completed one but less than five years' service who is regularly on shift work and rostered to work on Sundays and/or public holidays specified in clause 43 of this Part—three weeks.
>
> (2) Any other employee who has completed at least one year's service—two weeks. . . ."
>
> (c) In regard to employers other than the Victorian Railways Commissioners the subject of annual leave shall be at the discretion of the employer provided that his employees covered by this Part shall not receive less favourable treatment than the majority of other transportation employees in his service, and provided further that the provisions of this sub-clause shall be without prejudice to the right of the Union to further prosecute its claim in this behalf."

For present purposes paragraphs (ii), (iii) and (iv) of sub-clause (a) are not directly relevant to the present application.

The foregoing provisions are similar to those contained in sub-clause (a) of clause 30 of Part I of the general Railway and Tramway Employees award.(2) I refer to what I have said about them in the course of my judgment in the Australian Railways Union application for variation of the general award (application No. 547 of 1948) and particularly to the fact that the principle thereof is closely akin to that of the Court, namely, that the only class of employees to whom additional leave, beyond the general prescription of a fortnight, has been accorded is that of seven-day shift workers, that is to say, of shift workers who are regularly rostered to work on any of the days of the week, not excluding Sundays or holidays.

(1) Serial No. 8565. (2) Serial No. 7371, at p. 46.

The Australian Federated Union of Locomotive Enginemen has included in its log of claims in connexion with the dispute the following demand:—

"*Annual Leave.*

(Victoria, South Australia and Tasmania only.)

"31. Employees of the Victorian, South Australian and Tasmanian Railways Commissioners shall be granted annually three weeks' leave of absence on full pay exclusive of public holidays. Payment shall be made for proportionate leave based upon the number of months since the date on which his leave became due to any employee who is retired, resigns or is dismissed, or dies."

In accordance therewith the present summons seeks an award of three weeks' annual leave with pay for all members of the claimant organization employed by the Transport Commission of Tasmania or by the South Australian Railways Commissioner.

As I have elsewhere indicated, the general rule laid down by the Full Court in the *Annual Leave case* of 1945, a decision made prior to the reduction of standard hours of work to 40 per week, was of a fortnight's leave with pay per annum. The Court, bearing in mind the special addition, contemplated in its earlier annual leave judgment,[1] of leave for seven-day shift workers, was prepared to authorize the grant by single judges of an additional period of one week for that class of shift workers. But it went no further. And when the single judges came to exercise the discretion left to them in this connexion the class of employees to whom the additional leave was granted was, generally speaking, somewhat rigidly defined. It can be said that the additional leave has, as a matter of general practice as well as relative justice, been limited to the case of shift workers who are regularly rostered for work on any of the days of the week, not excluding Sundays and holidays. I have, in my judgment on the application to which I have already referred, indicated the basis upon which the additional leave has been granted. Whether the Full Court which decided the 1945 *Annual Leave case* would have made the same general order, had the standard hours of work in industry been of forty and not of forty-four hours per week at the time of its decision, can only be a matter for conjecture. The fact is that the increased leisure then accorded has been further increased by the 40-hours decision. The 40-hour week has been only recently introduced, in fact, only since the beginning of this present year. In my opinion, bearing in mind the continued shortage of labour in industry generally as well as the additional leisure accorded by the 40-hours decision, the time is not ripe to review the standards of the Court in respect of annual leave, at any rate with a view to further increasing paid leisure.

For reasons which I have given in connexion with the other applications dealt with to-day, I hold strongly that no extension of annual leave concessions beyond the standards laid down or sanctioned by the 1945 judgment should at present be allowed. Accordingly I would go no further than to order that seven-day shift workers, by which I mean those who are regularly rostered for work on any of the days of the week, not

(1) 44 C.A.R., at p. 179.

Kelly J.]

excluding Sundays and holidays, should be allowed an additional period of seven consecutive days of leave in or for each year. For service as such seven-day shift workers for a lesser period than a year I would include in the order proportionate additional leave at the rate of one day for every eight weeks of such service. Such an order should be limited to cases in which the general prescription of annual leave for employees in the industry covered by an award does not exceed fourteen consecutive days.

Foster and Kirby JJ.:

We think the awards governing the members of the Australian Federated Union of Locomotive Enginemen; the Australian Railways Union and the Boilermakers Society of Australia in South Australia and Tasmania, in respect of annual leave for shift workers should be brought into substantial uniformity with the awards of the members of those organizations covered by Federal awards in other States, and that the first-mentioned awards should be varied accordingly.

With the assistance of the parties and for the help of the Court we suggest that the Conciliation Commissioner in charge of the industry be requested to draw up the appropriate variations for these classifications. These matters are obviously much more familiar to him.

On 23rd June, 1949, the Court issued orders varying the respective awards which orders are printed and published separately—see infra, p. 525 (Railway and Tramway Employees award), infra, p. 527 (South Australian Railway Ironworkers Assistants, etc., award); infra., p. 528 (South Australian Railways Metal Trades Grades award) and infra, p. 529 (Locomotive Enginemen's award).