



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

**JUSTICE HATCHER, PRESIDENT
VICE PRESIDENT ASBURY
COMMISSIONER SPENCER**

s.739 - Application to deal with a dispute

**Application by Aurizon Operations Ltd T/A Aurizon
(AG2023/110)**

**Australian Federated Union of Locomotive Employees
and
Aurizon Operations Ltd T/A Aurizon Bulk Queensland
(C2022/7178)**

Brisbane

10.16 AM, TUESDAY, 9 MAY 2023

Continued from 13/03/2023

PN1

JUSTICE HATCHER: Please be seated. I will take the appearances. Mr Massy, you appear with Mr Rich for the AFULE?

PN2

MR C MASSY: That is so.

PN3

JUSTICE HATCHER: And, Mr Williams, you appear with Mr Walthall and Ms Smith for Aurizon?

PN4

MR D WILLIAMS: That is correct, your Honour, yes.

PN5

JUSTICE HATCHER: All right. Both parties are granted permission for legal representation. In respect of the objections which the parties have filed unless we're persuaded otherwise we propose just to note the objections, admit the material and the parties can make submission about what use that material can be made, both in relation to the issue of interpretation and the variation application.

PN6

MR WILLIAMS: That's an agreed position at the Bench, your Honour.

PN7

MR MASSY: Can I just hand up to the Full Bench a document which summarises the response from the AFULE to the objections - - -

PN8

JUSTICE HATCHER: All right.

PN9

MR MASSY: - - - which identifies which of those objections are conceded and which - sorry, which of the passages of evidence are conceded and which are still pressed. But I don't wish to trouble the Full Bench with that now.

PN10

JUSTICE HATCHER: All right, we will note that.

PN11

MR MASSY: Might I also deal with one other preliminary matter, which is an order that the parties propose, which provides that evidence in one proceeding will be evidence in the other.

PN12

JUSTICE HATCHER: Yes.

PN13

MR MASSY: Might I hand up a draft - the intention is obviously to avoid any confusion as to whether material in one proceeding can be used in the other.

PN14

JUSTICE HATCHER: Yes, we make that order.

PN15

MR MASSY: If it's convenient to the Full Bench my learned friend and I had agreed that it would be best if the AFULE went first.

PN16

JUSTICE HATCHER: Yes.

PN17

MR MASSY: And in those circumstances I had proposed to make a very brief opening and then call the AFULE's witnesses.

PN18

JUSTICE HATCHER: Yes.

PN19

MR MASSY: In circumstances where there are written statements of evidence and outlines of submissions filed I hadn't thought that a detailed opening would be particularly helpful. However, I thought it might assist if I outlined in very broad terms how it is the AFULE puts its case.

PN20

The matter comes before the Full Bench on a dispute notification filed by the AFULE. The dispute arises out of the rostering practices at the Toowoomba and Goondiwindi depots. Currently master rosters are being produced at those two depots which do not include a start time for 70 per cent of the shifts to be worked by employees. The AFULE contends that on its proper construction clause 77.1 of the enterprise agreement requires that the master roster contain a start time for 70 per cent of the shifts for employees during the period of that roster.

PN21

Aurizon has filed an application pursuant to section 218A. However, that application does not fall to be determined unless the Full Bench is with the AFULE on the dispute and the proper construction of clause 77.1. That is how I understand the way in which it's being put from Aurizon, but it only really arises if the Full Bench is with the AFULE.

PN22

Now, in respect of the dispute notification the AFULE's principal position is that Aurizon's response to the dispute is an abuse because the proper construction of clause 77.1 and the extent of the obligations imposed by it have been settled as part of an earlier dispute under the dispute settlement clause.

PN23

Mr McKittrick gives evidence of a dispute in 2020 which is consistent throughout the state about the production of master rosters. That dispute was the subject of two separate notifications to the Commission. The dispute was ultimately resolved in writing. The critical part of the settlement is contained in Mr

McKittrick's first statement at page 295. There's an email between Mr Fulton and Mr McKittrick. I won't read it out now, but that is the passage we rely upon.

PN24

The AFULE will contend that the subject matter of the disputes which were the subject of that settlement were the proper construction of clause 77.1. The settlement was to the effect that clause 77.1 would be interpreted in a particular way and given effect to in that way. It will be the AFULE's contention that it is now not open to Aurizon to contend that the agreement should be construed differently.

PN25

It will be the AFULE's position that there is no room in the words used in that settlement to read in any implication that the requirement to roster a start time on 70 per cent of the shifts is dependent upon the existence of a master train plan. I won't take the Full Bench to it now, but it's well established that once a matter is litigated and determined it's an abuse of process for a party to seek to relitigate the substance of that subject matter - I'm sorry, the same subject matter that was dealt with in the earlier proceeding.

PN26

There is also authority that those principles apply in respect of an arbitration conducted pursuant to an enterprise agreement, and there is authority to the effect that the same proposition arises in respect of settlements obligation. That is if the case is settled it's an abuse to seek to relitigate the same subject matter.

PN27

Now, so there's no confusion the AFULE doesn't say there's no jurisdiction for the Commission to deal with the matter. The AFULE simply says that consistent with principle the Commission should not entertain Aurizon's attempt to depart from the earlier agreement as to the proper construction of clause 77.1.

PN28

JUSTICE HATCHER: Mr Massy, as I understand what the company says it is that on this grain contract that irrespective of how the agreement is going to be construed, that is even if its construed in the union's favour it can't comply with it because of the nature of the work. What does the union say about that?

PN29

MR MASSY: I don't understand their position to be they can't comply with it because they were. I think it causes some difficulty for the operations. And in my submission consistent with the scheme of the Act the proper way for that to be resolved is by way of a variation.

PN30

JUSTICE HATCHER: And has that been discussed at some stage; that is an appropriate variation that might deal with this circumstance?

PN31

MR MASSY: It hasn't, but it is a matter, in my submission, which could be the subject of variation. There has been already one variation of the agreement, and

there's no reason why, in my submission, that this couldn't be the subject of variation.

PN32

Now, can I say, returning to the way in which the AFULE puts the case, in the event that the Full Bench is against the AFULE on the effect of the earlier settlement and the Full Bench finds that the settlement is limited to the two particular disputes which were raised in the two particular depots, our choice is that we will say that that doesn't help Aurizon because the same words in clause 77.1 can't mean one thing in Rockhampton and Hughenden, and something different in Toowoomba and Goondiwindi. If clause 77.1 is to be construed in a way described in the settlement then it must mean that for everyone.

PN33

Finally, the AFULE will contend that even if the Full Bench is against it on the abuse point the Full Bench undertaking the construction exercise afresh should construe clause 77.1 as requiring an actual start time to be included for 70 per cent of the shifts. The AFULE will accept that the phrase 'known workings' which is used in clause 77.1.1 is unusual and a difficult phrase to come to grips with. However, it will be the AFULE's contention when one has to regard to the context provided for by the agreement, the words in clause 77.1.1, and the context provided for by the history of the rostering clause, the AFULE's construction should be preferred. On that basis the AFULE will contend that the answer to the question for arbitration should be 'No'.

PN34

Now, I will come to it in some detail in the closing submissions, but touching on a matter which is raised by the objections so there can be no confusion, the AFULE accepts that the Full Bench in Berri left open the prospect that negotiations might be capable of being admitted for the purposes of assisting in the resolution of the proper construction of an agreement. In my submission the review of the authorities suggest that having regard to the evidence that will be called in this matter the evidence on the negotiations in this case will be of no assistance.

PN35

Putting aside debates about whether people are talking about subjective intentions or expectations, the evidence in this case the AFULE contends does not reveal any objective facts of the type permitted by the authorities. Secondly, and this is a matter arising from what Rares J said in the *ANPA v Qantas* matter, there's no evidence that any of those negotiations were put before the employees who are parties to the agreement, and that presents a fundamental hurdle to it being admissible to the objective intentions of those parties.

PN36

JUSTICE HATCHER: Given that the evidence is going to both matters do you accept it might be the case that evidence that can't be used to construe the agreement could if we got to it be used in aid of a position in respect of the 218A application?

PN37

MR MASSY: That largely depends on the construction the Full Bench adopts about the section 218A. For the reasons that I am about to identify now it's the AFULE's position that section 218A should be construed as the equivalent to the slip rule for agreements, and if that construction was adopted (indistinct) intention type evidence would only be relevant to explain the existence of a mistake, but ultimately couldn't assist in establishing that the agreement had departed from the objective intentions of the parties.

PN38

Section 218A is in materially the same terms as section 602. Section 602 has previously been construed as a repetition of the statutory form of the slip rule. That construction is also consistent with the explanatory memorandum which expressly identifies that purpose. It will be the AFULE's contention that the slip rule is available in circumstances where there has been an unintentional departure from the objective intention of the court.

PN39

Considering orders or judgments it's been well accepted that the slip rule is not available unless it's certain that the court would have come to the outcome sought in the amended order. If the change to the order is a matter of controversy or debate the slip rule is not available. When I say controversy or debate I don't mean whether it's opposed, I mean whether there is some doubt as to whether the court would have made the order in that form.

PN40

The order sought to be rectified or amended has to go without saying would be the AFULE's contention. The AFULE submit that those principles should be adopted in respect of section 218A, and the section should be reserved to circumstances where the agreement contains a mistake, defect or irregularity which departs from the objectively ascertainable intention of the parties.

PN41

The AFULE will contend that the Aurizon application seeks to have the Commission make amendment to the agreement on a merits-based review of what Aurizon considers will be an appropriate bargain. The AFULE will contend that that is not an obvious error, defect or irregularity in the sense contemplated by section 218A. Unless there are any other questions I propose to call Mr McKitrick.

PN42

JUSTICE HATCHER: All right. So who's the first witness?

PN43

MR MASSY: Michael McKitrick.

PN44

THE ASSOCIATE: I will just have you state your full name and address for the record, please.

PN45

MR MCKITRICK: Yes. Michael John McKitrick, (address supplied)

<MICHAEL JOHN MCKITRICK, AFFIRMED

[10.29 AM]

EXAMINATION-IN-CHIEF BY MR MASSY

[10.29 AM]

PN46

MR MASSY: Thank you, Mr McKitrick. Could you please state your full name for the record?---It's Michael John McKitrick.

PN47

What's your current occupation?---I am the State Secretary of the AFULE.

PN48

And your current address?---(Address supplied.)

PN49

Have you made a statement in this matter dated 3 April 2023?---I have.

PN50

Are there any corrections or amendments you wish to make to that statement?---There are.

PN51

What paragraphs do they relate to?---At paragraph 47, 48 and 64.

PN52

And what is the correction you wish to make to those three paragraphs?---In relation to those paragraphs there I speak about the committee has given a master train plan. I wish to amend that to be the committees have provided details of train services, not the actual master train plan. So that could be an Excel spreadsheet or it could be a Word document with just times on it.

PN53

Thank you. Other than that with those changes are there any other changes you wish to make to the statement?---No, I don't.

PN54

Is it otherwise true and correct?---It is.

PN55

I tender that.

**EXHIBIT #1 STATEMENT OF MICHAEL MCKITRICK DATED
03/04/2023**

PN56

Mr McKitrick, have you made a further statement dated 21 April 2023?---I have.

PN57

Do you have it with you?---I do.

*** MICHAEL JOHN MCKITRICK

XN MR MASSY

PN58

And are there any corrections or amendments you wish to make to that statement?---There is not.

PN59

Is it otherwise true and correct?---It is.

PN60

I tender that statement.

**EXHIBIT #2 FURTHER WITNESS STATEMENT OF MICHAEL
McKITRICK DATED 21/04/2023**

PN61

Mr McKitrick, have you made a third statement dated 3 May?---That's correct, I have.

PN62

Are there any corrections you wish to make to that?---No, there is not.

PN63

Is it otherwise true and correct?---It is.

PN64

I tender that.

**EXHIBIT #3 REPLY STATEMENT OF MICHAEL McKITRICK
DATED 03/05/2023**

PN65

That is the evidence-in-chief of this witness.

PN66

JUSTICE HATCHER: Thank you. Mr Williams?

PN67

MR WILLIAMS: Yes, thank you.

CROSS-EXAMINATION BY MR WILLIAMS

[10.32 AM]

PN68

Mr McKitrick, can I just start with some questions in relation to this step to industrial dispute, which is annexed to your first statement, described as 'The notice of a step to dispute'. If it's of any assistance I have a paginated number down the bottom right-hand corner of 323. It's a letter dated 25 October 2022 from you to Mr Dukes?---On page 333 did you say?

PN69

323 according to the - - ?---Yes, I have that here.

*** MICHAEL JOHN MCKITRICK

XXN MR WILLIAMS

PN70

I will just wait for the Bench to catch up. Thank you. Mr McKitrick, referring you to the paragraphs below, the heading 'Facts material to the dispute', in particular the third paragraph down, which begins:

PN71

Aurizon Bulk master rosters must have RDOs and X days shown in the master roster.

PN72

Do you see that?---I do.

PN73

And it goes on to say:

PN74

The remaining days shown in a master roster are days employees know that they are required to be available to work.

PN75

Do you see that?---That's correct, yes.

PN76

Essentially AFULE's position in this matter is that the days that employees know they are required to work (indistinct) known workings?---Correct.

PN77

Essentially?---Essentially.

PN78

And in fact you go on to say in the next sentence, 'These days I know I'm working'?---Mm-hm.

PN79

And you say:

PN80

The enterprise agreement states that for 70 per cent of these known workings the shift length and start time are to be shown.

PN81

?---Correct.

PN82

It goes on to say:

PN83

The remaining 30 per cent of known workings are to be filled with available shifts.

*** MICHAEL JOHN MCKITRICK

XXN MR WILLIAMS

PN84

?---That's correct.

PN85

So at the time that this was provided the position of the union was that leaving aside RDOs and X days both the rostered shifts and the available shifts were known workings for the purpose of the clause?---Correct.

PN86

Yes. If we go over the page you've helpfully extracted the relevant clause, clause 77, and of course we're very familiar with it, but is it AFULE's position, or certainly the time that this was notified, that the way to interpret subclause 77.1.1 is that you could usefully excise the word 'known workings' and include the words 'rostered and available shift'. So it would read:

PN87

The shift length and start times for at least 70 per cent of all rostered and available shifts.

PN88

Is that pretty much the interpretation?---Well, it is 70 per cent of known workings to the employee. So there's 70 per cent of known and that only leaves 30 per cent left with 100 per cent to encompass availables.

PN89

You see on the first page you attribute, or you describe the available shifts as known workings as well?---Correct. So it is a day that employees - it's calculated towards their 40 hours average per week, and they are days that employees know in advance that they will be expected to attend work and some time are unavailable.

PN90

And that's the essence of your position, is that with what's known to employees as the relevant fact?---Correct. That's right.

PN91

You see available shifts of course are referred to in clause 77.1.2. It says available shifts or all other shifts. So that might tend to suggest that available shifts are not part of clause 77.1.1?---I think that it's interchangeable within the dispute notice there and material facts, and based off the original disputes that were run in 2020, and the language that had been used since bargaining going forward.

PN92

Yes, I understand that, but I suppose what I am getting to is it really AFULE's position that available shifts are known workings for the purpose of the clause?---For the purpose - they are known insofar as an available day an employee will know that they are expected to be rostered to work.

*** MICHAEL JOHN MCKITRICK

XXN MR WILLIAMS

PN93

But does that mean, and I appreciate I'm asking you a question about interpretation, but does that mean that, if we look just at 77.1.1 and the phrase '70 per cent of all known workings' you include in the bucket known workings of the available shifts?---So 77.1.1, 'The shift length and start times for at least 70 per cent of all known workings.' So availables and known workings are all encompassed to make it 100 per cent. Yes. So I guess what you're saying is an available, yes, is a known working insofar as the 100 per cent bucket, and then 70 per cent of them will have a start time and a shift length, 30 per cent of those will have no start time or shift length.

PN94

But if available shifts are incorporated in known workings for the purpose of 77.1.1 what are all other shifts for the purpose of clause 77.1.2, what are they?---So the 30 per cent.

PN95

But leaving aside X days and RDOs aren't they already incorporated in 77.1.1 in known workings?---To find out your 100 per cent of attendances that an employee would be expected to attend on a master roster you have your master roster in its entirety. You then take out the RDOs. You then take out the incoming or the X days and you are left with the remainder, which are days that an employee knows that they're going to be expected to work. The roster committees then designate what 70 per cent of them will have a start time and a shift length and 30 per cent of them will not, which then provides the balance there and the flexibility for the company.

PN96

All right. Perhaps it will be a matter for submissions, but your belief at least or your evidence about how to construe that clause includes that available shifts are incorporated in known workings for the purpose of clause 77.1.1.

PN97

MR MASSY: I object. I'm not sure what the witness's belief about how the clause is construed is relevant. There's going to be a lengthy debate at the end of this proceeding - - -

PN98

JUSTICE HATCHER: Mr Williams, you can cross-examine the witness about intentions in respect of negotiations, but I don't think it's the admissible course to cross-examine him on the text of the clause and how it should be construed. I think Mr Massy will tell us the union's position on that.

PN99

MR WILLIAMS: I accept the ruling, your Honour. Mr McKitrick, can I take you to some evidence in your statement, your first statement, paragraph 61, and you're giving a description of the rostering process at the Toowoomba and Goondiwindi depots. I'm just interested in what you say at paragraph (c):

*** MICHAEL JOHN MCKITRICK

XXN MR WILLIAMS

PN100

70 per cent of those workings will then have to be rostered as known workings

- - -

PN101

You say known to the train crew.

PN102

- - - and 30 per cent of those workings will be unknown to train crew and marked as available.

PN103

So I'm not asking you to answer another question about what you think the clause means, but in relation to what AFULE's position in this arbitration is, is it AFULE's position that the rosters marked available in the master roster are known or unknown?---So again when we're creating a master roster we have the amount of links there which corresponds to the amount of drivers in the depots. We then must have the minimum amount of RDOs per the enterprise agreement. We then must build in incoming days to make work runs work from night to back in the day shift, what is left over to average out at 80 hours a fortnight, other days that are there. All of those there are what an employee knows that they are to be working on those days. So we've taken out, we know we're not working on an RDO, we know we're not working on incoming day, we know the rest of these blank spots there, I'm going to be expected to work. Seventy per cent of those the roster committee will put in a start time (indistinct). So they know I'm not working an RDO, I know I'm not working an X, I know I am working the rest of them. The master roster committee will determine how they get broken up.

PN104

But in terms of the use of the language the word 'known' you would say that because an available roster is a day that they might be required to work, or they would certainly be required to be available to work, that's known to them?---It's known to the employee that they are expected to attend work on those days.

PN105

Thank you. To get back to paragraph 7 of your first statement, and you give some evidence of the predecessor agreement, which is the 2015 agreement, which covered both Coal and Bulk, as Bulk was at the time, and they had a different rostering configuration for each of them. Would that be fair?---Correct.

PN106

And you give evidence about how it worked for Bulk in paragraph 11. You give some evidence about how it compares with the Coal operation. And it would be fair to say that you had, and I will use the language a little bit loosely, you had a 70/30 rule in Coal, but you had no such rule in Bulk?---Correct.

*** MICHAEL JOHN MCKITRICK

XXN MR WILLIAMS

PN107

So although, as you point out in paragraph 12, for Bulk Aurizon was required to insert the shift length and start time for rostered shifts, but there was no particular

requirement in relation to percentage?---So within - we're talking about the Coal operations?

PN108

Well, I'm talking about Bulk?---Bulk. So the 2015, that's correct, there was start times and available. No percentage, because what was in the master roster did not correlate what happened in the real life.

PN109

Indeed. And in fact, although hopefully it didn't happen too often, but Aurizon would have been entitled to roster to call everything an available if they wanted to?---Absolutely.

PN110

And even to the extent it fixed them as rostered shifts instead of shift length and start time it could change anything it liked in the forecast and the daily rosters?---The only thing that were not able to changed are RDOs.

PN111

Yes, exactly. And that was, broadly speaking, you entered the negotiations for the 29 agreement, which was - whether it be a free standing Bulk agreement - you entered that with an objective to improve the position for your members?---One hundred per cent.

PN112

And of course nowhere in the 2015 enterprise agreement either for Coal, or for Bulk for that matter, was the concept of known workings used?---I do not believe so.

PN113

I did have a question for you in relation to your evidence in paragraph 64, but I think you've amended that. I think your evidence now is that the depot roster committee is not necessarily given the master train plan, but is given information from the master train plan?---Provide information from the local depot manager.

PN114

Yes. But that would include - if it's from the master train plan that would include, presumably, information about actual train movements in the master train plan?---You would presume, but our people are not provided the actual, I guess, commercial and confidence details that the company has.

PN115

But you agree that they are given, even if in different form, a list of the trains which are running each day, the start and estimated finishing times, and the start and end points of each leg of each job?---Correct.

*** MICHAEL JOHN MCKITRICK

XXN MR WILLIAMS

PN116

Yes, okay. And I guess the committee, which is a joint committee, it would have to trust that Aurizon is faithfully reproducing information from the master train plan?---That's what we'd have to rely on.

PN117

Yes. Now, paragraph 65, which is the next one down, you refer to a master train plan. I think you modified your evidence a little bit, and I'm not being critical, I think in one of your other statements you say that you yourself have not seen a master train plan?---Correct.

PN118

So if I see reference in your evidence reference to a master train plan perhaps we should take that to mean information from a master train plan?---That would be correct.

PN119

And you say in paragraph 65, 'The master train plan' - or as we've discussed it - 'will not always provide details of all the workings that will end up being worked by drivers.' Do you see that?---This is in 65?

PN120

Yes, paragraph 65?---Yes. The top line there. Yes.

PN121

Now, accepting that you may not have seen a master train plan, of course the master train plan says nothing about shifts, does it, as in shifts that Aurizon employees work?---Not that I'm aware of, no.

PN122

So when you use the word 'workings' there you're talking about train movements, aren't you?---Yes. So things like maintenance, these sort of things, ad hoc.

PN123

Workings that will end up being worked by drivers. Train movements that they drive a train from one place to another as per the master train plan?---Well, there are - there's some of those workings there which are freight train from depot A to depot B which is running, and there are other ad hoc services such as, you know, we need ballast, we need a rail train, we need services that drivers are confident and aware that they come up, but I would say they would not be in a shown in a master - or in a master roster.

PN124

I have heard them described as a local working?---Local workings are also, you know, duties around the depot, shunting, local work.

PN125

But they're all train driver jobs?---Predominantly, yes. There can be some car driving jobs and these sorts of things as well to pick up crews and - - -

*** MICHAEL JOHN MCKITRICK

XXN MR WILLIAMS

PN126

JUSTICE HATCHER: Mr McKitrick, on a master roster where you've got an identified shift start and finish time, does it identify the train route or the train that needs to be driven, or not?---Your Honour, so lots of master rosters they will go into that detail. However, the company is very clear, and we tell our people very

clearly as well that we're not married to that train service. It's not - we don't own them. So it's indicative. There's nothing in the enterprise agreement that says that that will be your working and you will work that train. But it is, I guess, a layer of information that's provided, but that can change.

PN127

You say to the extent that information is provided in the master roster it's not required to be provided under clause 77?---Correct.

PN128

Thank you.

PN129

MR WILLIAMS: Reference to the availables in a master roster, and to his Honour's point, they of course would not have a relationship with an actual working, would they?---Most of the time, no. However, there are some times there where there may not be - the roster committee is provided with too many services by the company and to make up the 70/30 split we actually have to take out some of those services that are provided by the company. So quite often an available will sit hiding a job that is expected to run, but to ensure we've got the 70/30 split they'll be taken away and converted to an available, but predominant of the time, no, there is no train running allocated to them.

PN130

Although in the process of conversion of available to rostered shifts in the forecast roster or the daily roster that's when they might be allocated to an actual working?---Correct.

PN131

I will ask you a question about one of your other statements, your further reply statement. It's exhibit 3, the one dated 3 May. You give some evidence there in response to some evidence from Aurizon. I just wanted to focus you briefly on paragraph 9. You have a recollection that Mr Maszczak identified a concern that if Aurizon were to put all shifts that it knew into the master roster there would often be less than 30 per cent available shifts, and that would not work because the company required more flexibility. Would you accept that what Mr Maszczak was referring to there was the shifts that were known to Aurizon?---I would.

PN132

And I think you have a recollection that Mr Maszczak had some concerns about your position, because it might in various ways limit the company's flexibility?---Mm-hm.

PN133

Would you also accept, and you may not, but you may have a recollection of the discussion, that Mr Maszczak's concern in relation to what the company knew was what it knew about the train services that would actually run?---Yes.

*** MICHAEL JOHN MCKITRICK

XXN MR WILLIAMS

PN134

Let me know if I've misunderstood your evidence in paragraph 11, because you accept, I think, that the term 'known workings' may have been used to mean both trains and shifts interchangeably, depending on context. You see that?---Mm-hm.

PN135

So for the moment, Mr McKitrick, I'm just going to ask you to accept the proposition or the possibility at this stage that the parties were just at cross purposes?---Were just at what, sorry?

PN136

Were at cross purposes. When Aurizon used the word 'known workings' it was referring to trains that it knew would run, and I've listened to your evidence about what you understand known workings to be, and therefore would you accept the possibility that the parties were just - the negotiating parties - were just at cross purposes?---Well, I believe that Aurizon with the original agreement were talking about known workings as in what they knew, which then could change from the forecast of the daily again, which really we found ourselves in the same position as 2015. And then there was a seismic change afterwards where it changed into what we knew. When the company's talking about known workings we've got no way of quantifying what those known workings are either. So where Mr Maszczak is talking that, you know, if we provide you all around known workings we may not get that 30 per cent flexibility. Conversely we could run the same argument and say, well how do we know what you're providing us. You may know 30 trains, but you only provide us 10. We've got no way of quantifying that. So that's where - hearing from Mr Maszczak on that day as well they had this issue with if we provide you all with our known workings, and we can only have up to 30, we won't have that flexibility, and that's where it was sort of flicked into, well we'll have the clean cut of 70/30, and if you know more than 70 per cent we'll take some of those out and make them available, and if you don't know 70 per cent then we'll convert some of those availables into a start time.

PN137

Yes, okay. So you understood what Mr Maszczak was saying that on some routes there might be more than 70 per cent of workings that they knew, they might know 100 per cent of them?---And that's his interpretation. We would never know that ourselves.

PN138

No, I understand that, but that appeared to be his concern?---That appeared to be - yes.

PN139

And we will come to it, but that was in the context that you might recall of a claim from the union that 100 per cent of known workings should be inserted. Do you recall that?---Yes.

PN140

Mr Maszczak was saying, 'Well hang on if we put 100 per cent of known workings in that might fill the whole roster', correct?---Correct.

*** MICHAEL JOHN MCKITRICK

XXN MR WILLIAMS

PN141

And he was concerned that that might reduce flexibility?---That's right.

PN142

Because of course known working could be known at one point of time, but then something can happen. It can be cancelled or delayed, correct?---That's correct.

PN143

Thank you. Do you remember a document at a relatively early stage in the negotiation for the union proposal for a roster code of practice?---I do.

PN144

Members of the Bench Ms Pollock has attached what I think Mr McKitrick will identify as a proposal. It's annexure EP9. I actually have sufficient copies for everyone to have a free standing copy if that's of any assistance.

PN145

JUSTICE HATCHER: Right. You can hand those up.

PN146

MR WILLIAMS: Or I believe I have sufficient copies, even for Mr Massy I think. I think I may have said this, but for reference it's annexure EP9 of (indistinct) to become paginated page 47. Mr McKitrick, you recall that document and that correspondence?---I do.

PN147

So that was a proposal from the union side of the negotiation?---That's correct.

PN148

There was a discussion at one point that the issue in relation to rostering might be solved via a code of practice, and that was your proposal?---That's correct.

PN149

Can I just ask you a few questions about the document. Do you see below 'master roster' there's a series of dot point?---I do.

PN150

There's a principle in relation to an average of hours, rostered overtime would be kept out of it. Include RDOs, which I think there's no dispute about that. And then the fourth dot point, 'Include start and finish times of each shift'?---Correct.

PN151

And a couple of further dot points down, an issue we've already discussed, that 100 per cent of known workings would go into the master roster?---Mm-hm.

PN152

And further down, 'The master roster must reflect actual workings unless otherwise agreed'?---Correct.

*** MICHAEL JOHN MCKITRICK

XXN MR WILLIAMS

PN153

So if I've heard your evidence correctly, Mr McKitrick, I think you suggested that there came a point in the negotiation where the language, use of language changed. We will come to that. But would you accept that at this point both you and the company were referring to known workings as actual train movement?---Well, this is in relation to the company proposed enterprise agreement.

PN154

Yes?---So we were at that point in time discussing the company's proposed enterprise agreement, and we're talking there also that there's an entitlement to master workings as well. So what we are talking there is listening and bargaining in good faith around the company's proposal of 100 per cent of known workings to go into the master roster. The next step from that is also ascertaining the transparency for what the known workings would be.

PN155

Yes. I will certainly give you an opportunity to explain how things may change, or alternatively your counsel will, but it's simply the fact, isn't it, that at that time both the company and combined unions were referring to the term 'known workings' by reference to actual train movements?---So in effect business was referring to known workings insofar as the train movements, and we were simply adopting and bargaining their sort of - their points on known workings being train movements.

PN156

Yes, train movements. And at that point - - -

PN157

JUSTICE HATCHER: Just so I understand that, in the fourth bullet point it says, 'Include start and finish time of each shift.' Does that mean every shift?---In the proposal, yes.

PN158

Doesn't that mean that every rostered shift would have a start and finishing time?---That's correct.

PN159

That's the same thing as known workings on either view, isn't it?---That's correct.

PN160

Tell me if I'm right; I read that as meaning every rostered shift will have a start and finishing time, that's the start and end?---That's correct.

*** MICHAEL JOHN MCKITRICK

XXN MR WILLIAMS

PN161

That is there's no available shifts?---In this proposal where we were going down the line of finding that mechanism of the transparency of finding out what the actual workings are that the company knew, and then there would be leftovers there that would potentially become available. If 100 per cent of the known working was in and there wasn't enough to equal 80 hours a fortnight there would be extra shifts. But under this proposal there it was finding that mechanism to

ascertain that the employees had transparency of everything the company knew, having a start time, a shift length, an entitlement to that working, and if there was anything leftover that would then convert to an available and the forecast of the daily phase.

PN162

MR WILLIAMS: I've got a couple of questions for you on that point, but just to be clear on this point, further dot points. So that there is an entitlement to master roster workings, the next dot point down. So that means that once the master roster allocates a driver to train movement then essentially they're entitled to work that train movement?---Back to the bad old days. Yes, that's what used to happen. You were going to Cloncurry on Thursday, and whether you like it or not you're going to Cloncurry on Thursday. And it didn't work very well for anybody really, but we were sort of working through it.

PN163

Okay, I understand. But workings there is a reference to train movements, isn't it?---Correct.

PN164

There's another reference to actual workings, but I assume unless you tell me otherwise the language is the same. But on that point of the relationship between rostered shifts with start and finish times and availables can I just take you over the page. This is under the heading 'What can change from the forecast roster to the daily roster.' Do you see there it says, 'A start time will be allocated for an available'?---I do.

PN165

So in fact - you had a discussion with his Honour, the president, about this - but this rostering code of practice contemplates that the master roster will actually include shifts which don't have a start and finish time, initially at least, in a master roster?---So again based off what the company's proposal was, and that was around 100 per cent of what they knew would be in the master roster, and we'd have to ascertain how we all have the transparency what was new, the employees are still getting paid 80 hours a week, and if you're in a depot where we were happy with the process and all known workings, everybody knew it was in there, but it didn't equate to 80 hours. We also knew that our employees, our members had to work 80 hours. So if there were - once that we ascertained a start time and finish time of each shift which correlates to the known workings, the entitlement to those workings, and if there's time left over we expect that we would be available to work those days.

PN166

So can I summarise it this way, and we read this document as a whole, the company's - the union's position - 100 per cent of known workings to go into the master roster, and that means 100 per cent of the train movements which Aurizon knew at the time, correct?---Yes, that we would have to also factor, yes.

*** MICHAEL JOHN MCKITRICK

XXN MR WILLIAMS

PN167

Yes, I accept that. Of those known workings, 100 per cent of known workings, at least in relation to those a start and finish time had to be allocated?---Correct.

PN168

Over the page, it still provided for the possibility that there would be available shifts which did not at that point have a start and finish time?---Yes.

PN169

And the start and finish time for those rosters would have to be allocated in the change from the master roster to the forecast roster, or the forecast roster to the daily roster?---Correct.

PN170

Thank you. Thanks, Mr McKitrick, you can pass that document back or put it to one side. Do you recall that at a later point there was a document, and I will hand it to you, because it's not a memory test, headed 'Union proposal without prejudice 7 March 2019'? Let me pass it to you. For everyone's assistance it is an annexure to Ms Pollock's statement. It's annexure EP11. It appears at paginated page 52 of her statement, and I will pass a copy for everyone. Your Honour, it is the intention that these documents go into evidence, a convenient course. It would appear to be in Ms Pollock's evidence.

PN171

JUSTICE HATCHER: Yes.

PN172

MR WILLIAMS: Do you recall this document, Mr McKitrick?---I do.

PN173

So that's a document which has been drafted and provided by the unions?---Correct.

PN174

May be I can shortcut this. At this stage in the negotiation at least can I take it that when the language of working or job is used, and both are used in this document, and you can take your time to read through it, that was a reference to a train movement?---Well, again this is from the Aurizon proposed enterprise agreement.

PN175

It is a union proposal though?---Yes, but this is in relation to the Aurizon proposed enterprise agreement that was negotiated. And we were at this point in time still trying to negotiate in using their terminology, using their input into essentially salvage something out of the deal that was there. So this is, I guess, a counter proposal if you will to some of the details in the Aurizon proposed enterprise agreement.

PN176

All right.

*** MICHAEL JOHN MCKITRICK

XXN MR WILLIAMS

PN177

JUSTICE HATCHER: Is that proposed agreement in the evidence?

PN178

THE WITNESS: Yes.

PN179

Where do I find that?

PN180

MR WILLIAMS: The 2019 agreement is - actually that's an interesting question. I'm not sure it is in evidence yet.

PN181

JUSTICE HATCHER: So this is the agreement that went to a vote and went down by 90 per cent or something, is that what we're talking about?

PN182

MR WILLIAMS: We're certainly at the stage before the failed vote, yes.

PN183

JUSTICE HATCHER: Is that document - I think the witness is saying that these documents you're taking him to need to be understood in the context of the proposed agreement by Aurizon. I am just wondering if that agreement is in the material.

PN184

MR MASSY: As I understand it it's annexure MM4 and MM5 to Mr McKitrick's first statement.

PN185

JUSTICE HATCHER: All right, thank you. Yes, go ahead, Mr Williams.

PN186

MR WILLIAMS: Thank you. The next document I want you to refer to is a document which is entitled 'Conditions agreed in principle 20 March 2019.' It's annexure EP16 to Ms Pollock's statement, and it appears on page 73 in her statement. I will pass you a copy, Mr McKitrick. Do you recall that correspondence, Mr McKitrick?---I believe I would have, yes.

PN187

So it's come from Mr Johnson to you?---Yes.

PN188

If you go over the page - sorry, I should make this clear - it's entitled 'Train crew rostering principles agreed in principle.' I am not asking you to say one way or another whether you agree that they were agreed in principle, but it's a document sent to you from Aurizon?---It is.

*** MICHAEL JOHN MCKITRICK

XXN MR WILLIAMS

PN189

And if we go over the page to the heading 'Master rosters' 1.2 - - -?---Yes.

PN190

- - - you see that says, 'The master rosters will exhibit all known workings'?---Yes.

PN191

Did you understand at the time that what Aurizon was referring to were the train movements which were known to it?---From that voted down agreement, yes, that's what they were referring to.

PN192

Thank you. And the only other question I have for you, and we can go to the detail if we need to, but at that point Aurizon was proposing considerable flexibility between the master roster and the forecast and daily rosters?---They were proposing - the only thing they could not change would be the RDOs.

PN193

That's right. So at that point it appears that they were prepared to put all of the known workings in, but they reserve the right to change them as they saw fit?---Correct.

PN194

And that no doubt was unacceptable to the union?---Correct.

PN195

Thank you. The discussion was evolved from there, didn't it? I wanted to ask you some questions about a meeting on 8 August. I think you give some evidence about the meeting on 8 August, paragraph 29. Do you see that, 29 and 30?---I do.

PN196

So just to refer to your own evidence you say that you proposed that all known workings to be recorded on the roster. Do you see that?---(No audible reply.)

PN197

So your starting point was that all known workings be included in the roster, and for all anyone knew that might be 100 per cent of the shift, correct?---Yes.

PN198

But you then had a proposal that 40 per cent of the workings in the roster be available shifts?---So this is - we're talking about maximum level of availability?

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XXN MR WILLIAMS

PN199

Yes?---In this context there of the discussions that the company were to put in the detail provided to our depot roster committees of the trains that they provided us as their known workings; that the maximum amount that the roster could show on availability stakes would be 40 per cent, or there was 50 per cent getting thrown around there as well. And that was again to allay any fears that any roster committees may have had that maybe they weren't receiving all the details, all the truth of what the trains running were, that gave them that baseline that they would

not fall below 40 per cent availability. But in the event that Aurizon provided them a lot more then the availability may only be 10 per cent in that event.

PN200

So to hypothesise the situation, which you must have clearly thought about it, maybe been discussed, where for a particular master roster Aurizon was prepared to accept that they were all known workings 100 per cent. What were you proposing as the regime for available rosters for that situation?---For this here or - because the voted down enterprise agreement they were talking about having essentially no availability, no available shown. It will be start times, but they could all change. And then for the context of this here it was that the master roster would have your RDOs, that can't change, having your incoming X days that can't change, and potentially up to 40 per cent of the slots are left would be available. But if the known workings that the company provided to the roster committee ended up being 80 per cent of those (audio malfunction) wouldn't be available (indistinct).

PN201

All right. Should I understand this proposal that you put on the whiteboard as being that step 1 Aurizon had to put in all of the known workings, presumably for the master train plan; yes?---Or the data provided to the roster committee, correct.

PN202

And if that filled up all of the rosters there would be essentially no availables?---Correct.

PN203

And under no circumstances could there be more than 40 per cent of availables in the first year?---Correct.

PN204

And 30 per cent in the second year?---That's correct.

PN205

Right. But it is clear that when you use the language 'all known workings to be included' that's a reference to the workings that Aurizon knew?---I think it's very interchangeable again, but in this context there where we're talking about that we can't fall below a threshold, so with the known workings that the company provides. However, if you fall below that 60 per cent threshold we were talking about here with the 60/40 split then the roster committee would build in more workings that they know to get that threshold done, the break up done.

*** MICHAEL JOHN MCKITRICK

XXN MR WILLIAMS

PN206

Can I ask you a question. You're aware that Ms Pollock took some minutes of these negotiations? My instruction is that they were not minutes in the sense of approved or confirmed minutes, but they were Ms Pollock's minutes. I still want to ask you a question about them just to see what your recollection is. Members of the Bench, the relevant annexure to Ms Pollock's statement is at page 67. It's

annexure EP15. I will just make sure I give you the right document, Mr McKitrick.

PN207

JUSTICE HATCHER: Page 66 says it's minutes for the meeting of 14/05/2019. Is that - - -

PN208

MR WILLIAMS: I'm not sure that is what I'm looking for on that.

PN209

THE WITNESS: It's probably paragraph 67, Mr Williams, maybe.

PN210

MR WILLIAMS: Yes. That's certainly not correct. I think the correct term references page 418. I'm sorry about this, your Honour, and members of the Bench.

PN211

JUSTICE HATCHER: What page?

PN212

MR WILLIAMS: I think it's 418, but please let me be sure. No, that's not correct.

PN213

JUSTICE HATCHER: What's the date of the meeting you're looking for?

PN214

MR WILLIAMS: The date of the meeting is 8 August. It might be EP19, perhaps EP20. The correct annexure is EP20, and the correct page is 280. What I have is copies of extracts from Ms Pollock's statement itself, which does extract the minutes, but is not the minutes. The minutes themselves are at page 280. Could I pass you a document which is - it's a copy of an extract from Ms Pollock's statement. I intended to have copies of the minute itself for you, but I don't. Mr McKitrick, you may not remember this, and it's not evidence that you've given, but I just wanted to ask you a question to check your recollection. At that meeting in the discussion about what the roster configuration should be my instruction is that Sarah Dixon - do you remember Sarah Dixon?---I do.

PN215

General manager - had indicated a specific concern relevant to the negotiations that involved 'they would have more work which don't align with the master train plan'. Can you recall a discussion of that kind?---I recall concerns that the business had about essentially everything that we were proposing, because we were going from 100 per cent flexibility to try to actually get the train crew some certainty. So there was concerns about a lot of things.

*** MICHAEL JOHN MCKITRICK

XXN MR WILLIAMS

PN216

I suppose my proposition is this, that I think you've accepted, up to this point at least, that when the company, and in fact the unions used the term 'known

workings' they were referring to train movements. Also that the master train plan was the reliable source of what a train movement would be. And I'm just asking you to also accept that from Aurizon's point of view at least it was concerned that the extent to which train movements would be set out in the setting would be known to Aurizon from the master train plan might vary from place to place and depot to depot?---Well, I think general train runnings do vary. So everything is up for grabs, especially in Queensland, we've got the weather and everything else. But when we're talking about - if we understand that no workings was master train plan it's two-fold insofar as what's in the master train plan that we then would have to find a mechanism to quantify that those actually are correct and real, and then also building them up to meet our quotas or whether we landed on 80 per cent, 70 per cent, 40 per cent. So those master train plans, or the train details that the company provided we also then quantify them. We had to find that mechanism. But they actually then turned into no workings for the train crew as well. So it's two-fold. And then if we didn't have enough from what the company's provided that we quantify that they are real, so we now know them as well, then additional shifts were put in to make up to our quota of 60/40 to 70/30.

PN217

Yes. And I appreciate there was a negotiation where you were trying to get less flexibility, broadly speaking, and the company was trying to get more flexibility, broadly speaking?---Yes.

PN218

I accept that, but the point that I ask you to accept is that the language being used when that language was using the term 'known workings' on both sides was a reference to actual train movements?---Primarily, but if there weren't enough train movements that (a) the company provided to us, or (b) that we could quantify that they existed, well then additional shifts would be built into the master roster to become known.

PN219

I accept that the issue of flexibility could be dealt with in various ways. In fact one way you propose flexibility was that all of the train movements the known workings would go in, but some of them could be allocated to available?---Correct. To get that 70/30 split, to get the deal done, listening to the company needed flexibility, and there may be a depot there, I think would be doubtful in my view that the company would provide sufficient amount of known workings in their view to fill in a time master roster, which is where the more practical outcome was that they have - 30 per cent of the time they have absolute free rein of the train crew to do as they wish. But 70 per cent of the time our people also had some certainty with rather large flexibilities of 33 hours notice moving them three hours either side of those start times as well. Our people are very open to the fact that train movements move around and vary and so they need to be flexible, but they wanted something back a little bit in their favour as well.

*** MICHAEL JOHN MCKITRICK

XXN MR WILLIAMS

PN220

I understand. But the company throughout the negotiation was expressing concern about not having an unworkable roster for it?---Well, I think to flesh out

with further discussions there I think that where we ended up landing on it, it took away all the ideas of how we were going to find out what's know, how are we going to trust - it just became a very simple split, that it went to taking away train workings, taking away train IDs. None of that's referenced in the enterprise agreement. It's not referenced actual workings must be, you're not entitled to a working. All that literature disappeared and it went straight explicitly down to a 70/30 split of roster shift, length and a start time.

PN221

Let's explore that. A question for the witness referring to annexure EP21 in Ms Pollock's statement. I will pass you a copy. I'm going to pass you a document which is in Ms Pollock's statement. You may have seen it there. It's headed 'AFULE proposal' with some colour codes, 'Following the discussions of 7 August without prejudice basis: red, not agree, yellow, requires further discussion, green, agreed in principle.' You will probably remember it when you see it. I will pass you a copy of it. Members of the Bench, I may have said this, but it's EP21. The document commences at page 286 of Ms Pollock's statement. The reference I want to take the witness to is at page 342. I will let you have a look at that document, Mr McKitrick, and see if you remember it?---Yes, I know this document.

PN222

It's headed 'Without prejudice joint union proposal, Bulk Train Crew Agreement 2019.' And if I can ask you to leaf over to the relevant clause, which is page 342 on the paginated right-hand corner, and it has a clause 36 'Rostering specific all train crew.' It's not tremendously easy to read, but you see that colour coded in green it appears that - it originally had said, 'The master roster will show for all train crew the shift length and start times of each of your rostered shifts.' And that somebody has marked it up so it reads, 'The shift length and start times for all known workings.' Do you know who marked that up?---I believe that that is the business's mark-ups. I think that would be Mitch Patterson at the time.

PN223

JUSTICE HATCHER: Whose mark-ups?---Aurizon's mark-ups.

PN224

On your document?---Correct, we share the document.

PN225

MR WILLIAMS: So they had taken out the shift length and start times for each rostered shift into your rostered shifts and included each for all known workings?---Correct.

PN226

And then there's a clause below it which is allocated in yellow, and I think that meant that it wasn't agreed and still required discussion, correct?---Correct.

*** MICHAEL JOHN MCKITRICK

XXN MR WILLIAMS

PN227

And that's the flexibility. 'An average over the roster cycle of up to 30 per cent of planned shift.'

PN228

JUSTICE HATCHER: Sorry, green was agreed, wasn't it?

PN229

MR WILLIAMS: Well, green was agreed in accordance with what the union had put forward, but as I think appears and as the witness has said there was a mark-up from the Aurizon side which suggests that perhaps it wasn't agreed. Would that be right, Mr McKitrick?---I would agree with that. Yes.

PN230

JUSTICE HATCHER: So who coloured the document?---So this was provided to Aurizon, and we were essentially going through on the screen, very similar to what we have there, going through essentially clause by clause, and, you know, if it was completely out of their thought pattern it got changed to red. If it was something we wanted to discuss more it went to yellow. If it was something that they were happy to live with it went green. We sort of just worked through it and identified - - -

PN231

So it was coloured in a joint process between - - -?---Correct, as we went through.

PN232

So does that mean this was marked green because the parties agreed upon the amended version?---I don't recall the exact events, but I would go as far to say, yes, we would have agreed to those - to those words there. And the yellow would have been - maintained yellow as we were still - the company would not have been happy with the 30 per cent mark.

PN233

Thank you.

PN234

MR WILLIAMS: And finally I take you to the final one of these minute documents I'm going to ask you about, minutes of a meeting on 21 August.

*** MICHAEL JOHN MCKITRICK

XXN MR WILLIAMS

PN235

JUSTICE HATCHER: So before we leave that page, so how do the parties get from agreeing to set out the shift length and start times for all known workings to setting it out to 70 per cent workings?---Your Honour, essentially the script had been flipped at that point where we are now talking about employees known, and it really started - moved on from the rostered shift and all these sort of things back to the employees, and it was always our driver that the employees don't know. At the moment with our 2015 agreement we don't know. So the dialogue of the room and the context of my recollection of the accounts of that day, or over those days is that we'd moved vastly from train numbers, train times, into what was then widely accepted that it had been flipped into what the train crew knew and we were talking about how much flexibility the business needed. Do we need 50 per

cent availability, do we need 40 per cent availability, do we need 30 per cent availability. So it had really been switched around at that point. Because we were, in my view, we were all singing off the same hymn book that we were looking at 70 per cent known workings, well that could only mean that there's only 30 per cent left to make the 100 per cent. So that's the 70/30 split that we had proposed, and through this sort of purpose, and I guess we were sort of drafting on the run a bit as well, that if 70 per cent is known that means only 30 per cent could be available. So we had our split there that we were looking for.

PN236

When did this happen? I mean this document shows that that version was agreed at a certain date. What changed and when did it change?---I could not be precise on that, your Honour.

PN237

MR WILLIAMS: I was going to explore that with the witness, your Honour.

PN238

JUSTICE HATCHER: All right.

PN239

MR WILLIAMS: Mr McKitrick, I'm going to ask you to look at a document - - -

PN240

JUSTICE HATCHER: Just remind me, Mr Williams, what was the date of this meeting, the one you took - - -

PN241

MR WILLIAMS: I think that was the 8th of - - -

PN242

JUSTICE HATCHER: The 8 August.

PN243

MR WILLIAMS: The meeting that was referred to was 8 August. This document I think may have predated that.

PN244

JUSTICE HATCHER: Mr McKitrick, the meeting you talk about where you're looking at the document on the screen and marking was that 8 August?---I believe that was 8 August, your Honour, yes.

PN245

MR WILLIAMS: I am now going to ask you to look at a minute or a record prepared by Ms Pollock of a meeting on 21 August. I will pass the entire document to you. Members of the Bench, regrettably I don't have a copy to hand up as I did with the others, but it is at page 467 of Ms Pollock's statement. It commences at page 467 paginated number.

*** MICHAEL JOHN MCKITRICK

XXN MR WILLIAMS

PN246

JUSTICE HATCHER: Yes.

PN247

MR WILLIAMS: I do have a copy of the full document for the witness. Can I refer you first to the first page, close to the bottom referring to clause 36.1, and in relation to this clause you say, 'Each day needs to remain. Roster committee needs to decide what workings go in.' Do you see that?---Mm-hm.

PN248

So we can be certain that when you refer to workings there you're referring to the train movements, which the roster committee puts in from the information given to it?---I'd actually say that this is in relation to the availables, and that we're actually assisting the business here where we wanted to ensure that they were spread evenly across each day so we don't end up in a situation where you've got a truck load of available on a Friday and zero on a Monday.

PN249

I think you refer to that a bit further down. You say, 'We ran into an issue with Coal. All nine workers were in.' So my question was more about the language. Assuming you accept that's an accurate summary of what you said, your reference to workings is a reference to workings from the master train plan or local movements, or at least workings which were known one way or another to Aurizon?---I still say that each day needs to remain is in accordance with spread evenly across each day, the availables. Seventy per cent say in principle this is what we need to achieve. Yes, I'm not really too sure what the context from memory of that second part there, around the issue in Coal.

PN250

All right. I accept it's someone else's minute, not yours. If we go over to page 471, which is I think over two pages from where you are, close to the middle of the page there's 36.1 proposed. By the way I should ask you this; is it the case that although you're referring to a clause titled '36.1', this is the clause which became 77.1.1?---I've agreed, yes.

PN251

Yes. So it's the proposed clause, 'The shift length and start time for at least 70 per cent of all known workings.' Do you see that?---Mm.

PN252

'Available shifts for all other shifts be spread evenly across each day on average over the roster cycle.' And you see there's a reference to a comment from AM. Would that be by Andrew Maszczak?---It would be.

PN253

He says:

*** MICHAEL JOHN MCKITRICK

XXN MR WILLIAMS

PN254

The reality is that some depots would have a split. We need the ability to flex due to customers. I get how this applies for SEQ. It only has master train jobs.

PN255

Do you see that?---Mm-hm.

PN256

So that was Aurizon through Mr Maszczak explaining why Aurizon was only prepared to commit to put in shift lengths and start times for 70 per cent of all known workings, wasn't it?---I'm not quite sure what's being referred to as some depots will have a split.

PN257

I'm not sure either?---'I get how this applies for SEQ.' Well, SEQ has only got one depot that would have been covered at that time by this agreement.

PN258

Correct?---And it's a terminal depot where essentially they have frame-workings and they've got crews that are just rostered, staggered 24 hour period around the clock.

PN259

I just want to suggest to you that this is Aurizon explaining that they can't commit to 100 per cent of all known workings, they can only commit to 70 per cent, because in that depot that you've just referred to they only have master train jobs, and therefore 100 per cent of the work is not be known. And it was unacceptable to Aurizon to commit to start and finish times for 100 per cent of the shift in the master roster?---Right. Which then leads us to our 70/30 split to give them the flexibility they need as well. So even if they had 100 per cent there, and which was going to give them no flexibility, the roster committee then in conjunction with the business take out jobs to build up the flexibility again.

PN260

Can you recall - you're recorded as saying something like 'Changes to the dynamics.' You may not recall anything you said, but do you have any recollection - - -

PN261

MR MASSY: I'm sorry, the witness just shook his head in response to the question and didn't give an audible answer.

PN262

MR WILLIAMS: I probably hadn't finished by the time he did that, but you can certainly give your answer.

PN263

JUSTICE HATCHER: Would you remember saying that?---I just - I don't remember what the changes to dynamics refers to.

*** MICHAEL JOHN MCKITRICK

XXN MR WILLIAMS

PN264

Before we go further when the minute says 36.1 proposed, and then it has what appears to be the text of the current 77.1, who proposed that? Was that the company or the union's proposal?---Your Honour, I would say this is through the

discussions and the drafting process where we had flipped it from trying to get away from it, or how do we know what you know, and it really turned into the rostered shifts 70 per cent, or start time and shift lengths, which has then fallen into what the company can provide or was willing to provide, added with the roster committee building in additional shifts to then create 70 per cent of known workings.

PN265

Can you answer my question; who proposed the clause in that text form?---I do not recall, your Honour.

PN266

MR WILLIAMS: You can check if you want to, but that's the clause in its final form, isn't it?---That is.

PN267

Mr McKitrick - - -

PN268

JUSTICE HATCHER: The difficulty I have, Mr Williams, is obviously someone proposed it, and you can't understand the text of it, can't understand the gravamen of the comments unless we would know who's proposing it. I don't know whether AM is agreeing with it or disagreeing with it.

PN269

MR WILLIAMS: Ms Pollock might be able to assist with that. My instruction is, I think, that it was proposed by the company, but that's an instruction. Ms Pollock can answer the question. Mr McKitrick, inescapably, as of course we know, the term 'known workings', in fact all known workings has found its way into the clause of course; that's a fact. And my suggestion to you is that it was commonly understood by all people, all negotiators on both sides, that workings was reference to a train movement.

PN270

MR MASSY: I object.

PN271

JUSTICE HATCHER: How can he answer that, Mr Williams?

*** MICHAEL JOHN MCKITRICK

XXN MR WILLIAMS

PN272

MR WILLIAMS: I accept that's a difficult question to answer, so I withdraw it. I suggest this though, the clause that was proposed of someone recorded in that minute which became the final clause, my suggestion to you is that AFULE agreed to that proposal?---Based off the fact of my recollection of the conversations that were happening at that time where we were drafting on the run and that we had actually landed on the position there where the business was comfortable that they could stretch to 30 per cent of the time they've have open slather, 70 per cent of the time we would have some sort of certainty for our people, that they would be known for 70 per cent of the time, and the context of the drafting there, but, yes.

PN273

If that was really what you were agreeing to or proposing the 30 per cent rule would have appeared in the second paragraph, wouldn't it, relating to available shifts?---My context of that would be that there's only 100 per cent that you can get to. It's interchangeable. It could have said 30 per cent availables and the rest known workings, or 70 per cent known workings and some of them are going to be available.

PN274

But there's plenty of precedent, isn't there, for a master roster rule which has a 70/30 per cent split. For example in the 2015 enterprise agreement for Coal had a 30 per cent availability rule, and that was drafted into the second line, wasn't it?---I believe so.

PN275

Thirty per cent available shifts?---Yes.

PN276

But this has - it also I suppose has a 70 - well, I'm not sure if it does have a 70/30 rule because it says at least 70 per cent, but the 70 per cent qualifies the workings, all known workings, not a reference to availables at all?---I believe the Coal agreement - it's just reversed.

PN277

Yes, but if you had agreed or they'd even thought you were agreeing to the position you put in the dispute notification, Mr McKitrick, the clause had been drafted differently and in conformity with how the rule had been set in the Coal agreement; correct?---I feel as though that I was on very firm footing and the firm understanding of the discussions that took place on that day and the discussions that I had, that it was very clear that I was saying around the 70/30 per cent split and that it was understood, and that I was comfortable with the notion that 70 per cent would be known, we'd be silent on the available because the most you can get is 100 per cent.

PN278

Under this clause how many availables do you have if 80 per cent - sorry, I withdraw that. If all of the workings are known and the company puts them all in, if it appears that they're able to, how many available shifts are there in that configuration?---Well, you may very well fall into a position, Mr Williams, where the business has realised that the 70/30 split is working so well that we actually want to give a bit more certainty to the employees, so we're happy to do more than 70 per cent.

*** MICHAEL JOHN MCKITRICK

XXN MR WILLIAMS

PN279

As we've discussed during the morning the company wasn't prepared to commit to that, because it did not want to be in a situation where all known workings would be in and it wouldn't have that flexibility?---Again we are referring to the ability that there would be 100 per cent transparency and knowing from all parties and

we hadn't got to that point of actually establishing a mechanism of how we would ascertain what is known.

PN280

Mr McKitrick, the task of working out what the clause means will be up to the Bench. So I'm not asking you for a view about that, but I want to put this proposition to you. You had negotiated hard for a regime which was equivalent to the way it worked in Coal where there would be a guarantee of 30 per cent available shifts, you worked hard for it. The company had not accepted that, and at this meeting the company made its best proposal, which is set out there, and the commitment it was prepared to make was that 70 per cent of known workings, meaning known workings to Aurizon, would have start and finish times, and no other shifts would have start and finish times, but they would be available shifts?---I do not agree, Mr Williams.

PN281

Thank you. Mr McKitrick, I want to ask you some questions about an assertion made on your behalf that my client's position in response to your dispute is an abuse of process, and I want to do so by reference to your first witness statement. Before I do that I would like to pass you if you don't have it a copy of the 2019 enterprise agreement.

PN282

MR MASSY: Can I hand up to the Bench now - yesterday an electronic copy of all of the authorities referred to in AFULE's various submissions was filed, but here is a shorter bundle of authorities, which at the front of it has the current enterprise agreement.

PN283

JUSTICE HATCHER: Thank you.

PN284

MR WILLIAMS: Can I pass you a volume which includes a copy of the 2019 enterprise agreement, and I acknowledge Mr Massy's assistance, thank you. You'd be very familiar with this agreement, Mr McKitrick, having sweated blood as a negotiator. The copy I have handed you is as amended, and you'd be familiar with the variation as well, but the variation, the amendments really related to nominal expiry date and money issues, pay issues?---Correct.

PN285

So the dispute resolution clause for example is unchanged from as it was when you first filed your dispute?---Correct.

PN286

Can I take you to firstly the coverage clause at paragraph 3. I'm sure this is unnecessary, but you accept that the union is not named as a party to the agreement?---Yes, I agree.

*** MICHAEL JOHN MCKITRICK

XXN MR WILLIAMS

PN287

You are covered by it of course - - -?---Of course we are, yes.

PN288

- - - but that's as a consequence of a notice that you supplied at the point of approval?---Right.

PN289

And if we go to the dispute resolution procedure in clause 7, and I won't unnecessarily dwell on this, Mr McKitrick, but it's a dispute resolution procedure which applies as between employees of Aurizon and Aurizon as the employer?---Correct.

PN290

And you no doubt would nearly always have a role, but I suggest to you that that role is exclusively covered by paragraph 7.2?---Correct.

PN291

So when there's a dispute under this agreement it's a dispute between employees and the company, and the union's position is, if at all, is as a support, including representation of the employees?

PN292

MR MASSY: Can I object at this stage. Mr McKitrick can't be asked to give evidence about the meaning of the clause. If he's being asked what his understanding is for the purposes of some - - -

PN293

MR WILLIAMS: I accept that, and that's all I'm doing. I accept that. I just wanted to see whether there was a contrary view. It appears there's not. Can I then go to your dispute notifications. I think they commence at page 264 of your statement. Sorry, strictly I think page 260. Mr McKitrick, take your time, but the first one I will refer to I think is the dispute which arose at Hughenden. It says so on - - -?---Yes.

PN294

So what this says, 'A dispute has arisen in Hughenden depot.' Do you see that?---Yes.

PN295

Do you accept that this is a dispute between Aurizon and its employees at Hughenden depot?---Yes.

PN296

And a similar dispute arose at Rockhampton, and that dispute notification, separate dispute notification commences at page 275 of your statement, and the similar clauses describing the scope of it or where it's arisen is at 279, and that dispute has arisen in the Rockhampton depot?---Mm-hm.

*** MICHAEL JOHN MCKITRICK

XXN MR WILLIAMS

PN297

So it's fair, isn't it, to say that what we have is a dispute between employees, or at least employees who are your members, at Hughenden and at Rockhampton?---Correct.

PN298

And if you don't mind me asking are all of the employees at Rockhampton and Hughenden in train driving roles your members?---It would be in excess of 90 per cent of those depots.

PN299

You accept that some are and some are not?---Correct.

PN300

Thank you. There's some correspondence attached to your statement, and I want to refer you to an email which Mr Fulton on behalf of Aurizon sent you on 8 July 2021. It appears at page 296 of your statement. Mr Fulton says this, he says:

PN301

We developed the current master rosters rule at the Bulk east depots.

PN302

Do you see that?---Mm-hm.

PN303

Just pausing there, that could not have included the Toowoomba and Goondiwindi depots because they didn't exist, correct?---At that point in time they did not exist.

PN304

And then he says they've been operating under a trial arrangement since March. What trial arrangement was that, do you know?---That was negotiated through the dispute process with myself, whereas I actually went to these depots and wrote their master rosters for them to display that it is operational.

PN305

So do you accept that the process was that there had been a proposal, perhaps from yourself, and that Aurizon had agreed to give it a go, to trial it?---It was through the dispute settling process, and it was essentially to avoid - it was discussions with Sarah Dixon at the time, and it was to avoid arbitration at that time. But the company came to us and said would you entertain showing us that it works, which we did, and then it went across the state.

PN306

Okay. But at least at that point in time you must have understood the company position to be that if trials hadn't worked then they wouldn't have agreed to your position?---And we would have enlivened our steps.

PN307

And we would have been in a process like this one?---We would have been here, correct.

PN308

But it didn't get there, because as Mr Fulton says the trial, as he says, no major issues identified, and he says:

*** MICHAEL JOHN MCKITRICK

XXN MR WILLIAMS

PN309

Aurizon is willing to continue with this process for master roster development for future rosters.

PN310

You see that?---I do.

PN311

But he certainly couldn't have been contemplating Toowoomba and Goondiwindi?

PN312

MR MASSY: I object.

PN313

MR WILLIAMS: All right, I withdraw. But then he goes on to say something quite significant, Mr McKitrick. He says:

PN314

In any issues are raised in the future with the preparation or use of the rosters using this process from either Aurizon or the workers we would still like to be able to use our continuous improvement process to sit down to work through any issues in consultation with both unions.

PN315

Do you see that?---I do.

PN316

And that means what it says, doesn't it? What Mr Fulton was saying in a courteous way was that if issues arose presumably anywhere in the future there might need to be more discussion?---And I believe I quantified that in my response to Mr Fulton.

PN317

You said something about it. He says he asked you to confirm that your union was happy for this process to continue to be used and reviewed if required. Do you see that?---Yes. And then I do quantify that with a response.

PN318

So you'd have to have read that as Mr Fulton saying the trial works, we'll continue with it, but if problems arise in the future we'll reserve our right to raise it?---That was at 9.07. At 10.34 I write back to Mr Fulton. I also say:

PN319

The AFULE is certainly happy to continue the work for the Bulk business and participate in future continuous improvement processes consultation, albeit on the proviso it relates to improvement and not regression.

PN320

Agree. So you'd agreed to Mr Fulton's suggestion?

*** MICHAEL JOHN MCKITRICK

XXN MR WILLIAMS

PN321

MR MASSY: I don't think the witness can be asked to confirm whether or not what he said constitutes an agreement.

PN322

MR WILLIAMS: I'm inviting him to, but he doesn't have to.

PN323

JUSTICE HATCHER: If there's an agreement it doesn't have to be construed objectively, Mr Williams.

PN324

MR WILLIAMS: So the problem is one of the issues, your Honour, is that we're being confronted with an allegation or an assertion that there's an agreement which is said to be constituted with two conversational emails.

PN325

JUSTICE HATCHER: They can constitute a contract of law, but the terms of the agreement will be derived from the text of the exchanged emails.

PN326

MR WILLIAMS: All right. Well, I have asked you about your own understanding there, Mr McKitrick, and nothing more. You understood that Aurizon had agreed to continue with the process which had been established and tested by the trials, but that Aurizon was reserving its position in relation to future disputes which might arise. Do you agree?

PN327

MR MASSY: I object again in the context of how this witness's understanding of the agreement is relevant to the proceeding.

PN328

MR WILLIAMS: As I understand it this witness is asserting that there's an agreement, and I'm exploring with him what the terms of that agreement are.

PN329

JUSTICE HATCHER: Well, the terms of the agreement are in the two emails, are they, Mr McKitrick?---That's correct, your Honour.

PN330

That's a matter for us to determine.

PN331

MR WILLIAMS: Including as to whether there's an agreement of course and what those terms are. Can I refer you to your own language. 'We can resolve our long outstanding disputes.' So they're the disputes which had arisen at Hughenden and Rockhampton, aren't they?---And the reason that we - if I may, the reason that we selected Rockhampton and Hughenden is because this agreement essentially covers two parts of the business, the AER business and the east coast business. So that's why we selected those two individual depots.

*** MICHAEL JOHN MCKITRICK

XXN MR WILLIAMS

PN332

When you say 'we selected' the disputes are between the employees and Aurizon?---Correct. We could have - Mr Williams, rather than starting a dispute in each individual depot it affected the entire state.

PN333

That may have been your strategy, but the facts are that there was a dispute at Hughenden and a dispute at Rockhampton and they're the only disputes; is that right?---That's correct, they're the ones that - - -

PN334

Thank you. So when you refer to long standing disputes they're the disputes you're talking about, right?---That had made it through to the Commission, but also as part of the trial and everything else it wasn't just though depots that had master rosters completed for them.

PN335

At the risk of being boring they certainly weren't trialled at Goondiwindi or Toowoomba, were they?---No.

PN336

So no one knew how it might work at Goondiwindi or Toowoomba, did they?---(No audible reply.)

PN337

It's an entirely future scenario, and you weren't resolving a dispute in relation to Goondiwindi or Toowoomba, were you?---In my view - - -

PN338

MR MASSY: I object. The question of the extent of the dispute is a matter to be characterised from the evidence. Mr McKitrick has given evidence about what the dispute was and the dispute notification has been filed. I don't see how he can characterise what the dispute was in his evidence.

PN339

MR WILLIAMS: I don't need to take it any further, your Honour. In the next line you say:

PN340

Aurizon have given an undertaking to roster in line with the AFULE interpretation.

PN341

It doesn't say - you haven't asked Mr Fulton to say that he agrees with your interpretation. You've just asked, or you've referred to an undertaking to roster in line with the interpretation at those depots.

PN342

MR MASSY: Again the objection - - -

*** MICHAEL JOHN MCKITRICK

XXN MR WILLIAMS

PN343

JUSTICE HATCHER: Again all this says what it says, Mr Williams, and you will be entitled to make a submission about what that means.

PN344

MR WILLIAMS: All right, your Honour. Thank you, your Honour. I am just troubled by the assertion of an abuse of process.

PN345

JUSTICE HATCHER: That's a legal submission.

PN346

MR WILLIAMS: Thank you, your Honour.

PN347

JUSTICE HATCHER: You don't need to take it personally.

PN348

MR WILLIAMS: I certainly don't personally take it personally, but my client might be entitled to. Thank you, Mr McKitrick. I don't have any further questions for you.

PN349

JUSTICE HATCHER: Just before you begin; so, Mr McKitrick, let's assume the union's interpretation of the agreement is correct, as I understand it the company says it has a practical problem with this grain contract, in that it can't comply with the 70 per cent because it just doesn't know with sufficient notice when the trains are going to run, and so it can't comply with the clause. Do you have any practical suggestions as to how to resolve that difficulty? I mean you can insist upon compliance and you can necessarily take the company to the Federal Court and get a penalty. That doesn't seem to me to resolve the problem. Do you have any ideas as to how the actual issue might be resolved?---I do, your Honour, and in my statement dated 21 April I've actually - I believe it's this one - I've actually written a master roster that complies with enterprise agreement. Similarly to what I did with the trial process for the disputes in early 2020 I potentially put Aurizon should be cutting me a cheque, I've written them a roster for this depot also.

PN350

Where is that?---So it's annexure MM22 on my 21 April 2023 further witness statement of Michael McKitrick. So the flexibilities that have been built into the enterprise agreement with the 70 per cent were a start time and a shift length there's still a three hour movement that the company can move with 33 hours notice. They've also then got the ability for one hour lift up on the day or a further three hour layback. So there's a lot of coverage there to use within their flexibilities to push people around, rather than just leaving them completely blank line available every day. We built in the flexibilities that a bulk business needs to operate, and I don't believe that they've explored those flexibilities that are there for them, which I developed for them.

*** MICHAEL JOHN MCKITRICK

XXN MR WILLIAMS

PN351

The master roster will nominate at least a notional time?---Correct.

PN352

And then the flexibilities in the agreement will allow that to be adjusted by the day to day roster?---Correct.

PN353

By how much?---So a 5 am start could be as early as 2 am or as late as 8 am, and then on the day it could get from 2, it could be lifted up further to 1, or could get pushed out as far as 11 am. There's a really large window there that can be utilised to move people around.

PN354

All right, thank you.

PN355

VICE PRESIDENT ASBURY: Can I just understand - sorry, Mr McKitrick. To allocate the shift in the master roster though you have to know the day on which it's going to fall, don't you, to say that's - to use that window of flexibility you have to be able to say it's going to be on this day?---So, your Honour, the way that I cut up this roster is I basically on every day it's got a statement, start times and the master rosters. So it's not alone to a train, it's not - it covers off on the 24 hours of the clock. So on any given day, and there is a one hour gap each day where all the flexibilities don't cover it. We only cover 23 hours of flexibility. So it's not necessarily a requirement to know what train on what day is running. It's a requirement to know that I've got - the business has got the flexibility to move those crews around to cover that train when they come. And the one hour that is missing on that coverage we can put down to by agreement the crews can move an extra one hour, and if for whatever reason the crew doesn't agree with that one hour it certainly is quite common business to dwell for an hour or more awaiting a crew to come and relieve that service.

PN356

But in order for that to work that requires you to take the cycle and say on this day, this day, this day there's a known working, nominated window I guess for the known working?---Essentially.

PN357

But then you need to have the people available to work on it, don't you?---We do.

PN358

So you then have to allocate people to the roster, and if they're not required on that particular day or shift what happens?---Well, similarly to Rockhampton you'd be placed on an available for duty window where you can be called in to do tasks around the depot, cover off on people going ill. There is certainly other tasks there, and it happens on the east coast in the same sort of predicament where a train falls over at Acacia Ridge and never makes it way to Rockhampton, that crew still gets reallocated work or is placed on a window to be available for duty.

*** MICHAEL JOHN MCKITRICK

XXN MR WILLIAMS

PN359

But as I understand it that's a different scenario than this one, because my understanding, and correct me if I'm wrong, is that the company is saying it's not a matter of we know a train is going to operate on that day and it might break down or the track might be blocked, or something might happen so it can't, the company is just saying we don't know on any given day whether the train is going to operate. So it's one thing to say, and again you can agree or disagree with me, it's one thing to say, look, if something happens on a day the train should have operated and it can't we can find them work?---Correct.

PN360

But to have to say on any possible day we've got to have people at work that might not need to be there, because we don't even know that anything is going to happen on that day, we have to find them work, that's a different concept, isn't it?---I guess it is, but that's freight operations as well. Even if we were to enter into a master train plan was what we know and all the rest they get moved around and ripped up quite constantly as well. I think what the important part for us is, and we want the bulk business to - and the grain business is exceeding, because we move more grain we get more drivers, we get more employment for our people. We want it to work. By staggering the shifts throughout the day, and having a look at - you know, we want to talk about (indistinct) and these sort of things that are brought up in some of their submissions. With the SEQ down here, because they have to run through the city train networks a lot of the (indistinct) is at night. So again we can condense that master roster even further into having crews predominantly based around the evening time, early in the morning to relieve them - - -

PN361

So you know that likely it will be at night that this will operate?---Yes. Minister Bailey is not going to let a grain train come through at peak hour for the city.

PN362

Can I just understand one last thing. When you're talking about a known working is it the case that you have the master roster, the known working, and then the third step is to allocate the time on the known working when people are going to work? So a known working can be - there's a point at which a known working is just a day on which you know that a service will operate. And then the third step, or the second step, however you want to look at it, is now we have to allocate a start and finish time for 70 per cent of those?---So what Aurizon do they provide our roster committees with specific details of times, and it could be 0205 (indistinct). There's nothing at all, and actually I've been waiting for it - I don't want to give a tip off - but instead of actually putting those sort of identifiable times and staggering them right across the block and using that flexibility to move drivers to trains rather than sort of picking and sticking. So the first step is the master roster. There's nothing there at all that says that you must be allocated for a train time. You could have a week of 2100s and the next week a week of 5 am, and they could just use their flexibilities. But the way they're doing it at the moment is putting you onto what they believe trains will be there and then filling up, you know, the 30 per cent of availability to cover sick leave and annual leave and late running trains and cancelled trains.

*** MICHAEL JOHN MCKITRICK

XXN MR WILLIAMS

PN363

So the 70 per cent of time that need to be allocated, what you're essentially saying is there's a lot of flexibility once you've done that to move it?---Absolutely. There's a three hours either side of them and then there's the day of operations as well. So with 33 hours notice an 8 am job could become 5 am or 11 am without agreement. It could be moved further than that by agreement with a penalty. There's also the one hour lift up on the day, three hour to firm it on the day. So that there is plenty of flexibility in it. What it was more so to cover off on is we know that the business needs flexibility, but also we wanted our people to be able to look at their master roster in October and be able to tell their family I'm on night shift for Christmas, or I'm on early morning for Christmas. Not that I'm going to be home at 2.15 in the afternoon, but I know I won't be at work at 2.15 in the afternoon. Even with all the flexibilities I at least have some sort of idea if I'm going to be starting early or starting late on that day. That's really the crux of what we were trying to get to, knowing that the business needs that flexibility, but just giving our people also some sort of view into the future, because the way that it was their master roster would say that they're starting at 2 am on Christmas morning, 33 hours out they're now starting at 2300 on Christmas night. So we wanted to give some sort of view to our people, but also not taking away 100 per cent of the flexibility from the business also.

PN364

JUSTICE HATCHER: Do you want to ask anything arising out of those questions, Mr Williams?

PN365

MR WILLIAMS: Not arising out of those questions, no, your Honour.

PN366

JUSTICE HATCHER: All right. Any re-examination, Mr Massy?

PN367

MR MASSY: Very briefly, your Honour.

RE-EXAMINATION BY MR MASSY

[12.10 PM]

PN368

Mr McKitrick, you were asked some questions - during your evidence you spoke of a time in the negotiations where there was a change in dynamic about the focus of known workings; do you recall that?---Correct.

PN369

When was that?---Essentially post no vote. The game had changed that it's about what we know.

PN370

You were asked a number of questions about Ms Pollock's notes. Do you recall those?---I do.

*** MICHAEL JOHN MCKITRICK

RXN MR MASSY

PN371

Did you get those notes at the time?---No.

PN372

You were asked some questions by Mr Williams concerning the form of the enterprise agreement and clause 77.1.1 referring to 70 per cent availability, and clause 77.1.2 not referring to 30 per cent availability; do you recall?---Correct.

PN373

I think I might have said 70 per cent availability, I mean 70 per cent known workings. The second part of the clause not saying 30 per cent availability. Do you recall those questions?---I do.

PN374

I recall you saying something in one of your answers about coal having to reverse?---I believe that's - Coal talks about 30 per cent availability, and then silence on the known workings.

PN375

Thank you. You were asked some questions about the disputes in 2020 concerning the master rosters and you gave some evidence about master rosters that you prepared. Do you recall that?---Yes.

PN376

What did the master rosters you drafted provide for?---The split of 70 per cent of those was to be put in the RDOs, X days. Whatever's left 70 per cent of those our members and the train crew had a start time and a shift length. Thirty per cent of the time was open slather, the company had full flexibility for.

PN377

Thank you. I have no further questions for this witness.

PN378

JUSTICE HATCHER: All right. Thank you for your evidence, Mr McKitrick, you're excused, which means you can sit in the court and leave as you please?---Thank you.

<THE WITNESS WITHDREW

[12.12 PM]

PN379

MR MASSY: I call John Pedersen.

PN380

THE ASSOCIATE: Can you please state your full name and address for the record.

PN381

MR PEDERSEN: John Anthony Pedersen, (address supplied).

<JOHN ANTHONY PEDERSEN, AFFIRMED

[12.13 PM]

*** MICHAEL JOHN MCKITRICK

RXN MR MASSY

EXAMINATION-IN-CHIEF BY MR MASSY

[12.13 PM]

PN382

MR MASSY: Mr Pedersen, will you please state your full name for the record?---John Anthony Pedersen.

PN383

And what's your address?---(Address supplied.)

PN384

And what's your current occupation?---I'm a driver trainer with Aurizon Operations.

PN385

Have you made a witness statement in this matter dated 24 April 2023?---That's correct.

PN386

Do you have a copy of that with you?---Yes, I do, yes.

PN387

Are there any corrections or amendments you wish to make to that statement?---No.

PN388

Is it otherwise true and correct?---Yes, it is.

PN389

I tender that statement.

**EXHIBIT #4 STATEMENT OF JOHN PEDERSEN DATED
24/04/2023**

PN390

That's the evidence-in-chief of this witness.

PN391

JUSTICE HATCHER: Mr Williams?

CROSS-EXAMINATION BY MR WILLIAMS

[12.14 PM]

PN392

MR WILLIAMS: Yes, thanks. Mr Pedersen, I've only got a couple of minutes for you, and I apologise asking you to come all the way to Brisbane for that?---That's okay.

*** JOHN ANTHONY PEDERSEN

XXN MR WILLIAMS

PN393

We did indicate that we'd be prepared to do it by video or phone, but good to have you here. Your statement at paragraph 5, if you have a copy with you. May I take

it from that statement, or that paragraph rather that you've read Mr Fulton's first statement?---I have, yes.

PN394

And were you asked essentially - sorry, is your intention essentially to give evidence about the matters where you disagree with what Mr Fulton said?---Yes.

PN395

And you say you don't agree that the term 'known workings' had been solely used to describe master train plan workings?---Sorry, can you repeat that question.

PN396

Yes, I'm sorry, I'm just - I speak too quickly sometimes. I was reading from your evidence:

PN397

I do not agree that the term 'known workings' had been solely used to describe master train plan workings.

PN398

Do you see that?---Yes.

PN399

Paragraph 5?---Yes.

PN400

So I take it from that you agree that known workings is a term which is used to describe master train plan workings?---No. It's known workings - (indistinct) what I said there - 'The term 'known workings' had been solely used.' 'I do not agree that the known workings had been solely used to describe master train plan workings.' That's correct.

PN401

Yes, but I had taken that that you accepted that if there were workings in the master train plan then they would be known workings?---They would be workings in the master train plan.

PN402

And they would therefore be known workings?---I don't quite understand your question.

PN403

I am just reading your evidence, Mr Pedersen. You say:

PN404

I don't agree that the term 'known workings' had been solely used to describe master train plan workings.

PN405

?---Yes, that's right, it's not solely used to describe.

*** JOHN ANTHONY PEDERSEN

XXN MR WILLIAMS

PN406

Not solely, but if there are workings in the master train plan then they are known workings?

PN407

JUSTICE HATCHER: For what purpose?

PN408

MR WILLIAMS: I'm just exploring the evidence, your Honour.

PN409

JUSTICE HATCHER: I don't want to be at cross purposes here. The witness's evidence seems to be about the term generally. It doesn't say anything about a meaning that attaches to it in the context of the agreement.

PN410

MR WILLIAMS: No, he doesn't say anything about the agreement at all, because I'm asking questions about terminology.

PN411

MR MASSY: Sorry, he refers to paragraph 40 of Mr Fulton's statement.

PN412

MR WILLIAMS: Well, that's true. I presume that's a reference to Mr Fulton's first statement. I can pass you a copy or I can read it to you, Mr Pedersen. What would you prefer?---Could I have a copy of it. I have got a copy of it - - -

PN413

So Mr Fulton says:

PN414

I understood at the time that known workings meant workings in the MTP.

PN415

Which I'm sure we can take is reference to master train plan.

PN416

I'd only been working with Aurizon for approximately two years at the time, but my impression at that time and talking to other more experienced Aurizon employees was that the term 'known workings' had been used to describe MTP services for a long period of time.

PN417

You've come to give evidence that you disagree with that proposition, but I just wanted to explore the scope of your disagreement. Do you accept that known workings can mean workings in the master train plan?---Yes.

*** JOHN ANTHONY PEDERSEN

XXN MR WILLIAMS

PN418

Find your statement again, Mr Pedersen. Back to paragraph 5 of your statement. Your point of disagreement appears to be what you call local workings can also be known workings?---That's correct.

PN419

Shunt shifts, shed shifts, required shifts and relief shifts. Would it be fair to say that the local workings are generally attached or related to a working that's in the master train plan?---No.

PN420

In what circumstance - - -?---Not to my understanding anyway.

PN421

So in what circumstance might there be a local working which is a known working?---There's a number of local workings in different depots; not all depots, but some depots, and when the company gives us a list of jobs to go into the master diagram the local shifts are there.

PN422

And when you say the master diagram - - -?---The master roster, sorry.

PN423

The master roster?---The master roster.

PN424

And when you say jobs is that train movements?---Sign on and sign off times.

PN425

For actual trains that are expected to run?---Some are, some aren't. So local workings aren't there for - well, in my view they're not there for there. You might be rostered 6 am to 1400 or whatever it is as a local working.

PN426

All right?---And that's a known working in my opinion.

PN427

Nothing further.

PN428

MR MASSY: No re-examination, might the witness be excused?

PN429

JUSTICE HATCHER: All right. Thank you for your evidence, Mr Pedersen, you're excused and you're free to go. You can stay in the court if you wish.

<THE WITNESS WITHDREW

[12.21 PM]

PN430

MR MASSY: That's the evidence for the AFULE.

*** JOHN ANTHONY PEDERSEN

XXN MR WILLIAMS

PN431

JUSTICE HATCHER: All right. How long do we think we will take - - -

PN432

MR MASSY: That clock is broken.

PN433

JUSTICE HATCHER: I know. It's pretty close at the moment actually. Is it convenient that we took an early lunch and then we can start with the union's case after lunch?

PN434

MR MASSY: Can I say that my cross-examination on both Ms Pollock and - - -

PN435

JUSTICE HATCHER: Mr Williams' case after lunch, sorry, yes.

PN436

MR MASSY: Mr Maszczak will be relevantly brief subject to some issues arising from the matters which the Bench elicited from Mr McKitrick. So I'm not sure whether it's convenient - and I assume at that point we will then move into final addresses.

PN437

JUSTICE HATCHER: All right. Alternatively if that can be done by 1 o'clock we can take lunch then and hear submissions after lunch.

PN438

MR WILLIAMS: I am certainly in a position to call my witnesses. If that's how we proceed I will call Ms Pollock.

PN439

THE ASSOCIATE: Can I please have you state your full name and address for the record.

PN440

MS POLLOCK: Emma Jean Pollock, (address supplied).

<EMMA JEAN POLLOCK, AFFIRMED [12.22 PM]

EXAMINATION-IN-CHIEF BY MR WILLIAMS [12.22 PM]

PN441

MR WILLIAMS: Ms Pollock, I wonder if you could state your full name for the record, please?---Emma Jean Pollock.

PN442

And you were employed by Aurizon as a Human Resources Partner in the Freight and Bulk business from 2013 until 27 January 2023?---Yes.

*** EMMA JEAN POLLOCK

XN MR WILLIAMS

PN443

And you were involved in negotiations for the 2019 Bulk agreement?---Yes.

PN444

Ms Pollock, you've made a statement in relation to these proceedings?---Yes.

PN445

Do you have a copy of your statement with you?---I do, yes.

PN446

And are the matters and facts set out in that statement true and correct to the best of your knowledge and belief?---Yes, they are.

PN447

I tender Ms Pollock's statement.

**EXHIBIT #5 STATEMENT OF EMMA POLLOCK DATED
24/03/2023**

PN448

Thank you. And that's the evidence of Ms Pollock.

PN449

JUSTICE HATCHER: Mr Massy?

CROSS-EXAMINATION BY MR MASSY

[12.23 PM]

PN450

MR MASSY: Thank you. Ms Pollock, in your statement you've attached a number of different sets of notes concerning negotiations you attended for the enterprise agreement 2019?---Yes.

PN451

It's fair to say that those notes are not a transcript of what was said?---They give an account of the discussions that took place during the negotiation process, yes. They're not verbatim word for word.

PN452

They're summaries of what you understood the people to be saying?---Yes.

PN453

And you'd agree with me, wouldn't you, that it's possible at times during the meetings individual speakers spoke longer than the summary recorded?---Yes.

PN454

And you'd accept, wouldn't you, and I don't say this with any criticism, but from time to time you might have apprehended what was being said?---I believe I was quite concise in what I was taking down from a notes perspective.

*** EMMA JEAN POLLOCK

XXN MR MASSY

PN455

So do I understand from that you're disagreeing with the proposition that you might have misapprehended what was being said?---I am, yes.

PN456

So you suggest that in all accounts, in all circumstances you properly understood exactly what everyone was saying?---Yes. There was numbers of clarifications and discussions.

PN457

Just in the course of ordinary human experience it's common for people to misunderstand or misapprehend what another person is saying?---Yes.

PN458

And can I suggest that it's entirely possible that your notes contained instances where you have misapprehended what was being said by one of the relevant speakers?---The notes that I have used and referenced in the witness statement are the account that I do recall as to what happened.

PN459

Perhaps focusing on my question; is it possible that when you have recorded what has occurred you have misapprehended what people have said?---Yes.

PN460

Thank you. Can I ask that you come to paragraph 68 of your affidavit. You've extracted a passage from the notes?---Yes.

PN461

And if you come over the page to the top of page 14 you've extracted a passage from your notes which is attributed to Mr McKitrick?---Yes.

PN462

Now, again without being critical is it possible in that part of the conversation that you are summarising in your notes Mr McKitrick said words to the effect that it was his intention there will not be a depot that have only 50 per cent known workings?---I couldn't recall. Yes.

PN463

Just to be fair do you suggest that that would at least be consistent with what you've recorded next when he said he didn't want to be in a position where the depot had 20 per cent of available and 100 per cent of known workings?---Sorry, in what context?

PN464

What I'm suggesting to you is that the second sentence it summarises Mr McKitrick as saying:

PN465

It's our intent that the depot will have 50 per cent of known workings.

*** EMMA JEAN POLLOCK

XXN MR MASSY

PN466

Just pause there. What I suggested to you was that that might have been a mistake and the substance of what Mr McKitrick said was that he didn't want to be in a position where a depot would only have 50 per cent of known workings?---I can't recall. Yes.

PN467

What I'm suggesting to you is that would be consistent with the second part of the sentence where he said:

PN468

We don't want to land in a position where a depot may have 20 per cent of available and 100 per cent of known workings.

PN469

?---Yes, again I couldn't recall.

PN470

Can I suggest to you at this point in the discussions the effect of what - or the substance of what Mr McKitrick was saying was that he wanted a split between known workings and availables to add up to 100 per cent?---I can't comment on that.

PN471

And can I suggest that during this part of the discussion the substance of what Mr McKitrick said was that he was proposing that the rosters would reveal 70 per cent of the shifts which would have a start time and 30 per cent which would have shifts as available?---Yes. I can't recall. Yes.

PN472

I understand. Coming forward to paragraph 88 you make a reference, in brackets, '(The disputes didn't involve Toowoomba or Goondiwindi)'?---Yes.

PN473

It's fair to say that when those disputes arose in 2020 Aurizon did not have any employees at the Toowoomba or Goondiwindi depots who were covered by the Bulk East agreement?---That's correct.

PN474

Thank you. I have no further questions for the witness.

PN475

JUSTICE HATCHER: Any re-examination?

PN476

MR WILLIAMS: There is. There's a question I should have asked in examination-in-chief, your Honour, that arose out of a question that you'd asked, and perhaps you would have asked it even if I hadn't.

PN477

JUSTICE HATCHER: I will grant leave.

*** EMMA JEAN POLLOCK

XXN MR MASSY

PN478

MR WILLIAMS: Mr Massy would obviously have an opportunity.

RE-EXAMINATION BY MR WILLIAMS

[12.30 PM]

PN479

I want to take you over to the minutes of a meeting which took place on 21 August. The minutes commence at paginated page 467 of your statement, and it's well towards the end of your statement. It's the last of the minutes that you annex.

PN480

JUSTICE HATCHER: 467?

PN481

MR WILLIAMS: 467 is the start of the minutes. The passage that we wanted to ask Ms Pollock about is on 471. Are you with me?---Yes.

PN482

So there's a passage in the middle of page 471 in your minutes or your record which says, '36.1 - proposed', and then it says, 'The shift length and start times for at least 70 per cent of all known workings.' Do you see that passage there?---Yes.

PN483

First of all is it consistent with your recollection that that was a clause which had been proposed by someone?---Yes.

PN484

And are you able to help us with who proposed it, and more specifically was it from the Aurizon side or was it from the union side?---Can I just have a minute to familiarize myself with - - -

PN485

Of course, and we accept that it's a long time ago and you may not recall, but I'm just checking whether you do have a recollection.

PN486

JUSTICE HATCHER: You might add that it appears to relate to the document that's in the preceding annexure.

PN487

MR WILLIAMS: Yes.

PN488

JUSTICE HATCHER: That is that seems to have 36.1 clause marked up in that way.

PN489

MR WILLIAMS: In those terms, yes. That is so. In fact, Ms Pollock, just to save a bit of time can I take you back to page 433, and I will ask you a question about that as well.

*** EMMA JEAN POLLOCK

RXN MR WILLIAMS

PN490

JUSTICE HATCHER: Sorry, just hold on, Mr Williams.

PN491

MR WILLIAMS: Before I do that, Ms Pollock, just to be fair to you, the annexure we're now on, one of two green highlighting, is annexure EP21, and can I take you back to the first page of EP21 first, which commences at page 286?---Yes.

PN492

By reference to what's written on the first page of that document are you able to say whose document it is, who created the document, initially?---No, I couldn't.

PN493

What, if anything, is the significance of the heading or what's written on the first page 'Without prejudice joint union proposal'?---Sorry, yes. So this is a document that was provided from the AFULE, the proposal.

PN494

If we now go back to page 433, and let me know when you're with me?---Yes, 433.

PN495

Take as much time as you need, but you will see that that's where clause 36 exists. And as appears from that document, it appears, and I'm asking you if you recall exactly what happened, but there's a clause which is highlighted in green and then there are some mark-up to that clause. Are you able to remember who did the marking up, or how it occurred?---So the marking up was as a result of discussions that took place during negotiations.

PN496

Do you remember who was actually physically doing the marking up?---I am. That would have been myself.

PN497

Yourself?---Yes.

PN498

And do you recall on whose proposal that that marking up was done?---No. There would have been - yes, there would have been one proposal that the mark-ups went back and forward, but who initiated that I couldn't - I couldn't recall that.

PN499

Thank you. Now, finally if we go back to page 471, and again, Ms Pollock, you of course may not recall, but when it says 36.1 proposed are you able to advise the Full Bench who proposed, if that in fact means anything?---I couldn't recall.

PN500

Thank you. They were the questions I wanted to ask.

*** EMMA JEAN POLLOCK

RXN MR WILLIAMS

PN501

JUSTICE HATCHER: All right.

PN502

MR MASSY: Nothing arising out of the questions, your Honour.

PN503

JUSTICE HATCHER: Thank you for your evidence, Ms Pollock, you're excused and free to go?---Thank you.

<THE WITNESS WITHDREW

[12.35 PM]

PN504

MR WILLIAMS: Your Honour, members of the Bench, I call Mr Andrew Maszczak, but I have another witness, Mr Fulton, who's made two statements. His original statement is dated 3 April 2023 and it would have been filed in the section 218A application. And his second statement - - -

PN505

JUSTICE HATCHER: He's not required for cross-examination.

PN506

MR WILLIAMS: He's not required for cross-examination, so I simply wanted to tender those statements while I remember to.

EXHIBIT #6 STATEMENT OF IAN FULTON DATED 03/04/2023

**EXHIBIT #7 FURTHER WITNESS STATEMENT OF IAN FULTON
DATED 24/04/2023**

PN507

Thank you.

PN508

JUSTICE HATCHER: Come forward, Mr Maszczak.

PN509

THE ASSOCIATE: Can I please have you state your full name and address for the record.

PN510

MR MASZCZAK: My name is Andrew Damien Maszczak, (address supplied).

<ANDREW DAMIEN MASZCZAK, AFFIRMED

[12.36 PM]

EXAMINATION-IN-CHIEF BY MR WILLIAMS

[12.36 PM]

*** ANDREW DAMIEN MASZCZAK

XN MR WILLIAMS

PN511

MR WILLIAMS: Mr Maszczak, I wonder if you can give your full name and address for the Commission, please?---My name's Andrew Damien Maszczak, (address supplied).

PN512

Thank you. Mr Maszczak, you're employed by Aurizon as Regional Operations Manager Coal Operations?---Correct.

PN513

And you've been employed since 2011?---Yes.

PN514

You work predominantly in the coal side of the business, but you had some involvement in negotiations for the 2019 Bulk agreement?---Indeed, I have.

PN515

In relation to matters touching both of those themes have you made a statement in connection with these proceedings?---I have indeed.

PN516

Do you have a copy of your statement with you?---I do have a copy of that statement.

PN517

And are the matters and facts set out in that statement correct to the best of your knowledge and belief?---Yes, they are.

PN518

I tender Mr Maszczak's statement.

**EXHIBIT #8 STATEMENT OF ANDREW MASZCZAK DATED
24/04/2023**

PN519

Thank you. That's the evidence of Mr Maszczak.

PN520

JUSTICE HATCHER: Yes, Mr Massy.

PN521

MR MASSY: Thank you, your Honour.

CROSS-EXAMINATION BY MR MASSY

[12.37 PM]

PN522

Mr Maszczak, at paragraph 5 of your statement you give some evidence about the master train plan?---Sorry?

*** ANDREW DAMIEN MASZCZAK

XXN MR MASSY

PN523

At paragraph 5 of your statement you give some evidence about the master train plan. Do you see that?---Yes.

PN524

Now, it's fair to say that whilst the master train plan identified as train services which are expected to run, it's the case, isn't it, that from time to time a service in the master train plan does not run a schedule?---It can, yes.

PN525

And it's for a variety of reasons?---Yes.

PN526

So sometimes the client will indicate that it doesn't require the service?---Services can be cancelled, yes.

PN527

And then sometimes there are operational reasons such as breakdowns or network outages?---There can be, yes.

PN528

And equally so there might be weather events which cause some delays to the network?---Yes.

PN529

If a service is delayed that might have a knock-on effect to other services?---It can, yes.

PN530

And that might mean that from time to time a service which was planned in the master train plan has to be withdrawn because of delays which preceded it?---It could, but it could just as easily be replaced as well with another service. Yes.

PN531

And that's why Aurizon requires some flexibility in the master roster, correct?---Yes.

PN532

Because even if you have a master train plan for a depot from time to time you will need to make changes for operational reasons?---There can be, yes.

PN533

Your Honour, I note that Mr Maszczak is employed in the coal side of the business. Those are the questions that I had proposed to ask him. I'm a little anxious about some of the questions that Deputy President Asbury asked Mr McKitrick, and some of the evidence that was elicited from him about the effects of the various constructions and the nature of Aurizon's business, and no one from Aurizon having had an opportunity to comment on those. I'm just not sure that Mr Maszczak will be able to answer those questions. I'm content to endeavour to put what I understood the effect of the evidence to be to Mr Maszczak. Equally so when the Full Bench has (indistinct), the Bench wants to question - - -

PN534

JUSTICE HATCHER: You go ahead, Mr Massy.

PN535

MR MASSY: Thank you.

PN536

VICE PRESIDENT ASBURY: I have to remember all my questions then, Mr Massy. You will probably do a better job than me.

PN537

MR MASSY: I doubt it. Mr Maszczak, it is right that there are some changes which can be made from the master roster to the forecast roster, correct? I'm sorry, I will start again. Dealing with the 2019 Bulk agreement - - -?---Yes.

PN538

- - - there are changes which can be made from the master roster to the forecast roster?---My recollection is, yes, there was.

PN539

So for example a shift can be picked up and either laid up or laid back on three hours?---Yes.

PN540

And then equally so in respect of the daily roster the shift can be picked up by an hour or laid back by two hours?---I'm a little vague on the exact hours in terms of lift up and laid back. It's been a while since I played in that space, particularly with the Bulk agreement, but there is some lift up and laid back, yes.

PN541

And those are cumulative, aren't they, in the sense that the forecast roster can move it by three hours and then there can be further changes in the - - -?---In general terms, yes.

PN542

And one of the effects of that is if the clause in the master roster, which was clause 77.1.1 which requires known workings to be included in the master roster - - -?---Yes.

PN543

- - - is construed as requiring a start and finish time of an actual shift to be worked rather than some reference to a train time. So can I ask you to make that assumption?---It would be an assumption. Yes.

*** ANDREW DAMIEN MASZCZAK

XXN MR MASSY

PN544

I'm not trying to trick you into agreeing with that proposition, but if that is the case that would mean, wouldn't it, that Aurizon could stagger the start times for shifts which were provided to its drivers so as to have broader flexibility across a particular day which the drivers were rostered?---It's a difficult - hypothetically speaking, yes, but it's difficult to give you a concise answer or an exact answer

because you would need to see trains for the day, rostered shifts for the day, to be able to understand whether that would be a solution to the proposition you make.

PN545

All I'm suggesting to you is that if - - ?---But it is a mechanism that you can move people through a roster, yes.

PN546

That is if clause 77.1.1 just requires you to identify the start and finishing time of an actual shift rather than attaching it to a proposed train path?---In my experience in the coal business that works as you're describing. In a bulk business there was some nuances to that.

PN547

No further questions for the witness.

PN548

JUSTICE HATCHER: All right. Any re-examination?

PN549

MR WILLIAMS: There's no re-examination, your Honour.

PN550

JUSTICE HATCHER: All right. You're excused, Mr Maszczak, and you're free to go?---Thank you.

<THE WITNESS WITHDREW

[12.43 PM]

PN551

JUSTICE HATCHER: Is that all your evidence, Mr Williams?

PN552

MR WILLIAMS: That is Aurizon's evidence, yes.

PN553

JUSTICE HATCHER: So is it appropriate that we break for lunch and then resume for submissions? Mr Williams?

PN554

MR WILLIAMS: I'm sorry, yes, it is, your Honour, and so far as that's concerned I think we're optimistic that we can complete the submissions today. But that being the case, subject to Mr Massy's estimate, I wonder whether we might return at 2.30, because it will give the advocates a little bit more time to prepare final submissions.

PN555

JUSTICE HATCHER: To finish by - - -

PN556

MR WILLIAMS: I think we'll still be finished by - - -

*** ANDREW DAMIEN MASZCZAK

XXN MR MASSY

PN557

JUSTICE HATCHER: By 4?

PN558

MR WILLIAMS: I think we still would be, or 4.30.

PN559

MR MASSY: Subject to the interrogation for the Full Bench I expect to be somewhere between an hour and an hour and 15.

PN560

JUSTICE HATCHER: Can I raise one matter that the parties might think about over their extended lunch break. The term 'known workings', which seems to be at the core of the interpretation dispute, is not defined in the agreement. I think that's clear. I can't say that it's an industrial term that's well enough known that I had ever heard about it before reading this material. And I think it was put to one witness that perhaps the parties were at cross purposes when they agreed to this.

PN561

MR WILLIAMS: Well - - -

PN562

JUSTICE HATCHER: No, I'm just - - -

PN563

MR WILLIAMS: Yes, I understand.

PN564

JUSTICE HATCHER: That's the premise of the question. But what I am leading to is this, that, Mr Williams, you've made this, your variation application, under section 218A. If those premises are correct why wouldn't that put us into the 217 territory more safely? That is just an ambiguity or uncertainty. Because you've got this term that is undefined. The parties may have had different understandings of what it meant. Why would an ambiguity application be safer territory to deal with that than - - -

PN565

MR WILLIAMS: It's an interesting proposition. I think perhaps can I respond to it in this way. An ambiguity application in itself does not appear to allow for a substantive change to the agreement. It just requires the terms be ascertained, and then a correction made so that the agreement doesn't mislead anyone, if I can put it in those summary terms.

PN566

JUSTICE HATCHER: Ambiguity, then there's uncertainty. So we know that they are two different things.

PN567

MR WILLIAMS: Ambiguity and uncertainty are different things, although ambiguity can plainly lead to uncertainty.

PN568

JUSTICE HATCHER: I mean leaving aside what the variation would be I am just wondering why we are squarely in that sort of territory unless we can assign a clear meaning to the clause.

PN569

MR WILLIAMS: Well, I think of course we're responding to the dispute and the interpretation they have put in that dispute. So we're responding to a situation where we have been asked to anticipate the possibility that Mr Massy's client's interpretation is correct. And if that's the case, whether that's arrived at via a conclusion that the agreement can be easily interpreted and has a plain meaning, or perhaps because of a resolution of ambiguity, either of which it seems to be would be available just as a response to the application without reference to 217, then we would be seeking an exercise of discretion to amend the agreement. If our situation was this, your Honour, that you accepted that the clause was ambiguous, but then it seems to me that before you exercise the power under clause 217 you have to work out what in any event it meant in accordance with the construction principle.

PN570

JUSTICE HATCHER: It's unusual, but there's at least one case I'm aware of where a court found that a clause was so uncertain in meaning that they couldn't assign any meaning to it.

PN571

MR WILLIAMS: And that would very possibly be a defect, which could be corrected under 218A. It's a little bit difficult for me to see how it could be corrected under 217.

PN572

JUSTICE HATCHER: I didn't ask for an instant response, Mr Williams, but the parties might want to think about that over lunch.

PN573

MR WILLIAMS: And I had some other submissions I will make in relation to the relevance of 218A on either scenario.

PN574

JUSTICE HATCHER: Yes, all right. We will now adjourn and resume at 2.30.

LUNCHEON ADJOURNMENT [12.47 PM]

RESUMED [2.30 PM]

PN575

JUSTICE HATCHER: Mr Massy.

PN576

MR MASSY: Thank you, your Honour. I propose to break my final address into seven parts. Firstly, I propose to make some observations about the facts. Then I propose to make some submissions concerning the legal principles about the

finality of litigation and when subsequent proceedings amount to an abuse of process.

PN577

Thirdly, I'll deal with why it is the AFULE contends that the matter raised in Aurizon's defence of the dispute notification is an abuse. Fourthly, I propose to say something about the principles concerning the proper construction of enterprise agreements.

PN578

Fifthly, I propose to deal with the proper construction of clause 77.1 of the agreement. That topic will only become relevant if the Bench is against the AFULE on the proposition that this question has been settled already between the parties.

PN579

The sixth topic then concerns the proper construction of section 218A, and then finally I propose to say something briefly about whether the matters Aurizon point to amounts to a state of defect or irregularity within the meaning of section 218A.

PN580

Convenient to the Full Bench, I might come to the first of those matters, being a brief summary of the relevant facts. In 2015 the relevant employees were covered by the Aurizon Train Crew and Transport Operations Transport Agreement 2015. A copy of that agreement can be found at Annexure 3 to Mr McKittrick's first statement, and it commences at page 27 of his affidavit

PN581

The relevant clause though is at clause 51 which is at page 92. And I say the important part of clause 52.2 which deals with master rosters is that the first bullet point requires the shift length and start times of rostered shifts; 4.2 provides for available; and then 4.3 provides for RDO's.

PN582

Can I just draw the Full Bench's attention to the use of the words, 'rostered shifts,' there in 51.2, and I think it's common ground between the parties that the balance of the provisions permitted changes to be made to the master roster through the forecast roster and then the daily roster without any effective restriction. What that meant is notwithstanding that the agreement described those shifts as rostered shifts, there was no certainty as to whether they would be the shifts the majority of the employees would work.

PN583

Unsurprisingly, when bargaining commenced one of the employee claims was for greater certainty in the rostering arrangements. The evidence of Mr McKittrick reveals that in July 2019 Aurizon put out a proposed enterprise agreement to the employees for a ballot without the support of the other bargaining representatives.

PN584

The draft enterprise agreement contained a reference to the rostering principles that were to be read in conjunction with that agreement. Those principles can be

found an Annexure MM5 which is at page 158. Importantly, section 1 which is headed, 'Master rosters' which deals with this topic, unsurprisingly, clause 1.2 says, 'The master rosters will exhibit all known workings and rostered days off for a depot and will show the sign-on and sign-off times for each shift.'

PN585

Now there was no provision in that document for availables. However, in my submission one of the vices was that just like the 2015 agreement, the master roster could be changed. But the absence of availables as a species in the rostering principle suggests that there was only RDO's and known workings which would be included in the master roster.

PN586

In my submission that is appointed towards the notion of a known working being synonymous with a shift.

PN587

JUSTICE HATCHER: How is that admissible to interpret the agreement?

PN588

MR MASSY: It was provided to the employees and it was one of the objective facts known to them when they came to consider what the phrase meant in the context of the subsequent agreement which was put to them for approval.

PN589

The proposed agreement was voted down by a no vote of 90 per cent and the bargaining would have commenced. There is a deal of evidence about what transpired during the bargaining.

PN590

However, and this is important, there is no evidence that the content of those negotiations between the bargaining representatives was ever put before the employees when they came to vote on the agreement, and for the reasons that I will come to in a little bit, in my submission the evidence concerning the substance of the negotiations and what was said in those meetings is of no assistance simply because it was not an objective fact known to the parties being both Aurizon and the employees.

PN591

JUSTICE HATCHER: And Aurizon put the first agreement to a vote, did it, providing an explanatory document?

PN592

MR MASSY: As I understood it the evidence was to the effect that the rostering principles document was part of the material that was put out.

PN593

JUSTICE HATCHER: Part of the agreement?

PN594

MR MASSY: Well, it was referred to in the agreement, yes.

PN595

JUSTICE HATCHER: Consistent with section 180, subsection (5), Aurizon separately explained what it was that it was asking people to vote upon?

PN596

MR MASSY: I'll get some instructions on that. I believe they would have, I would expect but I don't think that's in the evidence.

PN597

JUSTICE HATCHER: Okay.

PN598

MR MASSY: Yes. My instructor thinks it's not in the evidence but there's no reason to think that they would not have an explanation. Coming back to the facts, very briefly, ultimately an agreement was reached and it was approved by the employees. Within three months of the agreement starting to operate, a dispute about the master rosters arose.

PN599

Mr McKitrick gives some evidence of this and he says the dispute arose out of a direction that Aurizon gave the local roster committees that only 70 per cent of those trains on the master trains plan could be included in the master roster. That resulted in the amount of shifts being included in the master roster being less than 70 per cent of the total shifts.

PN600

And Mr McKitrick gives evidence that this applied throughout all of the bulk depots throughout Queensland. Two representative disputes were taken. Mr McKitrick (indistinct), one in Rockhampton and one in Hughenden. Those disputes can be found at annexure MM14 to Mr McKitrick's first statement. That's page 260.

PN601

Importantly one comes to section 2 which is the part of the form where one identifies what the dispute is about, and section 2.1(3)(d) identifies the respondent's failure to include 70 per cent of all known workings into the new depot master roster, and in my submission, importantly for the claims made by the AFULE about an abuse.

PN602

At clause 3.1 or at section 3.1 of that notification the AFULE identifies the relief which is sought, and at 4, the relief's orders, 'The respondent acknowledges the entitlement of train crew to have a master roster containing 70 per cent of workings that are known to them and the master roster is amended to reflect 70 per cent of the train crews' known working.'

PN603

That dispute was the subject of a settlement, or those disputes, I should say. Fortunately, the settlement of the dispute was recorded in writing and can be found in two, or perhaps three emails between Mr Fulton and Mr McKitrick on 8 July 2021. They can be found at page 295 of

PN604

Mr McKitrick's affidavit/statement. I should say the first email is actually at 296.

PN605

It is an email from Mr Fulton, then whilst it is in response, in my submission, Mr McKitrick's email of 10.34 which can be found at the bottom of page 295 is probably construed as an offer to resolve matters. The first paragraph of that email is some opening remarks but the important paragraph is the second paragraph. In my submission that is an agreement about the proper construction of clause 77.1 and the obligations imposed by it.

PN606

JUSTICE HATCHER: What are blank days?

PN607

MR MASSY: My understanding, and I'll get some instructions to ensure this is right, is that in the – if I just confirm, I can't say that I know the answer to that.

PN608

VICE PRESIDENT ASBURY: It might be a day when there's nothing, it's not available and it's not - - -

PN609

MR MASSY: I had understood it to be another species of an available type day where work could be had, but I'm just not sure that that is correct. It seems to have been an unrelated issue concerning what was being rostered after RDO's.

PN610

Can I say in response to that offer from Mr McKitrick,

PN611

Mr Fulton accepts that in the following email. There is a word missing but I think in this first statement Mr Fulton accepts that he was agreeing with what was in Mr McKitrick's email. They've having a bit of a debate but he didn't look to disagree with the proposition put in

PN612

Mr McKitrick's email. And the proceedings were ultimately discontinued and didn't proceed to an arbitration.

PN613

Then if we then go about that you can see that on page 294 there's a series of emails that says that the discontinuance took some time. Subsequently an issue arose which is the subject of this dispute, at the Goondiwindi and Toowoomba depots.

PN614

Before I go into the context of that dispute we are told by Aurizon that there are no master trains plans because of the nature of grain services, and if I can pause to note that circumstances where there's no master train plan – if Aurizon is correct in its construction of 70 per cent of known working refers to 70 per cent of the

train paths in the train plan, that would mean that they would not be required to include any shifts in the master roster because 70 per cent of zero is of course zero.

PN615

But if one can return to the facts for a moment, on 10 October Aurizon sent its employees an update dealing with this issue and that's at 315 of Mr McKittrick's statement. It's especially addressed to locomotive drivers based at Toowoomba and Goondiwindi.

PN616

There's the introductory paragraph and then there's a third paragraph and the note provides, 'All arriving train crew are engaged under the Aurizon Bulk Queensland Enterprise Agreement which outlines rostering guidelines. Given the operational requirement for grain presents issues in long term planning and environment and services not aligned to a master train plan the business is unable to have a detailed master roster for at least 70 per cent of all known workings.'

PN617

Then there's a proposal and then it says under the heading, 'Roster allowance,' 'In recognition of the master roster flexibility (unable to detail at least 70 per cent of all known workings), a roster allowance of \$12,000 will be paid.' And I'll just pause there. That is not consistent with the construction that Aurizon advances now.

PN618

JUSTICE HATCHER: Yes.

PN619

MR MASSY: If what Aurizon says now is the case then Aurizon would have been complying with the agreement by providing a master roster which did not include any known shifts, simply because the obligation would not have any content in respect of the Toowoomba and Goondiwindi depots. So, that is how the dispute which now comes before the tribunal arose. Unless the tribunal has any questions about the facts I propose to move onto the second topic which is the legal principles concerning an abuse.

PN620

JUSTICE HATCHER: No.

PN621

MR MASSY: Now, at paragraphs 28 to 31 of the written submissions on the dispute, the primary submissions for the AFULE, I have summarised what I say the relevant principles concerning the finality of the litigation arm. At a level of obstruction which was identified by the High Court in Aon Services, it's an abuse of process for a litigant to seek to relitigate a matter which has been the subject of earlier determination.

PN622

Now, of course, I note the exchange that occurred earlier. It is, with respect, as Your Honour the President said, a legal submission about the characterisation of

the submissions being made by Aurizon and whether or not they are permissible. It is not an allegation of misconduct or something of that nature. It is simply the way in which, in my submission, the law describes a submission or a case which cannot be advanced.

PN623

In my submission the principles concerning the finality of litigation apply to proceedings conducted in this Commission pursuant to a dispute resolution, of course. Can I ask the Full Bench to go - - -

PN624

JUSTICE HATCHER: Just to be clear, you're saying the 2.18A application is an abuse of process?

PN625

MR MASSY: No. The contention advanced in the response to the dispute notification of clause 77.1.1 means, or that 70 per cent of known working terms used in that clause, means known workings in the master train plan, because that is inconsistent with the earlier settlement as to the proper construction of clause 77.1. In circumstances - - -

PN626

JUSTICE HATCHER: But it's an argument raised in respect of an application made by your client.

PN627

MR MASSY: Yes.

PN628

JUSTICE HATCHER: How does that constitute an abuse of process?

PN629

MR MASSY: Because you can't seek to have a matter which has previously been resolved between the parties, relitigated which is what they seek to do by their response to the dispute. So, we had a dispute. It was settled.

PN630

They have acted inconsistently with the dispute where it brought the matter back on, and in our submission if the Full Bench accepts that there was a dispute as to the proper construction of clause 77.1 – sorry, if there was a settlement of the dispute as to the proper construction of clause 77.1 they are now not at liberty to depart from that settlement and say you should construe it in some other way.

PN631

JUSTICE HATCHER: But they're not the ones litigating it. I mean it sounds more like an estoppel argument than an abuse of process.

PN632

MR MASSY: Well, under the principles there's a passage in a written submission which identifies that there are some considerable similarities between an abuse and an estoppel, but the High Court in Ramsay said an abuse is a broader and

more flexible overall device than a pure estoppel. But if I could just ask the Full Bench to take up the decision in *Energy Australia Yallourn v the AMWU* which is behind tab 6 in the bundle that I handed up, the physical bundle.

PN633

The Full Bench might recall that this was a matter where a dispute was taken about what was meant by the enterprise agreement in the Commission. It was arbitrated. The union was successful and then a proceeding was taken in the court seeking a declaration which was inconsistent with the determination of the dispute.

PN634

And aside from a range of issues about whether the jurisdiction of the Commission had been properly invoked because it had been invoked by the unions as party principles, the central plank of Yallourn's case was that there was no (indistinct) matter before the Federal Court, or alternatively it was an abuse to rerun the same case which had been run in the commission.

PN635

And an issue was taken by the employer as to whether an abuse could arise in respect of a decision of a tribunal acting pursuant to a private arbitration agreement. Paragraph 169 and 170 of my submission there's a lengthy recitation of the principles concerning an abuse and the difference between those and an estoppel.

PN636

At 169 and 170 His Honour Bromberg J makes the finding where he says:

PN637

Analogously with the approach taken by Gibbs J, I can see no reason why the decision of the tribunal whose jurisdiction is derived from the submission of the parties but which is nevertheless final and has effect in law of extinguishing controversy which would otherwise have been judiciable, should not be regarded as an earlier relevant proceeding for the purposes of determining whether the re-litigation is an abuse of process.

PN638

In my submission what that establishes is that if the original dispute had proceeded to an arbitration and if the Commission had arbitrated the proper construction of clause 77.1, it would not be open for the respondent to now contend that it has a different meaning.

PN639

The real question which arises in my submission in this case is whether or not an agreement falls into that same category. You will see, your Honour, President at paragraph 30 of the outline the reference to *Ramsey v Tomlinson* in the (indistinct) where they describe the abuse as being different to an estoppel, but broader and more flexible.

PN640

The next step in the chain of reasoning comes to consider what is the effect of a settlement. There is authority which is in my submission unsurprising because litigation is commenced and then settled on terms between the parties and it is an abuse to later come and seek to try and re-litigate the same matters that were the subject of the settlement.

PN641

Can I ask the Full Bench to take up the decision of Johnson and Gore Wood, which is behind tab 7, a decision of the House of Lords. If the Full Bench could turn to page 32, section (h), and this is in the judgment of Lord Bingham – I won't read out the paragraph which goes over to the first sentence at the top of page 33, but in my submission that establishes that a settlement in the same place as if there had been a judgement.

PN642

Similarly at page 59, Lord Miller, section (c) or paragraph (c) in the paragraph starting, 'In one respect,' that's where his Lordship identifies that it goes further than the principle in res judicata and it is capable of applying in circumstances where the action has been compromised rather than proceeding to a judgment.

PN643

Can I pause to interpolate there that in my submission not only does this still operate as a matter of law, it is a matter which arises from the proper construction of clause 7.1.3 of the agreement which the dispute settlement clause.

PN644

Clause 7.1.3 is in fairly standard terms which provides at step 3:

PN645

The employers or company may refer to the dispute to the Fair Work Commission. The Commission shall first attempt to resolve the dispute through conciliation. Where conciliation does not resolve the dispute the matter may be determined by arbitration. Where the dispute is subject to arbitration the decision of the Fair Work Commission is binding.

PN646

In my submission it would be a strange outcome if the parties were bound by an arbitration made by the Commission but not bound by settlement reached by part of that dispute resolution procedure. How, and I ask rhetorically, of course, how would it serve to allow disputes to be resolved if at conciliation stage or between conciliation and arbitration, a party could avoid the arbitration by saying, 'Yes, yes, we'd agree with the relief that is sought,' enter into an agreement and then shortly after, act in a different way and then say, 'Oh, we're not bound by that, we wish to conduct our affairs as if the agreement had not been reached.'

PN647

In my submission it must follow that the settlements reached pursuant to that dispute resolution clause have the same effect as determinations by the Commission, otherwise the Commission would be inundated by parties proceeding to arbitration because there would be no benefit in a settlement.

PN648

JUSTICE HATCHER: In the Mayo's case it said that even if there has been an agreement it doesn't deny the fact that there's a dispute.

PN649

MR MASSY: I was about to come immediately to this - - -

PN650

JUSTICE HATCHER: Sorry.

PN651

MR MASSY: And the CFMMEU. Yesterday afternoon someone for Mr Williams' instructor sent through a copy of the Full Court's decision and I'm not sure if the Full Bench has a copy of it now but I just wanted to make some observations about the decision.

PN652

Can I start with describing how this made its way before the Full Court. It seems from my reading about the first instance dispute in the Commission in the appeal and ultimately, the judgment of Colman J in the Full Court there was a dispute between the *CFMEU v Maersk* about two vessels operated which were covered by the enterprise agreement, about whether they were required under either schedule 1 or schedule 2 to have four integrated ratings or five and the cook, and a dispute had been commenced about that.

PN653

Separate to that dispute there was some unhappiness from some of the seafarers about whether a full-time steward was required, and the dispute between the union and Maersk was settled in July of 2018 and the settlement included the ceasing of, or the discontinuance of various Fair Work proceedings included in the dispute notification, an agreement from Maersk that it would employ a fifth integrated rating and a cook, and that seems to have been part of the settlement but it wasn't on a consensual term, that the part-time steward would be put off to accommodate the extra integrated rating.

PN654

After that settlement was reached it seems the dissatisfaction from the employees with the absence of a steward increased and a few weeks later at their instruction a union organiser raised the unhappiness about the steward being put off at the time, and that went through the dispute resolution process and was unable to be resolved and a dispute was notified to the Commission.

PN655

At first instance Maersk contended to the Deputy President that it should dismiss the dispute notification because the substance of it had been settled, and in the first instance in the decision her Honour said, look, they are related disputes but they are separate.

PN656

The decision about the integrated rating didn't necessarily concern the steward although it ultimately – the settlement of that dispute might have caused the

subsequent one and there was a separate dispute, 'and in those circumstances I am not prepared to dismiss it and the settlement in the earlier matter doesn't prevent this dispute from proceeding.'

PN657

There was an appeal with the Full Bench divided, but the majority identifying that the decision that Maersk complained of, namely the failure to dismiss the dispute, was a discretionary decision and in circumstances where no error of the type described in *House v King* was shown with the decision not to dismiss the complaint in circumstances where they were slightly different disputes. The majority refused to give leave, Deputy President Colman (indistinct) came to a different conclusion.

PN658

But the challenge from there to the court became slightly different because obviously there's no appeal and they had to serve constitutional writs which happened to show that there was no jurisdiction for Deputy President Binet to have made the decision which she did. And the contention from Maersk in the court at first instance was that firstly, the settlement meant that there was no jurisdiction for the Commission to arbitrate, and secondly, that the dispute between the CFMEU and Maersk had been resolved.

PN659

Now, Colman J at first instance said that the contention that there was no jurisdiction for the Commission essentially involved a contention that the settlement agreement had varied the enterprise agreement to remove the dispute settlement clause or to involve an agreement not to exercise a statutory right and he said that that was not a permissible form of agreement and it couldn't be relied upon for that purpose, and he also found that the dispute persisted because it came after the dispute about the steward (indistinct) and therefore there was jurisdiction.

PN660

When the matter came before the Full Court, the court was divided as to reasons but not as to outcomes. White J's judgment at paragraph 103 identifies that so far as, and again bearing in mind Maersk's contention before the Full Court was that there was no jurisdiction for the Commission to deal with the dispute, not that the Commission shouldn't have deal with the dispute but that there was no jurisdiction – in paragraph 103 his Honour White J identified that the argument that the settlement agreement precluded jurisdiction was effectively an argument that that agreement amended the enterprise agreement and that because the variation procedures in the Act for varying an enterprise agreement weren't given effect to. It wasn't effective.

PN661

Then importantly, paragraphs 124 and 125 in viewing this second contention that the July settlement had meant that the dispute was resolved, because obviously then any dispute settlement clause provided that arbitration could only occur if the dispute was unresolved. His Honour identifies that the July agreement settled the dispute as at July but a further dispute arose after the making of the July dispute and that meant that the Commission still had jurisdiction.

PN662

Then in the footnote at paragraph 131 his Honour makes some observations that the AFULE relies upon. His Honour says:

PN663

The second is that even if the July agreement was not legally binding it was not without significance. The honouring by participants in industrial relations of agreements concerning workplace disputes is just as important as the honouring of agreements in other spheres of human activity.

PN664

A person's word should (audio malfunction). It is to be expected that the FWC would recognise that this is so and that other than unusual circumstances (perhaps some material change in the circumstances which existed at the time the agreement was made or some circumstance vitiating the settlement agreement), it would not in arbitration at the end of a dispute resolution process readily allow the departure from a previously agreed position. To do so would be likely to undermine the efficacy of agreements reached in the dispute resolution process. However that is a matter going to the exercise of the Fair Work Commission's jurisdiction rather than the very existence of the jurisdiction.

PN665

It is true that the Fair Work Commission does not seem to have adopted this approach in the present case, however the correctness or otherwise of the Fair Work Commission's decision on the merits of the claim is not a matter for this court.

PN666

MR MASSY: Similarly the majority, at paragraph 141 found – and I don't mean to take the Full Bench to it but found that for the reasons identified by the primary Judge the reliance on the July agreement of precluding jurisdiction amounted to a contention that it had varied the agreement impermissibly. Then at 145 the majority says:

PN667

We would not want to be taken to be making any broader point, however about whether employers, unions and employees may compromise in a binding way disputes that arise under enterprise agreements or other industrial disputes.

PN668

MR MASSY: If I can stop for a moment but that's precisely the territory where this Full Bench is in where we say that on the merits this response by Aurizon should not be entertained because it is inconsistent with the (indistinct) settlement. Then at 172 the majority notes in the middle of that paragraph that, 'If the July agreement were legally binding and effective because it was not inconsistent with the enterprise agreement then it could be pleaded in (indistinct) or the release of any claims made by the CFMEU.'

PN669

Then similar to the earlier observations of White J at 177 the majority says:

PN670

None of that robs legally binding settlement agreements of their effect. It is not to condone a party reneging - and then in brackets they note that that's a Maersk term - on agreements. Perhaps the Fair Work Commission should have concluded that the July agreement did stand in the way of a fulltime steward clerk. If the Fair Work Commission was in error about that, it was in error within jurisdiction.

PN671

On the facts of this case the Fair Work Commission had jurisdiction to arbitrate the claim including jurisdiction to dismiss it because of the July agreement. I had that jurisdiction because the dispute resolution procedure in clause 10 had been followed in relation to the matter and the matter remained unresolved for the relevant times.

PN672

In my submission what's said in Maersk is entirely consistent with the proposition we put here. We don't say that there is no jurisdiction. Indeed, we are the ones invoking the jurisdiction of the Commission pursuant to the disputes settlement clause. We just say that the Commission should not entertain Aurizon's attempt to reargue matters which were the subject of an earlier settlement.

PN673

JUSTICE HATCHER: A simpler way to reach the same outcome is that the outcome of the arbitration should be in the terms previously agreed by the parties.

PN674

MR MASSY: Yes, that is – I apologise for the elaborateness of it but what I had endeavoured to do was to try and identify that the merits approach which appeal to both White J and the majority separately in different ways, had a basis of legal principle consistent with the efficacy of agreements and the reason why is that parties are not entitled to relitigate matters, but yes.

PN675

JUSTICE HATCHER: So, I'm just reframing this, I'm not stating a position. Our obligation under the dispute resolution procedure is to resolve the dispute, and you say it can be resolved by requiring the parties to adhere to their previous agreement and that that is sufficient to resolve it and doesn't require us to re-engage in the exercise of construing clause 77.1.

PN676

MR MASSY: Certainly, that is the primary position advanced by the AFULE. The third topic I identified earlier was to identify how it is that the AFULE says that this is not abuse. I have taken the tribunal already to the terms of the dispute notification which was made to the Commission. In my submission it's clear from those terms that the proper construction of clause 77.1 was in issue. The settlement, in my respectful submission, is whilst couched by a layperson an agreement about the effect and the construction of clause 77.1, in my submission it is now not open for Aurizon to say, well, we wish to depart from that because the circumstances are different.

PN677

The proper construction of the enterprise agreement is not informed by the circumstances, but rather inverts the orthodox way of approaching it. The orthodox approach is to identify what the proper construction of the agreement is and apply it in the circumstances. This is not a clause or a resolution of a dispute which in some way depended on a particular factual position. It is a purely legal one about what did the agreement require.

PN678

I should also say it is AFULE's position that there is no room to read into that settlement contained in the emails, any conditioning of the agreement on the basis of there being a master train plan or something of that nature. Indeed the dispute arose because the master train plan in the circumstances did not contain enough trains for the 70 per cent threshold to be reached, and a resolution was arrived at so that the roster could state 70 per cent of the actual shifts.

PN679

One other matter which is saying something in a slightly different way, even if Aurizon could persuade the Full Bench that the settlement of the earlier dispute related to only the disputes emanating out of Hughenden and Rockhampton, that doesn't assist. If those disputes properly construed the enterprise agreement the same words can't mean something in Toowoomba and Goondiwindi than what they mean in Rockhampton and Hughenden.

PN680

If I could come now to the fourth topic which is engaging in an exercise which will be unnecessary if the Full Bench is with the AFULE in respect of the abuse point, but that is the proper construction of clause 77.1. If I can start with the principles of construction. At paragraph 43 and following of the AFULE's primary submissions I set out an extract from the Full Court in *Skene v Workpac*.

PN681

One of the decisions referred to in that extract is the decision of French J in the *City of Wanneroo v Holmes*. That is behind tab 5 of the bundle I handed up earlier today and I'll ask the Full Bench to come into page 378 under the heading, 'Interpretation and application of the award,' and I say that whilst this is dealing with awards it's been held repeatedly that it's applicable to certified agreements, as well.

PN682

I won't read out the passage but can I draw particular attention to the sentence which starts:

PN683

Resorts to such matters as prefatory statements and negotiations is of dubious assistance, if admissible, at all.

PN684

Then over the page after the indented passage on 379:

PN685

It is, of course, no part of the court's task to assign a meaning in order that the award may provide what the court thinks is appropriate. Indeed it has been said that a Tribunal interpreting an award must attribute to the words in the true meaning even if it is satisfied that so construed they would not carry out the intention of the award making authority.

PN686

Accepting that because an enterprise agreement is a consensual written document it is permissible for the Tribunal to take into account the surrounding objective facts, that is, matters which we know and to both parties at the time in which it was made. It seems to be common ground between the parties that subjective intentions and expectations are wholly irrelevant.

PN687

And I say that whilst it seems permissible in some limited circumstances to have regard to the negotiations in a document in order for those negotiations to be relevant they must rise to the standard of being an objective fact which was known to both parties. Evidence as to what one party thought they meant when they said something or what the other side thought it meant is not an objective fact.

PN688

Can I ask that the Full Bench take up the decision of Rares J in the *Australian National Pilots Association v Qantas* which is behind tab 3. That was an appeal from a decision of the Federal Circuit Court. At paragraph 25 his Honour deals with the question of the section of evidence about the negotiations of the clause.

PN689

And then from paragraphs 25, 26 and 27 he deals with that topic having regard to (indistinct) authority dealing with commercial contracts. And importantly at paragraph 29 his Honour identifies – and it's important to bear in mind that where there are multiple persons involved in the production of a document that any construction exercise has to bear in mind the principle of objectivity – and then he quotes a passage from Gray J's judgement in *Health Services Union v Ballarat*, and can I rely on the passage which is bolded there from Gray J's judgment.

PN690

That's the case here, in my respectful submission but whilst the negotiations might be relevant in circumstances where the unions and the employer were opposed to the agreement, such as a Greenfields Agreement, they cannot be relevant here where the agreement is in a statutory sense, between the employees and the employer and the material was not put before the employees.

PN691

In the event that I'm wrong about that can I just direct the Full Bench's attention to a decision of the Full Court in the *CMFEU v Hail Creek Coal*, just behind tab 4. That was a case where the union contended that properly construed the enterprise agreement provided for unlimited sick leave, and in support of that contention they relied on some of the exchanges which had occurred during the negotiations.

PN692

The evidence on this part is set out at paragraph 57 of the Full Court's judgment. In paragraph 57 the Full Court recites the relevant passage from Mr Pearce's evidence and in short, explains that in one of the bargaining meetings the union advanced a claim for fixed entitlement sick leave. And then at the bottom of the page he recounted what the representatives from Hail Creek said, where they identified that why would you want to do that, there's currently an unlimited entitlement to sick leave.

PN693

And then it identifies that the other Hail Creek employees representatives agreed with what had been said. Then in the passage immediately above paragraph 58 the Full Court identifies that there was other evidence which was consistent with this and that he wasn't challenged in cross-examination. This is not a case where the reliability of the evidence was in issue.

PN694

And at paragraph 59 after the quote from *BP v Maran(?)*, the Full Court characterised that evidence as not being evidence of an objective fact but rather, evidence of statements and actions of the party which are reflective of their actual intentions and expectations, and was not admissible.

PN695

So, that was a case where the statements in the negotiations were from the employer party, precisely to the effect that the clause had the interpretation that the union contended for. The union accepted that and proceeded with bargaining and gave up that particular claim, and that was not sufficient to be an objective circumstance.

PN696

So, in my submission putting aside the questions which arise about whether the evidence in this case of the negotiations ever made its way to the employees, it just doesn't rise that high to be a different fact.

PN697

The last principle of construction I wish to deal with is all of the authorities acknowledge that the words aren't to be construed in a vacuum. They are to be construed in their industrial context and having regard to the history of the work, the subject of the claim. In my submission that is not a licence though for the court to substitute its own views as to what would have been an appropriate bargain. It's not a merits- based review of the claim.

PN698

In my submission that simply means that the court or tribunal can have regard to the customs and working traditions of the industry to shed light on what might have been meant by the words. That is important because in my submission in a number of places Aurizon seeks to defend its construction and what it says in the industrial context.

PN699

But when that is analysed the industrial context is no more than why its construction would be good for Aurizon. In my submission that is not what is referred to in those authorities. Unless there's any questions as to those matters of principle can I come to the fifth topic which is the proper construction of clause 77.1.

PN700

The phrase 'known workings used in clause 77.1.1' is not (indistinct). It is, I think I've said in one of the submissions, a paradigm example of the term which is intelligible for the parties but without the careful attention to form and draftsmanship that one might expect from that (indistinct).

PN701

JUSTICE HATCHER: That term did not appear in the proceeding in question, is that right?

PN702

MR MASSY: It did not. However, it appeared in an earlier agreement which was not defined, but I'll take you to that as part of the context. The word 'workings,' is used in several places throughout the enterprise agreement and can I take the Full Bench to those because they are useful. In my submission where the word 'workings,' is used it's either used as a collective noun to refer to more than one shift, or as a synonym for a shift.

PN703

Can I ask that the Full Bench turn to 61.4 of the agreement. That clause provides that where the company rosters a layout of the jobs involving more than two shifts and/or more than one layer over on the existing Linfox service Townsville to Cairns, it says particular clauses will not apply to these rostered workings.

PN704

In my submission that is being used to describe the collective shifts that are being rostered. The same form of usage can be seen in clause 61.5. Similarly, in clause 74.5 - - -

PN705

JUSTICE HATCHER: Sorry, just staying with that, does the use of the word, 'rostered,' in association with 'workings' suggest that there may be workings that aren't rostered?

PN706

MR MASSY: I think that is probably passing the agreement in a way in which you'd expect a lawyer to have used it rather than the way in which it seems to have been here as a synonym for 'shift.'

PN707

JUSTICE HATCHER: Sorry, what was the next clause?

PN708

MR MASSY: Seventy-four, where an employee is rostered on a shift but would require them to work on a train that is not equipped with a microwave oven. 74.2

describes it as 'those workings,' and that seems to be referring to a particular shift. Similarly, in the heading, the heading, 'Train working,' is not consistent with 'working' meaning a 'train service' – it seems to be redundant.

PN709

And there are two other examples which arise in different parts of the agreement. The first is, of course, 5.1 which is the definitions. There is a definition of the phrase, 'master roster.' The definition is applicable to maintenance employees but the definition is – this is on – so, the copy of the enterprise agreement doesn't have page numbers but it's in the middle of what would be the third page of the table.

PN710

And 'maintenance employees,' means the forecast of rostered workings for the rolling stock maintenance department (indistinct) over a cycle of up to 16 weeks. And in my submission that's being used as a synonym for shift.

PN711

Finally, again, in the part of the agreement providing for maintenance employees, clause 51, point 3 talks about rostered workings; 51.7 is a 10 hour break between rostered workings. Now, I accept that those last three examples relate to maintenance employees and there was some evidence that the agreements were negotiated separately, however they form part of the same agreement and were put to the employees for approval. So, in my submission it's permissible to read the agreement as a whole and include those.

PN712

Coming more directly to some matters which impact on the master roster, clause 63 provides for the development of a master roster and that deals with the process of how a master roster is put together. That clause is important because it is distinct from clause 77, and in my submission clause 77 is not concerned with the process of making the roster but what the product must look like. That is, what the minimum requirements of the master roster are.

PN713

Clause 78 goes on to provide for a forecast roster. Clause 79 provides for the changes which can be made on the forecast roster. 79.2 provides that the start time may be altered by up to four hours or later where the track is closed for maintenance. Importantly clause 79.5 provides that an available must be an available as referred to in 77.1.2 may be converted to a roster shift for employees of Aurizon.

PN714

Now, importantly there is no provision in clause 79 for a known working to be converted to a rostered shift. In my submission that supports the inference that the phrase, 'known working,' is a synonym for 'rostered shift.' If a known working was some different type of advice one would expect it to be converted to a rostered shift at some point, but the agreement proceeds on the basis that they are the rostered shifts.

PN715

Then clause 80 deals with changes that can be made to the daily roster, (indistinct) you see there, the matters that Mr McKitrick referred to in terms of the additional period for rostered shifts to be moved or lifted way back.

PN716

Focusing on clause 77.1.1, Aurizon in my respectful submission correctly identified in its written submission that guidance can be gleaned from the use of the word, 'known.' 'Known' when used as an adjective like this generally means 'familiar to all, generally known or recognised,' given I think, one of the references to a dictionary to that effect.

PN717

In my submission 'known' requires certainty about the matter which is said to be known. As Aurizon, again respectfully correctly identifies, 'a matter which is anticipated or expected does not answer the description of being known.' In my submission the ordinary usage of the word, 'known' strongly suggests that the workings that have been known by everybody who reads the master roster.

PN718

That's fortified by the opening words to clause 77. So, 'The master roster will show for all paid train crew employees.'

PN719

JUSTICE HATCHER: In clause 51.14 there's an expression which comes fairly close to this. The second line of the first – 'are known work programs in connection with weekly rosters.'

PN720

MR MASSY: Well, 'work programs' seems to be in contradistinction to 'altering the workings of the master roster.'

PN721

JUSTICE HATCHER: In 77.1.1 the requirement is to specify the shift length and the start time. It doesn't have a requirement to specify the day. Does that imply that with a known working you know the day?

PN722

MR MASSY: I would have assumed that one of the matters to be inferred from the use of the notion of 'known' but also the start time. It would be strange if in the context it didn't require you to identify the start time on a particular day. 8 am isn't the start time of a shift if you don't say on what day the shift is, in my submission.

PN723

VICE PRESIDENT ASBURY: Mr Massy, where it speaks of the master roster and it says it's required to show for all train crew employees those matters, when is the process whereby the actual person gets allocated to the roster? Because my recollection and it's very hazy, I must admit, is that there's a roster that's got lines in it and they follow a line in the roster. So, is it the case that the master roster's got the workings, as in when the trains are going to operate, and then the time

between which they're going to operate, and then there's a separate process whereby an employee then gets allocated to work particular shifts?

PN724

MR MASSY: No, if the (indistinct). There is, for example, rosters attached. I'm just trying to find what the (indistinct) is.

PN725

VICE PRESIDENT ASBURY: Because what the rosters actually look like would give some meaning, wouldn't it, to – are they meant to be known by the employees who are rostered, or by the company?

PN726

MR MASSY: So, can I refer the Deputy President to Annexure MM20 at page 333 and there's a master roster attached to Mr McKitrick's statement.

PN727

JUSTICE HATCHER: Yes.

PN728

MR MASSY: And if you come over the page to 324 you'll see it continues.

PN729

VICE PRESIDENT ASBURY: Yes.

PN730

MR MASSY: And it has – the links are the drivers.

PN731

VICE PRESIDENT ASBURY: Yes.

PN732

MR MASSY: And there are knows allocated to those links.

PN733

VICE PRESIDENT ASBURY: So, the links – it's the link that follows this pattern?

PN734

MR MASSY: And as I understand it, during the period in clause 63 where it says that the master roster is hung for 14 days - - -

PN735

VICE PRESIDENT ASBURY: Yes.

PN736

MR MASSY: It is during that period that a link is allocated to a particular employee.

PN737

VICE PRESIDENT ASBURY: Yes.

PN738

MR MASSY: But that is before the roster commences.

PN739

VICE PRESIDENT ASBURY: Yes.

PN740

MR MASSY: It is hung for a period and then people are allocated their specific -
- -

PN741

VICE PRESIDENT ASBURY: Yes. But the point I'm getting to is that is this a layer process that starts off whereby you've got to identify the known workings and then you have to identify the time, the start and finish time of the known workings, and then you put the link with the person who's going to work that in there?

PN742

MR MASSY: Well, the union's contention is that known working as used in clause 77.1 doesn't require there to be a train behind it. It is an allocation of the employee to start and work at a particular time. Working is known if it says that Fred Nurk has to start at 0600 hours on Monday the 2nd.

PN743

VICE PRESIDENT ASBURY: But that's my question. Does it say Fred Nurk has to start, or does it say an employee will have to start?

PN744

MR MASSY: Well, if one - - -

PN745

VICE PRESIDENT ASBURY: And then later on the employee gets allocated to the - - -

PN746

MR MASSY: The allocation occurs during the 14 day window which the master roster is hung for in clause 63.5.

PN747

VICE PRESIDENT ASBURY: But that's my point, the master roster has already been – so that the process of putting the person into it doesn't happen until that point.

PN748

MR MASSY: Yes but that is part of the production of the master roster.

PN749

VICE PRESIDENT ASBURY: Yes, I understand that.

PN750

MR MASSY: Yes.

PN751

VICE PRESIDENT ASBURY: But when it starts - - -

PN752

MR MASSY: I'm sorry, we might be at cross purposes.

PN753

VICE PRESIDENT ASBURY: No, I'm just trying to establish, when it starts a known working doesn't relate or specify who will be working, it specifies a train will be going from A to B, the time it – then 70 per cent of those occasions it must say at what time it will depart, et cetera – like, it must say the window between which that will occur, and then 14 days out the person gets allocated to that?

PN754

MR MASSY: No, no, I'm sorry, not 14 days out. The master roster is produced and hung for a period – so, the master roster applies to the whole year, effectively.

PN755

VICE PRESIDENT ASBURY: Yes. I understand.

PN756

MR MASSY: And it is hung for a period of 14 days before it commences at operation for the whole year.

PN757

VICE PRESIDENT ASBURY: So, in that 14 days the links are allocated to - - -

PN758

MR MASSY: Assigned to - - -

PN759

VICE PRESIDENT ASBURY: Yes, okay. So, it's still developed before the people get allocated to work?

PN760

MR MASSY: Well, the initial draft is developed in that way, yes.

PN761

VICE PRESIDENT ASBURY: Yes.

PN762

MR MASSY: But that's the point I was making before, that clause 63 and 77 are important because clause 77 is directed at the end product, what the roster has to show for all train crew employees.

PN763

VICE PRESIDENT ASBURY: So, by 77.1 you mean it has to show for Fred Nurk.

PN764

MR MASSY: Yes.

PN765

VICE PRESIDENT ASBURY: Yes, I understand. Thanks.

PN766

MR MASSY: Can I come back to this proposition about the use of this word, 'known,' and the requirement for some certainty, and the fact that what has to be apparent from the roster, the master roster that is. In my submission two things flow from that.

PN767

Firstly, it's unlikely that the train crew are likely to have any details or any understanding at all of either the master train plan or Aurizon's operational requirements. That's especially so where the depot roster committees aren't even shown on the master train plan. You couldn't say in those circumstances that those things would be known to people reading the roster.

PN768

The second matter is that Mr Maszczak accepted as much and it's conceded in writing and emails and submissions, merely because a path is recorded in a master train plan does not mean with certainty it is going to run. Indeed, in Aurizon's case it requires 30 per cent flexibility over those things which are in the master train plan because they don't run when they're supposed to.

PN769

That suggests in my submission nearly one in three services might not run as recorded in the master train plans.

PN770

VICE PRESIDENT ASBURY: Well, the path just means that this time a train can go from here to anywhere, doesn't it?

PN771

MR MASSY: That's right but no doubt - - -

PN772

VICE PRESIDENT ASBURY: They don't always use that?

PN773

MR MASSY: That's right, and my point about that is what is recorded in the master train plan is not known. It is expected or anticipated or hoped, but it is not known. The only way that you can read 'known' as it's used in 77.1.1 of the ordinary way would be to read it the way the AFULE does and that is to say it must set out the shifts which the employees are recorded in the roster as working, because they are known to everyone because they're in the roster, they are certain because they're in the roster.

PN774

VICE PRESIDENT ASBURY: So, you say it doesn't necessitate a master train plan, it just necessitates Aurizon to say this is what's going to happen and we - - -

PN775

MR MASSY: Yes. Yes, that's right.

PN776

VICE PRESIDENT ASBURY: I understand, thanks.

PN777

MR MASSY: And that was Mr McKitrick's point earlier in his evidence in answer to your last question, that the rosters are currently promulgated having regard to trains which are in the train plans, but they would be at liberty to just identify start times for the drivers on the particular days and stagger them in such a way so as to use the flexibility that's involved to ensure that any delays, there was someone available who could drive.

PN778

JUSTICE HATCHER: They can't change the days?

PN779

MR MASSY: They can't change the days but they can change the times at which people start on the days and then there are considerable periods through the forecast roster and the daily roster to move by four hours, and I think three hours, and one hour on the day. So, Mr McKitrick's point is that if you stagger the start times of various people you can ensure that they are available to drive the train whenever it arrives.

PN780

VICE PRESIDENT ASBURY: But it's still the case, isn't it, that if the train doesn't arrive you've now got the person at work and you either find something for them to do around the depot, and it talks from memory about cleaning, mowing lawns, et cetera, and you can't unreasonably detain them there, so if they don't have to work then they go and they're still required to be paid?

PN781

MR MASSY: Yes but that is the same as any business when they have to determine when customers might come. You have to have sufficient staff to be able to deal with when customers come and some businesses are uncertain and it's difficult to plan that.

PN782

So, can I clarify something I said before on this section which is the master roster is hung for 14 days. By that point the names are attached to the links already. And that makes sense, of course, 63 which enables people to make an objection about the master roster.

PN783

JUSTICE HATCHER: So, if I've got a line allocated on a master roster for a year, if it's an available day I've just got to know I'll be available for work during that day, and at some time closer to the day I'll be told when I have to turn up?

PN784

MR MASSY: Either in the forecast roster or the daily roster, you'll be told you have to turn up.

PN785

JUSTICE HATCHER: If I've got a known working with a start and finishing time, there's again some – a large degree of latitude as to the extent to which that can be changed, what, in the forecast of the daily roster?

PN786

MR MASSY: There is no ability to change the date, there's an ability to change the start time.

PN787

JUSTICE HATCHER: Change the start times, that's what I mean.

PN788

MR MASSY: They can be then moved forward and backwards.

PN789

JUSTICE HATCHER: Yes.

PN790

MR MASSY: In both the forecast roster and the daily roster, but you have to turn up to work on that day.

PN791

JUSTICE HATCHER: I mean, so the certainty that you get – it seems to me the certainty that you get from having a known working with a start and finishing time on the master roster is not much certainty at all, is it?

PN792

MR MASSY: Well, it is certainty of knowing a particular day, as Mr McKitrick said, either in the morning or at night. Because the amount that it can be moved probably isn't enough to change that. So, as he says, they can look at the master roster and say, I'm working Christmas at night.

PN793

JUSTICE HATCHER: Right.

PN794

MR MASSY: But they know that rather than having a series of availables which they only find out either 14 days in advance, or 33 hours in advance.

PN795

VICE PRESIDENT ASBURY: So, when it's a known working they know this far out it can move by this much, and this close it can only move by that much, so I'm
- - -

PN796

MR MASSY: They have to come on that day.

PN797

VICE PRESIDENT ASBURY: Okay.

PN798

MR MASSY: They can't plan to go somewhere else or - - -

PN799

JUSTICE HATCHER: As available you've got to effectively block out 24 hours, is that - - -

PN800

MR MASSY: Yes, in the sense that the forecast roster can be converted to a rostered shift of some kind, seemingly the daily roster can do the same. So those are the contextual matters within the context of the agreement that I wanted to point to. Can I just raise some historical matters re sick leave.

PN801

The 2009 agreement is referred to and extracted in Aurizon's submissions at paragraph 53. I don't need the Full Bench to take them up, but the 2009 agreement has a series of bullet points expressly provided for – it was called the roster diagram and then you might include (indistinct) of that to include known workings, availables, and leisure period, and in my submission that is consistent with shifts.

PN802

But importantly the introductory words to the clause said that the roster diagrams had to align with the master train plan. Now in our submission that strongly counts against the contention that known workings are a synonym for a train in the train – in the master train plan. The same thing, you would not need to say they need to align because they would be one and the same.

PN803

I have taken the Full Bench previously through the 2015 agreement, but the only point I would make about that is that the relevant clause used the phrase, 'rostered shift,' even though they could be changed. Now what's said against us is, well, of course 71.1 meant what the union said, is why didn't they just use the words, 'rostered shift,' '70 per cent of rostered shifts'?

PN804

In my submission it's entirely understandable that lay people trying to make a change from what had previously been in the agreement would change the language, and they have changed it in a way which is idiosyncratic but in my submission is understandable in circumstances where 'rostered shift' had previously mean a shift which was not rostered.

PN805

Again, I've taken the Full Bench to - - -

PN806

JUSTICE HATCHER: Sorry, can I just go back to available days.

PN807

MR MASSY: Yes.

PN808

JUSTICE HATCHER: I don't know if the evidence touched on this but it may be the case if you're rostered for an available day there's nothing to be done and you never leave home, is that - - -

PN809

MR MASSY: As I understand it that is the case, yes. So, I have taken the Full Bench through the rostered principles document which preceded the agreement which was ultimately accepted but in my submission it referred to known workings and RDO's and would have no provision for available days That is again consistent with known workings being a synonym for shifts.

PN810

I don't wish to spend any time on the negotiations other than to observe, as Mr McKitrick did in his evidence, early in the negotiations there was a claim from the union to be provided with some degree of information about how known workings were calculated when known workings was being used as a synonym for trains.

PN811

After the agreement was voted down and Mr McKitrick says there was a change in the paradigm, there was no discussion about those matters at all and the logical inference from that is in my submission the parties had agreed on, as Mr McKitrick said, the roster providing for 70 per cent of actual shifts and there would be no need to interrogate anything or have any transparency about what was in the master train plan.

PN812

So, for those reasons the AFULE says that both the text, the context from the agreement as a whole and the historical context, supports the proper construction that it contends for. And if it is right in that, the answer to the question for arbitration should be 'No'. The rosters presently being prepared at Toowoomba and Goondiwindi do not comply with the clause 77.1.

PN813

JUSTICE HATCHER: If we go to 77.1.2 does it follow from your construction that the word, 'shifts,' can that clause be synonymous with 'known workings?'

PN814

MR MASSY: 'All other shifts,' yes.

PN815

JUSTICE HATCHER: No, 'all other known workings.'

PN816

MR MASSY: Yes.

PN817

JUSTICE HATCHER: So, 'all other known workings' would be available shifts?

PN818

MR MASSY: Sorry, all other?

PN819

JUSTICE HATCHER: I mean, it says, 'available shifts for all other shifts.' You would say that that means the same thing as 'available shifts for all other known workings'? That is, known workings that fall outside the 70 per cent in 7.1.1?

PN820

MR MASSY: Yes. Well, it wouldn't be a known working but the use of the word, 'shifts' there is suggesting that what's in 7.1 are shifts, they're synonyms for shifts.

PN821

JUSTICE HATCHER: But it would also be, 'known workings' on your - - -

PN822

MR MASSY: No because it's an available.

PN823

VICE PRESIDENT ASBURY: But it starts off that – and again, as I understand it, because 7.1.1 says the 'shift length and start times for at least 70 per cent of all known workings,' which implies that there's more – that - - -

PN824

PRESIDENT HATCHER: That 'no workings' is a larger group than the ones you show the start times for.

PN825

MR MASSY: Yes, well - - -

PN826

JUSTICE HATCHER: It includes the ones you can't show the start times for. I thought that was what Mr McKittrick was saying, that available shifts are also known workings, because 'known workings' just means a shift that appears on the roster.

PN827

MR MASSY: I think the way in which the AFULE says it should be read, as 70 per cent of all shifts which would be known to the employees. So, of all the shifts 70 per cent have to be known to the employees. And then the rest can be available.

PN828

VICE PRESIDENT ASBURY: Yes, but as I understood it, what Mr McKittrick was saying is, look, this is your flexibility. So, you might know – there might be a bigger number of known shifts and if you really wanted to, you could tell us a hundred per cent or 90 per cent of it but you don't have to, you can just indicate 70 per cent of them and we'll accept the rest of them are available. That was my understanding of Mr McKittrick's evidence. And I think that's what Mr Williams is trying to get to, that the number of known workings is more than the 70 per cent.

PN829

MR MASSY: It might be, it might not be. As I understood Mr McKitrick's evidence what he was saying was that in some cases 70 per cent of the total shifts might be less than everything that Aurizon knows, and in some cases it might be more than everything they know.

PN830

JUSTICE HATCHER: Now you've lost me.

PN831

VICE PRESIDENT ASBURY: It defeats the purpose of your argument, doesn't it, because if the 70 per cent can - - -

PN832

MR MASSY: The 70 per cent is fixed, it doesn't change on whether Aurizon knows - - -

PN833

VICE PRESIDENT ASBURY: But it's got to be 70 per cent of something, so - - -

PN834

MR MASSY: Of the total shifts in the roster.

PN835

VICE PRESIDENT ASBURY: Yes.

PN836

JUSTICE HATCHER: So, that's what 'known workings' means.

PN837

VICE PRESIDENT ASBURY: That's what 'known working' - - -

PN838

JUSTICE HATCHER: That is, a known working - - -

PN839

MR MASSY: I'm sorry, I – we're at cross purposes, I'm sorry.

PN840

JUSTICE HATCHER: Just let me finish.

PN841

MR MASSY: Yes.

PN842

JUSTICE HATCHER: I would have thought that on your case a known working is a known day upon which a shift will be rostered. You know the day, you know somebody will be required to have a shift rostered on that day. 70 per cent of those, at least, you have a start time. What's left over of those known workings is an available shift.

PN843

MR MASSY: I'm sorry, we're at cross purposes on that. Sorry, I thought you were talking - - -

PN844

VICE PRESIDENT ASBURY: And you've talked about the RDO's.

PN845

MR MASSY: Yes.

PN846

VICE PRESIDENT ASBURY: And you've crossed out the other things and then you're left with everything else is a known working.

PN847

MR MASSY: Yes.

PN848

VICE PRESIDENT ASBURY: Yes, and then - - -

PN849

MR MASSY: I'm sorry, I thought – I was at cross purposes. I thought you were talking about the train paths.

PN850

VICE PRESIDENT ASBURY: Yes.

PN851

MR MASSY: Yes. That is right.

PN852

JUSTICE HATCHER: Or to put it another way, in 77.1 there's three categories of days, there's no workings, RDO's and X days. And of no workings, at least 70 per cent have to be with a shift length and start time, and the residue will be in available.

PN853

MR MASSY: Yes.

PN854

JUSTICE HATCHER: Right.

PN855

MR MASSY: That is correct.

PN856

VICE PRESIDENT ASBURY: Or X days in the known workings because they're days you're coming back onto shift.

PN857

MR MASSY: I think the evidence of Mr McKittrick was that he took them out of the RDO's. The transcript will show that he - - -

PN858

VICE PRESIDENT ASBURY: I'll observe Mr McKitrick nodding independent of the courtroom.

PN859

MR MASSY: Can I come very quickly now to section 218A. this only arises in the way in which its put by Aurizon if the AFULE are really successful in the dispute notification. Section 218A is in the material in the same terms as section 602 of the Act. It seems to have been well accepted with 602 of the Act is a statutory repetition of the slip rule which is (indistinct) some superior courts.

PN860

In my submission that is exactly what section 218A is directed at. There is, and I've put the references in the written submissions and I won't take the Full Bench to it now, a strong presumption of where the same words are used in the same Act they ought to have the same meaning. It would be highly unusual for the parliament to have used these words to mean the slip rule in respect of a decision of the Commission, but something broader in the context of an agreement.

PN861

But can I confirm that construction or that contention by reference to the explanatory memorandum which is behind

PN862

tab 8 at 774 and following. Can I indicate that the Full Bench decision referred to there is a decision where the parties sought to have the agreement amended on the basis of the slip rule and it was not available because it only applied to the decision of the Commission and not the agreement.

PN863

Aurizon's construction of section 218A empowers the Commission to undertake a merits based review under the agreement if one party asserts that it is no longer fit for the purpose because of some lack of foresight or some change of circumstances it should be discounted.

PN864

If parliament had intended to enact such a substantial change to the legislative scheme concerning enterprise agreements it would have done so in language other than that using the slip rule. And I should say it's noteworthy that section 218A doesn't provide any guidance or indication of the exercise of the discretion to amend the agreement.

PN865

If it was a broader capacity to amend the agreement based on equity, good conscience and substantial merits of the case you'd expect that that would be something which was said. The fact that the power is only to correct obvious mistakes, irregularities or defects suggests that the power is confined by those circumstances to the slip rule type issues. But secondly, the premise of Aurizon's argument is inconsistent with the scheme of the Act and in particular the primacy of enterprise bargaining.

PN866

On Aurizon's construction that the scheme would be entirely upended because if the circumstances changed the parties wouldn't have to renegotiate with each other or enter into some sort of bargaining, but they could simply return to the Commission and say, please substitute your judgment for the bargain that we've struck.

PN867

At paragraphs 5 to 11 I have set out the various authorities dealing with the slip rule. Can I just say three simple things about that. Firstly, it's directed at correcting errors or defects which cause the order or judgment to depart from the (indistinct) ascertainable intention of the court.

PN868

It is not sufficient if the court is likely to have made the order in the form sought. It must be established that the court would have made the order in the form sought. That is, it must go without saying.

PN869

VICE PRESIDENT ASBURY: So, Mr Massy, do you say that that means that the factual scenario of one which the assenter's error or defect or irregularity is based – had to be in existence at the time the agreement was made?

PN870

MR MASSY: Yes. Yes.

PN871

VICE PRESIDENT ASBURY: And it can't be something that occurs subsequently.

PN872

MR MASSY: Yes. Because what the Commission has to work out is if it's to be described as an obvious error, defect or irregularity, that obviously involves some departure from some standard, and what is the standard that's being departed from? The only consistent one, in my submission, is the objective intention of the parties.

PN873

Because if it's departure from some standard of common sense, or what is good in the circumstances how would the Commission ever assess that? It would just be an invitation to reopen every bargaining if there had been any change in the circumstances.

PN874

And there are authorities which are identified in the written outline which make the proposition the Deputy President just put to me, that if it turns out that the defect in the order involves some matter not thought of which has only arisen subsequently, then the slip rule can't be used.

PN875

Now, in its reply submission Aurizon notes that there's some similarity between what the union says, and the common law doctrine of rectification in respect of the contracts.

PN876

That doesn't really take matters very far because obviously the doctrine of rectification doesn't apply in respect of statutory (indistinct) Acts. If anything that rather suggests that that's what parliament was intending to create, was some capacity for the Commission to fix those kind of mistakes.

PN877

Secondly, Aurizon appears to say that the Commission can always properly construe documents and agreements, so therefore there's no need to correct a mistake if it's limited to the objective intention of the parties because it has come along on an application and have the Commission do that. The problem with that is it ignores that these are practical documents of people every day in their employment.

PN878

A new employee doesn't know that there's a typo in the wage rates, potentially. A new employee doesn't know that the agreement has a mistake in it. If Aurizon's contention was right that would apply equally to the provisions in section 217 which is concerning variations or ambiguity or uncertainty there would be no need for those provisions.

PN879

In my submission the only sensible way of reading section 218A within the context of the legislative scheme and consistently with that scheme is that it is directed at (indistinct) type problems where some mistake has been made in the making of the agreement and the written document does not reflect the intention of the parties.

PN880

The final topic I have proposed to deal with is that the matters that Aurizon relies upon are not on the statement of defect. At 63 and 64 of Aurizon's primary submissions it identifies what it says are the error or defect. In my submission that just does not meet the test of an error or defect with a separately objective intention of the parties. It is a matter which has arisen as an afterthought or events which have occurred after the making of an agreement and is a matter to be addressed through a variation and not an application under section 218A.

PN881

Can I also say that it's apparent from Mr McKitrick's statement that this is a matter of debate and the Commission couldn't proceed on the basis that this is a correction that would have gone without saying at the time. This was a substantial part of the bargaining between the parties and one couldn't say that this goes without saying.

PN882

For those reasons we would say that the 218A application should be dismissed. Unless there are any other questions those are the submissions of the AFULE and of course, we rely on the written submissions.

PN883

JUSTICE HATCHER: How long do you think you will be,

PN884

Mr Williams?

PN885

MR WILLIAMS: I think up to an hour, your Honour, so if that means that we should push into tomorrow that's fine.

PN886

JUSTICE HATCHER: What do you prefer to do?

PN887

MR WILLIAMS: I'm sorry?

PN888

JUSTICE HATCHER: What would you prefer to do?

PN889

MR WILLIAMS: I prefer to push into tomorrow.

PN890

JUSTICE HATCHER: When you say push into does that mean we should adjourn now and - - -

PN891

MR WILLIAMS: I'm sorry, push to tomorrow. So, yes, my preference would be to adjourn now so I can be most helpful to the Full Bench.

PN892

JUSTICE HATCHER: No, that's all right. All right, we'll adjourn now and resume at 10 am tomorrow.

ADJOURNED UNTIL WEDNESDAY, 10 MAY 2023

[4.00 PM]

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