



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

DEPUTY PRESIDENT CROSS

C2023/6107

s.739 - Application to deal with a dispute

**Australian Rail, Tram and Bus Industry Union
and
Pacific National Services Pty Ltd T/A Pacific National
(C2023/6107)**

Sydney

10.00 AM, WEDNESDAY, 21 FEBRUARY 2024

Continued from 20/12/2023

PN1

THE DEPUTY PRESIDENT: Can I have the appearances, please.

PN2

MS S MBELE: May it please the Commission. Ms Mbele. Initial S. M-b-e-l-e, and I have with myself, Mr Matthews, initial (indistinct).

PN3

THE DEPUTY PRESIDENT: Thank you very much.

PN4

MR L IZZO: Your Honour, Izzo, initial L. I will be seeking permission because I'm not sure that permission has been granted thus far. I think a form F53 was filed, but I don't recall if permission has been granted, and Mr Tyler, initial D, from Pacific National.

PN5

THE DEPUTY PRESIDENT: Thank you.

PN6

Ms Mbele, any objections to permission being granted?

PN7

MS MBELE: (No audible reply)

PN8

THE DEPUTY PRESIDENT: Okay. Permission is formally granted, if it hasn't been already.

PN9

Ms Mbele.

PN10

MS MBELE: Thank you. We don't intend to honour you with any opening submissions and I seek to call our first witness.

PN11

THE DEPUTY PRESIDENT: Yes.

PN12

MS MBELE: Daniel Gerstenmeier.

PN13

THE ASSOCIATE: Can you please state your full name?

PN14

MR GERSTENMEIER: (No audible reply)

PN15

THE ASSOCIATE: Mr Gerstenmeier, can you hear me?

PN16

MR GERSTENMEIER: Daniel Gerstenmeier.

PN17

THE ASSOCIATE: Can you please state your full name?

PN18

MR GERSTENMEIER: Daniel Gerstenmeier.

<DANIEL GERSTENMEIER, AFFIRMED

[10.02 AM]

EXAMINATION-IN-CHIEF BY MS MBELE

[10.02 AM]

PN19

MS MBELE: Do you have a copy of your witness statement in front of you?---Yes.

PN20

And is that three pages long?---It is. Yes.

PN21

And there are 16 paragraphs?---That is correct. Yes.

PN22

And is that still a true and correct representation of your statement?---Yes, it is.

PN23

I tender that document.

PN24

THE DEPUTY PRESIDENT: Any objection?

PN25

MR IZZO: No objection.

PN26

THE DEPUTY PRESIDENT: Exhibit A1.

EXHIBIT #A1 WITNESS STATEMENT OF DANIEL GERSTENMEIER

PN27

Any questions in-chief?

PN28

MS MBELE: No questions.

PN29

THE DEPUTY PRESIDENT: Mr Gerstenmeier, you will now be asked some questions by Mr Izzo in cross-examination?---Yes, sir.

*** DANIEL GERSTENMEIER

XN MS MBELE

CROSS-EXAMINATION BY MR IZZO

[10.03 AM]

PN30

MR IZZO: Hi, Mr Gerstenmeier. It's Mr Izzo here. Can you hear me okay?---I can hear you okay. Yes.

PN31

Excellent. Thank you. So I just wanted to ask you a bit about your understanding of the rostering process generally, just by way of background. So can I just check this. So the starting point, as I understand it, is that you are allocated rostered days off in a master roster; is that right?---That's correct. Yes.

PN32

And I will just call them RDOs. I assume that's probably what they're referred to; yes?---That is correct. Yes.

PN33

Excellent, and you work on a blank line roster; is that right?---Blank line and forecasts. There's forecast rostering work on it as well.

PN34

So you do both?---Yes.

PN35

And unless there's a master roster change your understanding is that Pacific National can't change the RDOs. That's right, isn't it?---That's correct. Yes.

PN36

Now, that master roster also has your return window from an RDO if you're on blank line working; is that right?---That is correct. Yes.

PN37

Now, for blank line working - and we might just clarify the difference between the two. So forecast working, as I understand it, is working where you will have a shift time notified to you in advance, at the very least, nine days in advance on a working roster, whereas blank line working, there won't be that kind of advanced notification; is that right?---That is correct. Yes.

PN38

Now, for blank line working what you do get is a daily work plan which is given about 5.30 or so the day before the scheduled shift which tells you what your shift is; is that right?---That's correct. Yes.

PN39

But that daily work plan isn't necessarily the time you start. After the daily work plan is issued then there's a phone call, which they sometimes call a call time advice, which is when you're given your actual start time; is that right?---Yes.

*** DANIEL GERSTENMEIER

XN MS MBELE

*** DANIEL GERSTENMEIER

XXN MR IZZO

PN40

And that's when you might be lifted up or laid back. So that is the shift that you were told in the daily work plan might be moved forward two hours, or it might be moved back four hours when you're actually told your start time; is that right?---Yes. When you get your - when you get your advice it still has to coincide or co-exist on what the roster says for that date. So that date could be after 6am and before 1500 or after 1500.

PN41

You're talking about when you're returning from an RDO there I take it?---That's correct. Yes.

PN42

Okay, but I'm just talking generally, whether it's after an RDO or not. I just want to distinguish there's a daily work plan which you get at about 1530 which tells you your shift time, but then you get a call time advice after that?---Yes. That's correct.

PN43

Now, if we go to your statement. At paragraph 9 of your statement you refer to - no, don't worry about that. I withdraw that. At paragraph 10 you say that:

PN44

The allocated commencement time zones are strict.

PN45

Now, there you're talking about the time zone you come back from the RDO?---That's correct. Yes.

PN46

The time window. When you say they're strict, my understanding is that PN, when they issue the daily work plan, when they roster you, they can't roster you outside - I'm sorry, they can't roster you in a different window, can they? You agree with that?---I agree. Yes.

PN47

Unless they do a master roster change?---I agree. Yes. That's correct.

PN48

And so when you talk about overtime being offered for people to start outside their time zones, this might occur when Pacific National is rostering someone on the daily work plan. They want them to start outside their time zone. They can't do that so they might see if an overtime offer might make you agree. Would you accept that might happen on occasion?---I agree. Yes.

*** DANIEL GERSTENMEIER

XXN MR IZZO

PN49

So in relation to paragraph 11, that practice might be taking place before there's lift-up and lay-back. So that is there PN is now in the process of issuing its daily work plan and it's calling and say, 'You're rostered in this window. We want you to move to this window.' That's before any lift-up or lay-back discussion takes

place. Do you accept that?---Sometimes it is. Sometimes it's not. You know, they will try. They might try and start you earlier than you should. Then if you don't catch it you will just do it, and then sometimes people will wake up to it and say they're not doing it unless it's overtime.

PN50

But that's when they're offering it at the time that the daily work plan has been issued?---They do it. They do it both. They can offer it then or offer it when they - at a time when they ring you up. They do it on both occasions.

PN51

Now, in relation to changes when they actually ring you up at the call time, you accept that Pacific National can move you within your window with a lift-up and lay-back. So if your window starts at 0600 they can lay you back four hours, and you accept they can do that at the call time?---I accept that. Yes.

PN52

But you're simply saying that they can't move you from one return window to the next?---That's correct. So for coming - so, for example, coming from an RDO, every RDO starts at 0600 or after. So if you're rostered for 0600 Pacific National cannot, from an RDO, Pacific National cannot say lift-up to 4 o'clock in the morning. Under no circumstances. They cannot do it.

PN53

Because that would infringe on the RDO itself, wouldn't it?---That's correct. Yes.

PN54

Yes. Now, at 15, so paragraph 15 of your statement, you point out that blank line working is difficult - - -?---Yes.

PN55

- - - because it's hard to plan things, and I understand that, but I take it any information that you're given before your start time, so any information, advanced notice you're given about when you're working will be helpful for managing fatigue and your personal life; is that right?---That's correct. Yes.

PN56

So in an ideal world, if your commencement time could never move into a different return window after you come back from an RDO that's your preferred scenario?---It would, but unfortunately, that's the way it doesn't run with trains, and the business we do and the business that we chose to be in, so - - -

PN57

What do you mean by that? That's the way it is?---Well, ideally it would be nice to get, you know, to have a start time and it never changes, but we have agreed to that two hours up and four hours back, so things can happen.

*** DANIEL GERSTENMEIER

XXN MR IZZO

PN58

And when you say that's the way trains run, do you accept that's just part of running a train service, it's that trains run late or they need to be shifted forward? Is that what you're accepting?---I do accept that.

PN59

Now, when you say ideally the window wouldn't move, that's because you have absolute certainty, and so just - - -?---Well, the window - - -

PN60

I'm sorry?---The window shouldn't move because we agreed on an enterprise agreement. They accept the window doesn't move (indistinct).

PN61

I accept that. I'm not now asking you what the position is. I'm asking you what your ultimate desire would be. What's most helpful to you personally would be that it remains the same because you can plan your personal life and you can plan your rest with the most certainty if the window doesn't move at all?---That's correct. Yes.

PN62

Now, if lift-up and lay-back was allowed to move the return window by two hours forward or four hours back you would accept there's still some advanced notice you have of when your shift will roughly commence. It's just not as good as the ideal world we just discussed. Would you accept that?---Yes, I accept that.

PN63

And, for example, let's say you're coming back from an RDO on a Monday. If you're told you're not starting until 1500, that helps you on Sunday, but even with lift-up you would know, well, the earliest you will be starting is 1300; that's right?---That's correct.

PN64

And so there's still some benefit to the window because you can still plan your activities on Sunday. It's just not as good as the window being fixed?---Yes.

PN65

I have no further questions.

PN66

THE DEPUTY PRESIDENT: Re-examination?

PN67

MS MBELE: I don't have any re-examination.

PN68

THE DEPUTY PRESIDENT: Mr Gerstenmeier, just looking at what occurred that is the cause of this dispute - - -?---Yes.

*** DANIEL GERSTENMEIER

XXN MR IZZO

PN69

- - - it was originally indicated you would commence your shift at 1500 or 3pm?---No, it was 1445 I was supposed to commence that shift.

PN70

And that was changed to?---1515.

PN71

Yes, a half-hour difference; correct?---That's correct.

PN72

And it was pushed back half an hour; correct?---That is correct.

PN73

Is there any impact upon your fatigue management by having a longer period of time before you commenced?---No, but it just pushes you back into an outside window where you have got your window, so you would be doing day shifts or you would be doing night shifts. So when you're on between 600 and 1500 you would assume you're doing day shifts, and then when you're on 1500 and after you would be doing night shifts. So with the case of laying back after 1500 it means after 1500 you can do night shift, and when you start work between 6 o'clock and 1500 you can do a night shift again because there's nothing stopping you from starting work at 1449, laying back for four hours, and then you do a block of nights as well.

PN74

Anything arising from my questions, Mr Izzo?

PN75

MR IZZO: Just one question.

PN76

When you said, well, you can end up on night shift, in this scenario that you were asked about though you started at 1515 so that doesn't end up with your night shift, does it?---No, it doesn't, but it leaves the possibility that it can be manipulated where it can be led to night shift.

PN77

If you were laid back for four hours you are saying?---That's correct. Yes, when you have to have a minimum of 12 hours off between shifts. So if you start work four hours after 1500 that would be 7 o'clock. 7 o'clock at night I would consider night shift.

PN78

No further questions.

PN79

THE DEPUTY PRESIDENT: Ms Mbele.

PN80

MS MBELE: I don't have any questions for this witness.

*** DANIEL GERSTENMEIER

XXN MR IZZO

PN81

THE DEPUTY PRESIDENT: Thank you for attending, Mr Gerstenmeier. You're free to go. Thank you very much?---No worries. Thank you.

<THE WITNESS WITHDREW

[10.15 AM]

PN82

THE ASSOCIATE: State your full name.

PN83

MR PRYOR: My name is Kevin Pryor.

<KEVIN PRYOR, SWORN

[10.16 AM]

EXAMINATION-IN-CHIEF BY MS MBELE

[10.16 AM]

PN84

MS MBELE: Thank you, Mr Pryor. Do you have a copy of the witness statements with you?---I do. Yes.

PN85

I will take you to your first statement dated 23 November. Is that witness statement 19 paragraphs?---That's correct.

PN86

And does it have two annexures, KP1 and KP2?---Correct.

PN87

Are those correct?---They are correct. Yes.

PN88

And can I take you to your other statement of 19. I tender that statement.

PN89

THE DEPUTY PRESIDENT: I understand there's some objections.

PN90

MR IZZO: There are, Deputy President. Do you have a copy of the table that we provided to your chambers?

PN91

THE DEPUTY PRESIDENT: Yes, I do. I think you were meant to refer to paragraph 8 in the first.

PN92

MR IZZO: Let me check that.

PN93

THE DEPUTY PRESIDENT: Then from the second line at paragraph - - -

*** KEVIN PRYOR

XN MS MBELE

PN94

MR IZZO: Yes. That's correct. Yes. Thank you, Deputy President. So we have outlined the basis for each of our objections. I'm happy to expand or I'm not sure if you want to hear from Ms Mbele first, but there's three particular sections.

PN95

In relation to paragraph 8 and paragraph 14, your Honour, the concern is that it's not about weight and it's not about things like hearsay. It's evidence that it's very clear the Commission is simply not permitted to have regard to in construing the agreement, and the difficulty with allowing the evidence in is if it's allowed in and it's given some weight it does have the possibility of affecting the judgment with error because unless evidence is of notorious factual circumstances that were available to both parties at the time, if it's a subjective view of what the deal was or what the intent of the clause was, it's not permissible to construe the agreement by reference to that view.

PN96

So we think there is a danger in allowing it in. So that's the primary concern in relation both paragraph 8 and paragraph 14 which I'm happy to deal with.

PN97

In terms of paragraph 16, it's a matter of some importance. It talks about the practice that is in place and the evidence given is very generic. It says that:

PN98

Employees at most depots reject Pacific National's request for changing the time zone unless there's an agreement to pay overtime.

PN99

There's no actual evidence of any event. It's just an opinion or conclusion as to what's going on. It's not actually evidence of anything that's taken place, and so we object on the basis that it's, effectively, Mr Pryor's opinion of what's taking place.

PN100

THE DEPUTY PRESIDENT: We have heard similar evidence in relation to paragraph 16 from Mr Gerstenmeier, haven't we?

PN101

MR IZZO: So in relation to Mr Gerstenmeier, certainly there's elements of what he understood he had, as a driver, experienced. I think, for instance at paragraph 10, he says:

PN102

I always understood the time zones were strict.

*** KEVIN PRYOR

XN MS MBELE

PN103

So I took that as his understanding of what the practice is, as opposed to - I mean at paragraph 11, yes, he talks about some of his colleagues, but I was less concerned. I mean at least the colleagues he has. We don't even know who these

people are in relation to Mr Pryor, so I had more concern in relation to the prior statement which I think is even more generic than Mr Gerstenmeier said.

PN104

THE DEPUTY PRESIDENT: Ms Mbele.

PN105

MS MBELE: In relation to paragraph 8, we say that we press for that to be admitted on the basis that it explains the following paragraph, paragraph 9 of Mr Pryor's statement. It's evidence that shows Mr Pryor's intention which was then provided to employees, and by virtue of Mr Pryor's own understanding, the employees were provided this information and approved the agreement on that basis.

PN106

With reference to paragraph 16 of Mr Pryor's statement, we also press for that to be admitted on the basis that it would be expected that Mr Pryor, in his role as an RTBU organiser responsible for Pacific National depots, it's expected that he would have knowledge of that sense and that it should be admitted as well.

PN107

THE DEPUTY PRESIDENT: Thank you. Nothing further?

PN108

MS MBELE: If I may just add, if the evidence can be admitted subject to weight we find that that would assist the Commission in the task of instruction.

PN109

THE DEPUTY PRESIDENT: Thank you. I don't need to hear from you, Mr Izzo. I intend to strike the objectionable parts or objected to parts of paragraph 8. Whatever reliance there is on KP2 arises from the annexure which I note has a slight difference to what it appears Mr Pryor put at paragraph 8 by the insertion of the word 'approx' which I take to mean 'approximately'.

PN110

In relation to paragraph 14, that seems to suffer from the same problem in relation to Mr Pryor's own intentions and understandings, as opposed to the ordinary relevant considerations in agreement interpretation.

PN111

I think paragraph 16 falls into a different category. It is verging on opinion. It's certainly difficult for the respondent to test, but it will be given the weight that it accords, so it will be admitted subject to weight.

PN112

MS MBELE: Thank you, Deputy President.

PN113

THE DEPUTY PRESIDENT: So you wish to tender that. It's exhibit A2.

*** KEVIN PRYOR

XN MS MBELE

**EXHIBIT #A2 WITNESS STATEMENT OF KEVIN PRYOR DATED
23/11/2023 AND ANNEXURES KP1 AND KP2**

PN114

And the second statement commences at page 65 of the court book.

PN115

MS MBELE: Mr Pryor, with regards to that statement, the one dated 19 December 2023, does that have 19 paragraphs?---That's correct.

PN116

And does it have attached to it KP3 and KP4?---Correct.

PN117

And is that statement true and correct?---No. KP3, and I think - I'm not too sure which one it goes back to, but it should be related to clause 6 and the rostering conditions. I have just got to work out which item it refers to. Number 10. Number 10 I believe.

PN118

If I can make a correction and tender the correct attachment for KP3.

PN119

THE DEPUTY PRESIDENT: Mr Izzo.

PN120

MR IZZO: There is an objection.

PN121

THE DEPUTY PRESIDENT: Yes, but just dealing with the request by Ms Mbele is to provide the correct KP3.

PN122

MR IZZO: All right. Yes, if I can see it, because I actually just want to clarify what the - - -

PN123

THE DEPUTY PRESIDENT: If you need some time we can just take it on notice.

PN124

MR IZZO: Yes. If I can just review and come back to you, Deputy President, on that, I'm quite happy to.

PN125

THE DEPUTY PRESIDENT: That's fine. So subject to the respondent's formulating a position in relation to the substitution of KP3, then it steps down to the objection at paragraph 11, does it not?

*** KEVIN PRYOR

XN MS MBELE

PN126

MR IZZO: Apologies to interrupt. Could I just query because I just have a difficulty in understanding. There was a reference that the cross-reference is also incorrect. I just wanted to understand. So is it in paragraph 10 - and I suppose I'm directing this at Ms Mbele - but did I hear correctly that the cross-reference is changing as well because I thought it was said it was - is that right or not?

PN127

MS MBELE: No. So at paragraph 10 it references Part B, clause 6(a). The attachment KP3 is actually Part 5 instead of Part 6. So clause 5 is - - -

PN128

MR IZZO: Yes. There's no objection. I found the clause so there's no objection.

PN129

THE DEPUTY PRESIDENT: So instead of clause 6(a)(vii), it's clause 5?

PN130

MS MBELE: No, Deputy President.

PN131

THE DEPUTY PRESIDENT: No?

PN132

MS MBELE: So what's written at paragraph 10 is correct.

PN133

THE DEPUTY PRESIDENT: Yes.

PN134

MS MBELE: The attachment refers to the wrong part of the EA.

PN135

THE DEPUTY PRESIDENT: Okay.

PN136

MR IZZO: So you haven't attached clause 6? You have attached clause 5?

PN137

MS MBELE: Yes. Correct.

PN138

THE DEPUTY PRESIDENT: I see. So you will correct that?

PN139

MS MBELE: Yes, Deputy President.

PN140

MR IZZO: And there's no objection.

*** KEVIN PRYOR

XN MS MBELE

PN141

THE DEPUTY PRESIDENT: No problems, and otherwise then we're down to the objection to paragraph 11. Is that pressed, Ms Mbele?

PN142

MS MBELE: Yes, that is pressed on a similar basis that the evidence provided there indicates Mr Pryor's intentions which explains KP2 and KP4, which is information that was provided to employees and such evidence can be admitted under very - as objective background facts.

PN143

THE DEPUTY PRESIDENT: Mr Izzo.

PN144

MR IZZO: Your Honour, I don't agree with that and we press the objection. My understanding of paragraph 11 is that it is Mr Pryor's understanding of the intention of 6.1(g) and then he goes on to say not only what his understanding is, but he says:

PN145

Collectively this is what the employees would know. This is why we have set the clause as is.

PN146

It's entirely his view of what the clause means and what it's intended to achieve, and that is the very type of subjective evidence which very makes clear, at paragraph 114.11, is not to be admitted into evidence.

PN147

In terms of what was told to employees, there is separate evidence that is in his first statement with communications and that's a very different matter. There's no evidence in 11 of what he told employees. It's evidence of his understanding of what the agreement means, and as a result, that is not admissible, and so we think your earlier rulings would equally apply to paragraph 11.

PN148

THE DEPUTY PRESIDENT: Anything in reply, Ms Mbele?

PN149

MS MBELE: Nothing in reply.

PN150

THE DEPUTY PRESIDENT: Well, I think it falls within the prior ruling in relation, particularly, to paragraph 8 of the first statement. The word 'intent' is somewhat of a giveaway in relation to what is sought to be advanced by this evidence.

PN151

I note that the annexures to the two statements that the applicant seeks to rely on are before me, but paragraph 11 in its entirety should be struck as being irrelevant to my considerations.

*** KEVIN PRYOR

XN MS MBELE

PN152

MS MBELE: Thank you, Deputy President. I don't have any further questions.

PN153

THE DEPUTY PRESIDENT: Thank you.

PN154

MS MBELE: I tender the statement.

PN155

THE DEPUTY PRESIDENT: Thanks. That will be exhibit A3.

**EXHIBIT #A3 WITNESS STATEMENT OF KEVIN PRYOR DATED
19/12/2023 AND ANNEXURES KP3 AND KP4**

PN156

Mr Pryor, you will now be asked some questions.

CROSS-EXAMINATION BY MR IZZO

[10.30 AM]

PN157

MR IZZO: Mr Pryor, thank you. My name is Mr Izzo. I have just got a few questions to ask you about your statement. You do have both statements with you?---I do. Yes.

PN158

Yes. At paragraph 12 of your statement, if I could just ask you to - - -?---Which statement?

PN159

I'm sorry, your first statement?---Yes.

PN160

You talk about there's an advantage of having time zones because you can have an extra night away, especially if you know you aren't clocking on until 1500. Do you see that statement?---Correct. Yes.

PN161

Do you accept that if an employee is given in their daily work plan and in their master roster a return window that's subject to lift-up and lay-back they could still, in various circumstances, arrange an extra night away, couldn't they?---No.

PN162

Isn't the consequence of lift-up and lay-back applying simply that their return window - I'm sorry, that their earliest shift time will move from 1500 to 1300?---No.

PN163

So I will go back a step. If the return window is 1500 - - -?---Correct.

*** KEVIN PRYOR

XXN MR IZZO

PN164

- - - and that return window can be lifted up isn't the earliest it can be lifted up - - - ?---No, it can't be lifted up.

PN165

Let me rephrase. If Pacific National's view is accepted, and if you assume for one moment it can be lifted up, the most it can be lifted up is two hours to 1300. Do you accept that?---I can't assume that because my intent, and the way I know this clause, they can't lift it up past 1500.

PN166

Let me try this a different way. I'm not asking you about how that clause operates or what that clause means. I want to ask you about the consequences of lift-up and lay-back and the consequences of when someone starts. So if we put the EA aside for one moment. If a driver is told that they won't start until 3pm at the earliest your evidence is that they can arrange an extra night away?---Correct.

PN167

If a driver is told, forgetting the EA, that the earliest they can start is 3pm, but it might be as early as 1pm, they could still, in a range of circumstances, arrange an extra night away, couldn't they?---In a range of circumstances, maybe, but in another range of circumstances, no.

PN168

It will depend where they are going away I suppose?---Correct.

PN169

The reality is, depending on where they're going, they might have to come back the night before, depending how far away they have gone from their home?---But why would they have to come back the night before if they know they're not due back on until at least 1500?

PN170

The question I am asking is if they know that they might be coming back by 1pm, then - - -?---They don't know.

PN171

No. I'm asking you to assume a hypothetical, Mr Pryor. Now, this will go much faster if you - you don't have to concede how the EA operates. No one is asking you?---No, but I'm answering your question. If I was in your shoes, or the driver's shoes, and I was, and if I arranged an extra night away, knowing that I was going to start at 1500, I would not expect to start until 1500 onwards.

PN172

But, equally, if I knew that that 1500 could move to 1300 I still may have time to go away and come back. I just need to plan according. That's right, isn't it?---No. No, I still disagree.

*** KEVIN PRYOR

XXN MR IZZO

PN173

So there's no circumstances in which if someone is told they're starting at 1500, but it might be as early 1300, there's no circumstances in which they could have a night away the night before?---No.

PN174

Well, you earlier said that they were so why have you changed that decision?---No. I rephrase that. You said a hypothetical and I disagree with that hypothetical.

PN175

So why is it that they can arrange a night away if they're coming back at 1500, but they can't arrange a night away if they're coming back at 1300?---As you know, it's harder to make accommodation arrangements. All right? You can't make accommodation arrangements on the spot the day before. So they have already gone away for two nights, or three nights, which is mainly the case. They then book the extra night knowing they're not coming back until 1500. That makes them manage their fatigue better. It gives them time to get home and so forth.

PN176

So if we step back to it being a possibility?---It's a possibility, but then they're breaching on their - on their shift patterns and everything else. They don't get enough rest and so forth.

PN177

But you don't know where they're coming back from?---Exactly, and that's why it was written that way.

PN178

So, Mr Pryor, what I'm putting to you is a very simple scenario which is you think it is possible to arrange an extra night away if you know you're coming back at 3pm. What I'm putting to you is if you know you're coming back at 1pm, say at the earliest, you can still make a range of accommodations in relation to that, including possibly staying the extra night away. You're going to have less time, but you will still have a range of things you might plan in reliance of knowing you won't start before 1pm. You must accept that?---To a certain degree, yes. To a major degree, no.

PN179

The position I think you're putting is, is it not, that it's better if you know you can't start before 3.00 because you have more time in your personal life? More time for rest? More time for activities personally?---Correct.

PN180

But you still have an amount of time for rest and an amount of time for personal activities if you know you might start as early as 1pm. It's just less?---I will put it to you this way - - -

*** KEVIN PRYOR

XXN MR IZZO

PN181

No, I want you to answer my questions?---I'm trying to answer it and I will do it this way. I booked the accommodation. All right?

PN182

Yes?---Two weeks in advance. All right? I'm spending the extra night.

PN183

Yes?---All right? I don't get advised until the day before of what time I'm actually starting. All right?

PN184

Yes?---So now you're now cutting into my time, and this is what I call my time because I'm not signing on earlier than 1500.

PN185

But you will always know that the very earliest you can start is 1300?---That's regardless of the point.

PN186

What I'm putting to you is that - and I will go about it differently. In an ideal world - again, forget what the EA says, but just what's preferable. In an ideal world a train driver's time should not be before 1500. It's not before 1500?---Correct.

PN187

That maximises personal time and maximises rest up to that point. I mean ideally it would be even later possibly, but you have a certain amount of rest time and personal time if you know you're coming back at 1500?---Correct.

PN188

If you move that forward to 1300 it's not as good. You agree with that?---I agree with that. Yes.

PN189

But there is still a level of certainty that, 'Well, I need to be back to be able to start by 1300.' There's still some certainty of what you can and what you can't do. It's just not as good as 1500?---In a hypothetical world, yes.

PN190

At paragraph 13 you talk about there being benefit to time windows. You talk about managing sleep cycles. Do you see that?---Correct. Yes.

PN191

You accept that there is still an ability for the shift to move within the window, so that is just because your return window is 1500, you might not start at 1500; correct?---Correct.

PN192

You might start at 1600 or 1700 or 1800?---Correct.

*** KEVIN PRYOR

XXN MR IZZO

PN193

And so you don't have absolute certainty and you can't maximise the rest you might want to achieve, but you have a level of certainty?---You have a level of

certainty of what time, the window you're coming back to, and I will just go one step further. As I said earlier, you don't get notified until the day before, roughly about 1600, so then you can manage that fatigue if you're signing on further than 1500, say 2000.

PN194

But in an ideal world, if the train shift actually commences at 1700, in an ideal world the best way to maximise sleep, the best way to maximise rest is to know days out that it's going to start at 1700?---That doesn't happen in this agreement.

PN195

I know it doesn't happen. If we forget what's in the agreement for the moment. That's the ideal scenario?---That would be the ideal world.

PN196

That's right. 1500 gives you a level of certainty?---Correct.

PN197

And it helps because at least you know the window. If the window is subject to lift-up and lay-back there still is some benefit to the window though. You must accept that?---If the lift-up and lay-back is within the window.

PN198

Or if the lift-up and lay-back is across the window?---No.

PN199

Because you still know you can't start earlier than a particular point in time. That means the window still offers benefit?---All right.

PN200

It's not as much benefit. Do you accept that?---I accept that. Yes.

PN201

Now, I just want to talk about the rostering process generally as you understand it; not necessarily about this issue, just so we're clear. So the starting point is that drivers are allocated RDOs in the master roster?---Correct.

PN202

At the beginning of the roster cycle?---Correct.

PN203

We actually don't have evidence on in relation to how long the roster cycles are. They vary is my understanding?---Well, a roster cycle is normally two weeks. The master roster is - - -

PN204

The master roster?---The master roster is posted on the wall and it can go as long as necessary until it's changed.

*** KEVIN PRYOR

XXN MR IZZO

PN205

So it can be like 16 weeks?---That can be six years.

PN206

It could be six years. So it's a much longer period of time?---Correct.

PN207

For blank line workers the master roster doesn't show their shifts because they're not set in advance, but it does show the return window from the RDO?---Correct.

PN208

Now, outside of a master roster change, PN can't change the RDOs and it can't change the RDO windows - - -?---Correct.

PN209

- - - in the master roster. So that's the master roster. Then there's the next - I'm sorry, there's the working roster or forecast roster?---Yes.

PN210

Which is about nine days before?---Which has an effect of a blank line roster.

PN211

Correct. That's for people working to a forecast roster?---Correct.

PN212

And that's about nine days out or a little bit more?---Nine days out in advance of the working - - -

PN213

Of the Sunday?---Of the Sunday.

PN214

Yes. Getting back to blank line workers, then there's a daily work plan?---Correct.

PN215

The daily work plan has to be issued by, at the latest, 1730 the day before and it will have a notified start time?---Correct.

PN216

It will have the start time of the shift. Now, do you accept - and I suspect you will - PN can't change the return window when it issues the daily work plan, so if you're coming back from an RDO the shift must be rostered within the window for return that the employee has on the master roster?---Correct.

PN217

Following that, there's then a third notification point, which is the call time advice. Is it interchangeably referred to as the call time or the advice notification, but it's the time that they're called to be actually told when they can start?---Correct.

*** KEVIN PRYOR

XXN MR IZZO

PN218

Now, you accept, at that point, lift-up and lay-back can move the driver two hours forward or four hours back within their window?---Correct.

PN219

But you seem to be of the view that it can't be across the window?---Correct.

PN220

And then once that call is made no further shift changes are permitted?---I believe so. Yes.

PN221

All right. Thank you. I think it's just helpful for everyone to be on the same page in relation to that. Now, if an employee is requested to change their return shift window at the time the daily work plan is being issued, do you agree it's possible they might be asked to work overtime to change their window?---Correct, and it doesn't have to be on the daily work plan. It could be days out.

PN222

Or days out?---Correct.

PN223

Because PN wants to roster the shift differently so they call them up and say, 'Will you do it at overtime?''---If it's only on a different window. Yes.

PN224

And you think there's a practice where PN might agree to pay overtime at this point in time?---Correct.

PN225

Now, if I go to paragraph 15 of your statement. If you could just have a look at that paragraph?---Yes.

PN226

That's the practice you're referring to, isn't it, is that if an employee is requested to change their time zone by mutual agreement they can be paid overtime? Now, that's the type of practice that we just discussed?---Correct.

PN227

It might happen when the daily work plan has been issued?---Correct.

PN228

All right. Now, as you know, PN says that once the daily work plan is issued - and I don't need you to respond to this. It's just background - PN's position is:

PN229

We can move the start time by two hours forward or four hours back and it doesn't matter if it's across a window.

*** KEVIN PRYOR

XXN MR IZZO

PN230

That's PN's position. We say there is no practice whereby, at that point in time, PN is offering overtime for people to move their shifts, that it's happening earlier in relation to the daily work plan. What's your response to that?---Well, my response is I know it's true. I know that people get told, 'You're signing on a different zone.' You get paid overtime for it, and they move on.

PN231

But that's something when they're getting the daily work plan?---I couldn't say if it's the daily work plan or before that. It could be two days out. It could be three days out, depending on what's happening with the trains and who is working and a wide run of rostering at the time.

PN232

But there's no universal practice that it's happening when lift-up and lay-back is being done?---If there's – yes. If they're signing on a different zone, yes, because you don't get laid back past midnight, do you? It's called 'not required' then, which is totally different.

PN233

You accept that in terms of lifting up before 0600 that's not permissible because then you're infringing on the RDO itself? You accept that?---I accept that.

PN234

Just bear with me one moment. Now, we spoke about this. You're saying this is practice that occurs at the daily work plan or before. You also say it might happen at lift-up and lay-back. I'm putting to you that it's not universal; that is, it's not uniform. It doesn't happen. It's not common place. Would you accept that?---No, because the reason I say that is because people refuse to work it and then they say, 'We will tick the box. You will be paid overtime.'

PN235

So I think I have done something wrong here in that I have put a couple of propositions to you in the questions. Let me break it up. (1) the first proposition is it's not a universal practice that this happens at lift-up and lay-back?---It could. Yes. Possible.

PN236

It's also not common? It doesn't happen very often?---No, because these are only on the roster once in every few lines or something like that. So it doesn't happen on a daily basis. I will put it that way.

PN237

It's not common?---It's not common they lift it up and lay-back outside the zone, no.

*** KEVIN PRYOR

XXN MR IZZO

PN238

But some depots, even on your own evidence, it doesn't happen; for instance, you talked about Moss Vale as being an exception?---My understanding was at Moss Vale there were a few guys that did that practice and were told that that's how it is. Other depots they (indistinct).

PN239

When you say 'did that practice and were told how it is', you mean would have possibly their shift window changed at lift-up and lay-back?---Correct.

PN240

Without seeking overtime?---Without seeking overtime.

PN241

No further questions.

PN242

THE DEPUTY PRESIDENT: Ms Mbele.

RE-EXAMINATION BY MS MBELE

[10.46 AM]

PN243

MS MBELE: Do you have a copy of the court book?---I do. Yes.

PN244

So I will take you to your statement of December. Can you, please, look at KP3?---I haven't got the (indistinct) attachments.

PN245

MR IZZO: Apologies, Deputy President, and I appreciate this is unorthodox. Just before my friend commences, I realise there is one question I'm probably obliged to put to Mr Pryor that I haven't.

PN246

THE DEPUTY PRESIDENT: Yes.

PN247

MR IZZO: The re-examination hasn't started, so I do apologise, but is it possible to ask a further question?

PN248

THE DEPUTY PRESIDENT: Yes.

PN249

MR IZZO: It's just about a separate topic. It's nothing to do with KP3.

PN250

I do apologise, Ms Mbele.

FURTHER CROSS-EXAMINATION BY MR IZZO

[10.47 AM]

PN251

*** KEVIN PRYOR

RXN MS MBELE

*** KEVIN PRYOR

FXXN MR IZZO

Mr Pryor, you filed a reply statement in relation to an email you received from Mr Jeffery Crowe and that reply statement is at paragraph 14. It annexes an email. Do you see that?---Yes.

PN252

And then at 15 you say Mr Crowe called you. You had a brief conversation discussing the content of the email and, effectively, talking about people having shifts commencing outside of their return windows. Do you recall that?---Correct.

PN253

You say you don't recall the exact conversation, but Mr Crowe agreed with your interpretation and said he would email confirming this?---Correct.

PN254

Have you seen Mr Crowe's further statement that he's responded?---Yes. I don't believe it.

PN255

What I want to put to you is that what Mr Crowe is talking about is that Mr Crowe was talking about there being no ability to move people's return window at the point that they're rostering; that is, allocating shifts. Do you agree with that?---Well, at commencement time of that shift, yes. In their allocated time zone, yes.

PN256

Yes. That's what he was talking about?---Yes, and we also talked about lift-up and lay-back going into a different zone, and as my example - - -

PN257

That's not what Mr Crowe is saying?---No. I disagree.

PN258

And, finally, you accept, in relation to your email - if you look at your email on 5 December, so that's at KP4?---Yes.

PN259

It talks about the train crew being advised to work outside time zones on the same day that they're meant to return?---Correct.

PN260

Now, you don't talk in the email about lift-up and lay-back or about whether it's rostered. It's just you're generally talking about the time zone moving in that email?---Correct.

PN261

You talk about the example being someone who is in the 0600 to 1500 window being moved to 2000 hours?---Correct.

*** KEVIN PRYOR

FXXN MR IZZO

PN262

I mean, on anyone's view, that's not permissible. You would agree with that, and what I mean by that, you can't do it at the daily work plan, but you couldn't even at lift-up or lay-back because it's a five-hour change?---That was just an example I used in that email, but the intent behind it was you are allocated your commencement, as what's written in the enterprise agreement is you sign on on that zone, in that zone.

PN263

But it's entirely possible - I mean reading this email, (1) this could be talking about the daily work plan, when that's issued?---Correct.

PN264

And (2) when one reads it - I will withdraw that. So that's the topic I also wanted to ask questions about.

PN265

THE DEPUTY PRESIDENT: Thank you.

PN266

MR IZZO: Thank you. No further questions.

PN267

MS MBELE: I don't have any questions for re-examination anymore.

PN268

THE DEPUTY PRESIDENT: Thank you.

PN269

You're excused. You can remain in the body of the Commission?---No worries. Thank you, Deputy President.

PN270

Thank you.

<THE WITNESS WITHDREW

[10.51 AM]

PN271

MS MBELE: That's the applicant's case.

PN272

THE DEPUTY PRESIDENT: Thank you, Ms Mbele.

PN273

Mr Izzo.

PN274

MR IZZO: Thank you, your Honour. I think we're very content to proceed without any opening as well. We have two witness statements both from the same witness who is Mr Jeff Crowe, so we would ask Mr Crowe to be called. I mean if that's possible.

*** KEVIN PRYOR

FXXN MR IZZO

PN275

THE ASSOCIATE: Please state your full name.

PN276

MR CROWE: Jeffery Paul Crowe.

<JEFFERY PAUL CROWE, AFFIRMED

[10.53 AM]

EXAMINATION-IN-CHIEF BY MR IZZO

[10.53 AM]

PN277

MR IZZO: I just noticed, Mr Crowe, that you don't appear to have your statement with you. I'm not sure if we have a spare. We might need to get a copy for Mr Crowe. Is there a statement there? That's in the court book, is it?---(Indistinct reply)

PN278

So if I could ask you to turn, Mr Crowe, to page 89 of that binder. There's a witness statement there with your name on it and at the end of 18 paragraphs your signature. Is that your statement and are its contents true and correct to the best of your knowledge and belief?---Yes, it is.

PN279

We would seek to tender that, Deputy President.

PN280

THE DEPUTY PRESIDENT: Are there any objections?

PN281

MS MBELE: Thank you, Deputy President. So we make some objections to paragraphs 7 to 9 on the basis that it is evidence of Mr Crowe's own opinion and it should be limited to his own subjective understanding referring to bargaining if it is admitted at all.

PN282

THE DEPUTY PRESIDENT: Are there particular parts of those paragraphs that you wish to strike? I'm sorry, it's just when I look at it, paragraph 7, it says Pacific National could not agree with something, but then says what occurred. Paragraph 8 then moves down and starts talking of common intention, and 9 certainly talks of intention, but I'm wondering if all of those three paragraphs are objected to or just parts.

PN283

MS MBELE: I'm just getting the statement.

PN284

THE DEPUTY PRESIDENT: While you're doing that, I might just ask Mr Izzo.

PN285

Are there any parts that are conceded?

*** JEFFERY PAUL CROWE

XN MR IZZO

PN286

MR IZZO: Yes. So I'm happy to outline that if that's - - -

PN287

THE DEPUTY PRESIDENT: It might just refine it if the parties are happy to proceed on that basis.

PN288

MR IZZO: So there are parts that are conceded, but not - - -

PN289

THE DEPUTY PRESIDENT: Yes. All I'm wondering is I have obviously put Ms Mbele in a position where I have just asked are there any particulars that are pressed more than others, but it might refine things if - - -

PN290

MR IZZO: There are elements that are not pressed.

PN291

THE DEPUTY PRESIDENT: Yes. If you were to outline what is not pressed and then that might assist in any refinement by you, Ms Mbele.

PN292

MR IZZO: Yes. I'm happy to outline what's not being pressed. So this will be a little bit sporadic. I apologise for that, but if we go to paragraph 8.

PN293

THE DEPUTY PRESIDENT: Yes.

PN294

MR IZZO: I'm sorry, if you go to paragraph 9.

PN295

THE DEPUTY PRESIDENT: Yes.

PN296

MR IZZO: The first sentence, 'Clause B6.1 was never intended', all the way to the end of that sentence is not pressed.

PN297

THE DEPUTY PRESIDENT: Okay. So the third line?

PN298

MR IZZO: Yes. It ends with the word 'uses' full stop.

PN299

THE DEPUTY PRESIDENT: Yes.

*** JEFFERY PAUL CROWE

XN MR IZZO

PN300

MR IZZO: That section is not pressed. The balance of the paragraph is pressed. If we go to paragraph 8, there's a different set of phrase:

PN301

The common intention of both parties was to provide blank line employees who were returning with an indication of when they were to return to work so they could understand whether to plan work in the morning or the evening and thereby manage their time appropriately.

PN302

That sentence or that phrase is not pressed insofar as it gives evidence of what the parties' intentions were, but it is relevant to the sentence that follows because he then says:

PN303

This was discussed during bargaining.

PN304

So the fact there was a discussion about the matters in that phrase we do press. So I'm not sure. I mean we could certainly have it admitted not as being evidence of what the RTBU intended or what Pacific National intended, but as evidence of what was discussed.

PN305

THE DEPUTY PRESIDENT: Yes.

PN306

MR IZZO: They would be the two concessions.

PN307

THE DEPUTY PRESIDENT: What about paragraph 7?

PN308

MR IZZO: Well, certainly the bottom part, what Pacific National agreed to include. I think Pacific National did agree to include X, Y, Z. I mean that's probably not pressed because it's either a statement of what's in the EA or it's his intent as to what the EA means.

PN309

THE DEPUTY PRESIDENT: So that's the last three words of the third line to the end of the paragraph?

PN310

MR IZZO: Correct. I think the first part falls into a different category and so that's pressed.

PN311

THE DEPUTY PRESIDENT: So, Ms Mbele, that's narrowed things down to an extent.

*** JEFFERY PAUL CROWE

XN MR IZZO

PN312

MS MBELE: In that sense, we would be agreeable to that.

PN313

THE DEPUTY PRESIDENT: Okay. So that's the last part of paragraph 7 from, 'Pacific National did agree' to the end. The first part of 8 is not pressed regarding intention, but informing the last sentence which commences, 'This was discussed', and then the first three lines of 9 up to the full stop before 'there was' is not pressed. Next is paragraph 10.

PN314

MR IZZO: If you just bear with me, Deputy President.

PN315

THE DEPUTY PRESIDENT: Yes. I'm sorry.

PN316

MR IZZO: Yes, we don't press the first sentence which goes all the way up to halfway through line 4. We do press the balance because it's just setting out some matters about what the EA deals with. It's just a statement of fact as to what's in the EA, but we don't press the first sentence up to the words 'adhere to.'

PN317

THE DEPUTY PRESIDENT: Okay. Ms Mbele, does that assist?

PN318

MS MBELE: (Audio malfunction) not necessarily be admitted on the basis that it makes a submission. It's not assisting in the (indistinct).

PN319

THE DEPUTY PRESIDENT: Anything in reply, Mr Izzo?

PN320

MR IZZO: I think it's important the content remains. It's pointing out a range of provisions that are relevant to the EA how they operate. If it's his submission as to how these matters operate and it's accepted on that basis we would be comfortable with that. We'd be opposed to it being cut out because there's important content about the other bits of context that are relevant. So we're happy for it to be treated as submission and given that type of weight.

PN321

THE DEPUTY PRESIDENT: Ms Mbele?

PN322

MS MBELE: We don't have an issue with it being treated as a submission and given that weight.

PN323

THE DEPUTY PRESIDENT: On that basis and noting that the first three and a half lines are not pressed then we can move to paragraphs 12 to 15.

*** JEFFERY PAUL CROWE

XN MR IZZO

PN324

MR IZZO: Which are all pressed, Deputy President.

PN325

THE DEPUTY PRESIDENT: Ms Mbele?

PN326

MS MBELE: So paragraphs 12 to 15 we press for that to not be admitted on the basis that it's not relevant. It doesn't tend to prove a fact in issue in this dispute. If anything there is hearsay and speculation in those paragraphs, and again it's Mr Crowe's(?) own opinion and should be limited.

PN327

THE DEPUTY PRESIDENT: It seems to be largely factual what's put. In fact there's no response - there's no response in Mr Pryor's statement to any of these materials. They seem to have a largely factual basis to give an understanding of what causes concerns, in a broad sense, with rostering. I don't see hearsay or speculation. It seems to be broadly factually based. I would intend to allow those paragraphs. On that basis no further objections?

PN328

MS MBELE: No further objections.

PN329

THE DEPUTY PRESIDENT: That will be exhibit R1.

EXHIBIT #R1 WITNESS STATEMENT OF JEFFERY CROWE

PN330

MR IZZO: The second statement of Mr Crowe, that appears at page 192 of the court book that you have?---What page was it?

PN331

192. So after all those annexures you were just flicking - - -?---Okay.

PN332

Thank you. It's actually towards the very end. Got it?---Yes.

PN333

That's a statement which is one page signed by you 13 February 2023. Is that statement true and correct to the best of your knowledge and belief?---Yes, it is.

PN334

We would also seek to tender that.

PN335

THE DEPUTY PRESIDENT: Any objections?

PN336

MS MBELE: No objections.

*** JEFFERY PAUL CROWE

XN MR IZZO

PN337

THE DEPUTY PRESIDENT: That will be exhibit R2.

EXHIBIT #R2 SECOND WITNESS STATEMENT OF JEFFERY CROWE

PN338

Any examination-in-chief?

PN339

MR IZZO: No, there is not.

PN340

THE DEPUTY PRESIDENT: Mr Crowe, Ms Mbele will now ask you some questions in cross-examination.

CROSS-EXAMINATION BY MS MBELE

[11.05 AM]

PN341

MS MBELE: Mr Crowe, it's true, isn't it, that you were part of the negotiations in the 2013 enterprise agreement?---Yes, it is.

PN342

And you would agree that the RTBU and Pacific National bargained with the intention of providing blank line employees with an understanding of what their work schedule would be; is that correct?---Yes, it was. It was the intention to work on work life balance. So, yes.

PN343

Would you agree that an employee's work scheduling permits them to have an understanding of when they would be expected to return back to duties?---So I would agree that the EA refers to shifts being planned to give the train crew an indication of when they would return following an RDO (indistinct).

PN344

So the question that I'm asking it's about the scheduling and what impact it has on the employee or at least how they would receive it. So I will just go back to that question again. So I'm putting it to you that an employee's work schedule, it allows them to have an understanding of when they would be required to start work; is that correct?---Yes, it does.

PN345

Is it true that there was an agreement to introduce two different time zones, that being 6 am to 3 pm and the other time zone being 3 pm to 2359, and these were meant to be morning shifts and evening shifts; is that correct?---It's correct that they were - the intent of that was to include that in the planning of those shifts, yes.

*** JEFFERY PAUL CROWE

XXN MS MBELE

PN346

MR IZZO: I just object. There were two questions in that question. I believe the first was answered, but to the extent that - I think it should be rephrased if Ms Mbele is also seeking a response to the second, because there were two issues bundled up in the question, Deputy President.

PN347

THE DEPUTY PRESIDENT: What's the basis of the objection?

PN348

MR IZZO: The objection was - - -

PN349

THE DEPUTY PRESIDENT: There must be more to come.

PN350

MR IZZO: Well, it's just difficult to understand the answer when there's two questions in one. That's the concern. Ideally it would have been put before he'd answered the question, but that's the objection.

PN351

MS MBELE: Okay. So the first question is whether it's true that there was two different time zones introduced, 6 am to 3 pm and 3 pm to 2359; is that correct?---That's correct, yes.

PN352

Is it true that time zone A, 6 am to 3 pm, was a morning shift; is that correct?---That's correct, yes.

PN353

And is 3 pm to 2359 an evening shift?---That's correct.

PN354

So would you agree that if an employee is scheduled to return in a morning shift they would manage their time appropriately by ensuring they are able to sign on within the morning shift?---Can you ask that again, please.

PN355

So if an employee has a morning shift would you agree that during their time off they would manage that appropriately to allow them to commence work within that morning shift?---I would agree that the time that they're allocated a shift to commence lets them prepare for the shift with the proviso that there's a roster change clause that train crew are aware of within the lift-up and lay-back, and the roster change parameters that they also need to prepare for their shift.

PN356

Just to confirm what you've said there is that, yes, they would be preparing and ensuring that they can sign on in the morning shift?---They would be preparing for the planned sign on time in the morning shift with also the roster change clause of lift-up and lay-back.

*** JEFFERY PAUL CROWE

XXN MS MBELE

PN357

Would you agree that time zones would be confirmed through the creation of a master roster?---Yes, I do.

PN358

And you would agree that employees use that master roster to manage their time off?---Yes, I do.

PN359

Would you agree that part of managing that time off is also managing of fatigue?---Yes, it is.

PN360

If I put it to you that during bargaining you understood that employees would expect to sign on for duty within their allocated time zones you would agree with that, wouldn't you?

PN361

MR IZZO: Object. I mean he is now being asked about what employees would have understood during bargaining. It's about not even what the bargaining reps were, what employees out there - I think it's just speculating as to someone else's objective intention. So I object to the question.

PN362

THE DEPUTY PRESIDENT: How do you respond to the objection?

PN363

MS MBELE: I can ask the question again.

PN364

THE DEPUTY PRESIDENT: No, you've got to get past the objection. So the objection is that you are effectively going to - how can you go to question this gentleman about what might have been in the minds of employees. You're asking this witness to give hypothetical evidence in relation to what he thinks might have been in somebody else's mind.

PN365

MS MBELE: Given his role and the process of bargaining it would be anticipated that he would be aware of the information being provided to employees.

PN366

THE DEPUTY PRESIDENT: Yes.

PN367

MS MBELE: So he would know what the employees have been advised.

PN368

THE DEPUTY PRESIDENT: Yes, and he can give evidence about what he knows that employees have been advised. But how then an employee might digest that and form views in relation to that information is another step further.

*** JEFFERY PAUL CROWE

XXN MS MBELE

PN369

MS MBELE: I will withdraw that question.

PN370

THE DEPUTY PRESIDENT: No problems. If you want to rephrase it that's fine, or at least go there another route, but I think I have made my position clear in relation to the extent of the evidence I think can be given.

PN371

MS MBELE: Thank you, Deputy President, I will withdraw the question.

PN372

THE DEPUTY PRESIDENT: That's fine.

PN373

MS MBELE: Mr Crowe, just going back to the experience that you have with Pacific National, it's true that you've been there for just over 20 years now; is that correct?---Just turned 23 years, yes.

PN374

Currently you have about 14 years of experience in labour planning; is that correct?---Yes. Look, I couldn't say exactly how many years, but it's quite extensive and would cover most of my career with PN.

PN375

So you have a working understanding of what's involved in labour planning; is that correct?---That's correct.

PN376

In your role you would agree that you would turn your mind to any fatigue management requirements outlined in the Rail Safety National Law Regulations; is that correct?---Yes, we would. We would, yes.

PN377

And is it correct to assume that Pacific National's fatigue management program is in line with the Rail Safety National Law Regulations?---Yes.

PN378

And given your experience is it correct to say that you understand how lift-up and lay-back work?---Yes.

PN379

Is it also correct to say that you know the difference between schedule time and sign on time?---Can you clarify the question, please.

PN380

So I will take it one step back. You understand what scheduled time is; is that correct?---That's correct.

*** JEFFERY PAUL CROWE

XXN MS MBELE

PN381

And you also understand what a sign on time is; is that correct?---If you're referring to actual time, yes.

PN382

So going back to lift-up and lay-back, when an employee is lifted up or laid back does this happen before or after their sign time?---Before or after their scheduled sign on time; is that what you mean?

PN383

I will just take you back again. You said earlier that you understood that there's a difference between a schedule time and a sign on time; is that correct?---That's correct.

PN384

Can you explain to us when lift-up or lay-back happens?---Yes. So lift-up and lay-back will occur after the employees have a confirmed sign on time.

PN385

You will recall earlier that you said in your role you would turn your mind to the Rail Safety National Law Regulations. Can I please direct you to schedule 2 of the Rail Safety National Regulations. I have a copy of that. Can I refer you to schedule 2, which talks about the fatigue management requirements. Could you please read Part 1 'Interpretation'?---'For the purposes of this part the length of a shift worked or to be worked by a rail safety worker includes all the time between the signing on time and the signing off of a shift.'

PN386

(Audio malfunction) interpretation of what a shift length is. When does an employee's shift commence?---When they sign on.

PN387

Can I please turn your attention to page 71 of the court book?---Yes.

PN388

So this is email correspondence between yourself and Mr Pryor. I will take you to the fifth line of Mr Pryor's email to you where he states:

PN389

I understand that they might be advised for a not required, but I believe the intent behind the time zones was that you were to sign on within the time zone allocated.

PN390

Do you see that part?---Yes, I do.

*** JEFFERY PAUL CROWE

XXN MS MBELE

PN391

Mr Pryor posed this question about the intent of the disputed clause. You would agree that he expressly referred to a time when you would sign on for a shift, wouldn't you?---I would say that the conversation that me and Kevin had to discuss that, my understanding was we were actually talking about the shift that

was being planned. And I'd also say that the example given in the email where someone was to be allocated the shift between 6 and 1500, but then being advised to work 2000, would also not even have the lift-up/lay-back clause applied because it's outside of the four hours. So that's what I believe.

PN392

In this instance I'm referring to the email. In that particular line or passage that you've just read it doesn't make any reference to scheduling; would you agree?---I think he does, because he says, 'I understand they might be advised for a not required, but I believe the intent' - so I would say what my - how I understood that email to come across and discussions that me and Kevin had.

PN393

So in the fifth line he specifically notes - he makes reference to a time where an employee is to sign on; is that correct?---Yes, he does.

PN394

Would you agree that Mr Pryor's email does not pose a question to you about rostering or scheduling in that fifth line?---I think I've answered it. So my understanding of what we were discussing was how that was to be - or how that was being applied in planning, and that's what I agreed with Kevin that I would address.

PN395

Would you agree that your email does not dispute Mr Pryor's understanding within the email?

PN396

MR IZZO: I object. What's the understanding that he's being asked to - - -

PN397

MS MBELE: So going back to the fifth line Mr Pryor says, 'I understand that' - the understanding that I'm referring to.

PN398

THE DEPUTY PRESIDENT: 'They might be advised for a not required'?

PN399

MS MBELE: Yes.

PN400

THE DEPUTY PRESIDENT: Okay. Any objection, Mr Izzo?

PN401

MR IZZO: No, if that's what he's being asked.

PN402

THE DEPUTY PRESIDENT: That's what you're being asked about?---The 'I understand that they might be advised of a not required'?

*** JEFFERY PAUL CROWE

XXN MS MBELE

PN403

Yes. And as it follows for the next two lines?---Yes. So can you ask the question again, please, sorry.

PN404

MS MBELE: My question is would you agree that your response email to Mr Pryor does not dispute his understanding; is that correct?---My response to Kevin's email was my understanding, which was around - which was around the planning of the shifts, and that's what my response was about, and that was my understanding and what I responded to.

PN405

Would you agree that from Mr Pryor's email as it's written that an employee's shift was intended to commence within the scheduled time zone?---Yes. Once again my understanding was, and the way that I believe he has written, is that the employees plan to commence between those time zones.

PN406

I put it to you that your email response back to Mr Pryor quite simple in that it only seeks to confirm an agreed position to Mr Pryor's email to you?---I would answer and say it's maybe not so simple, because if you look at the example that Mr Pryor's put into the email it says that someone with a time zone of 6 to 1500 being advised to work at 2000, I would say that that's outside of the lift-up and lay-back clause. So if you read the email for its entirety, and I've answered it, is to say that that wouldn't even fit in with the lift-up/lay-back clause. That's outside of those conditions. So for that example I agree that it would be outside of the enterprise agreement if we were doing that, and that's how - and that's how what I was responding to about the planning of those times, and also if you look at that example that's outside of the EA conditions as well.

PN407

Given the amount of experience that you have you would agree, wouldn't you, that such an issue in Mr Pryor's email you would have clarified that?---Well, I thought I did. That was the intent of my reply, and the discussions that me and Kevin had was that a shift must be planned to commence within those sign on times, and that's what I was agreeing to.

PN408

You've consistently mentioned that your representation in that email was referring to scheduling or rostering. Yet this was not expressly outlined to Mr Pryor in your response; is that correct?---I've responded how I responded, and my understanding of how I responded was that we were actually discussing shifts being planned within those time zones.

*** JEFFERY PAUL CROWE

XXN MS MBELE

PN409

And my submission to you is that as a person with the experience that you have, given that you're saying Mr Pryor's email is not as simple, you didn't seek to clarify that in your response email; is that correct?---Well, I'd say I've got a lot more experience in 2023 than I did in 2013 to start with. That's quite some time

ago. But I answered the email with the best of my understanding of what we were talking about. If that could be clearer then I wish I had done it, but that was - that was my understanding of what we were discussing. And as I said when you look at the example that Kevin's given, which is 6 to 1500 and being asked to work at 2000 in the email, that's not allowed under the enterprise agreement as well. So I agreed with that.

PN410

And having reflected and you mentioning that the experience that you had in 2013 in comparison to now you would agree then that your email to Mr Pryor seems to be misleading, wouldn't you?--No, I wouldn't, because I replied with my understanding, and as I said if you look at Mr Pryor's email that also contains an example in there which he's asking me to respond to, which is conditions outside of the enterprise agreement.

PN411

Thank you, that's the cross-examination.

PN412

THE DEPUTY PRESIDENT: Any re-examination?

PN413

MR IZZO: Yes, thank you.

RE-EXAMINATION BY MR IZZO

[11.30 AM]

PN414

Mr Crowe, just in relation to that email, KP4, you've given various responses that you were talking about the shifts being planned, that it was about being in planning. You kept using the words about in plan or planning, what should have been planned. What do you mean by that phrase?--So the way that the EA was set out in 2013 was that there was a master roster that would indicate time zones for employees to help them plan returning from their RDO. From there there's then a working roster created, and then from there there's a roster change clause which is done by exception, and also includes a paragraph that says that Pacific National will develop master rosters that reflect the real and likely work. However, these are the exceptions. Now, the RDO zones are actually placed in the master roster. So the conversation that I recall that I had with Kevin was around the planning by crew planners of those shifts to train crew, and crew planners allocating shifts outside those zones. And I 100 per cent agree that the crew planners should not do that, and the process that we have in place if there's a specific reason around qualifications where we may require or ask someone to start we would need agreement with those individuals, and the majority of time, unless it suited those individuals, they would ask for overtime.

PN415

And when is this planning done?---This is done today for the next 30 hours. So it's done in the labour planning sense. It's not done in the live run, the management of shifts, which falls under a different clause.

*** JEFFERY PAUL CROWE

RXN MR IZZO

PN416

The planning of hours in 30 hours that reflects a daily work plan; is that right?---That's correct, yes.

PN417

The email also says, 'I understand they might be advised for an N/R.' Can you tell us what an N/R is?---So it's a not required. So if there's no work at a particular location or not enough work for the people that we've got we can actually not bring them to work on that - on that day. So it's what we refer to as a not required.

PN418

And when is that done?---That's also done in the planning phase.

PN419

And when is that again?---That's current day for the following 30 hours by the labour planners. That's prior - sorry, that's prior to the shift being confirmed by the train crew.

PN420

So it's the daily work plan?---Yes, correct.

PN421

No further questions.

PN422

THE DEPUTY PRESIDENT: Thank you very much for attending, Mr Crowe. You're free to go, but you can remain in the body of - - -?---Okay. Thank you.

<THE WITNESS WITHDREW

[11.33 AM]

PN423

MR IZZO: I think that concludes our evidence, Deputy President.

PN424

THE DEPUTY PRESIDENT: Okay. That takes us to submissions. How do the parties wish to deal with submissions?

PN425

MR IZZO: We are comfortable to do oral submissions today. I think the question is just in the timing. We're in your hands. We're happy to start whenever Ms Mbele is ready to start.

PN426

MS MBELE: Just proceed in that way and do oral submissions.

PN427

THE DEPUTY PRESIDENT: Yes, that's all right. Would you like a break?

PN428

MS MBELE: Yes, please.

PN429

THE DEPUTY PRESIDENT: Yes. How long? Fifteen minutes?

PN430

MS MBELE: Yes.

PN431

THE DEPUTY PRESIDENT: We will resume at 11.50. Thank you.

SHORT ADJOURNMENT

[11.34 AM]

RESUMED

[11.51 AM]

PN432

THE DEPUTY PRESIDENT: Ms Mbele.

PN433

MS MBELE: Thank you, Deputy President. The applicant will rely on its written submissions. We don't intend to repeat those for (indistinct). We will just provide a brief outline of the dispute before the Commission.

PN434

The applicant's case is about when a shift must commence. There's been some sort of a consensus between the parties that a shift commences when an employee signs on. This view is consistent with the Rail Safety National Law Regulations, and employees at the time of bargaining they were provided with information pertaining to what the clause, or at least the expectation of what the clause would be trying to achieve. And with that information that they had access to they essentially agreed and approved for the agreement to be made.

PN435

Turning to the dispute at clause B6.1(g), page 19 of the court book, we say that the clause is not ambiguous. It says there:

PN436

Blank line master rosters will indicate time zones where the shifts will commence upon returning from an RDO only.

PN437

And then it sets out what those time zones would be. Then it further goes in to state that:

PN438

Employees may not be required to return to work after an RDO.

PN439

We know that the clause was made in the context of blank line working employees where the realities are that these employees are working in unstable, or at least they don't have a forecast understanding of what their shifts would be and when they would commence. The respondent's evidence provides that there was

an intention to provide a better understanding to employees of when their shifts would commence, and this was to be done through the process of scheduling. The applicant's evidence provides that there was an understanding that employees would seek to have better certainty of when they would be required to sign on.

PN440

Now, the principles set out in Berri pertaining to the task of construction, it sets out that this task should rely on the language of the agreement. The language used in the agreement is quite plain. It advises there that the clause is about when a shift will commence. 'Commence' has a plain meaning, which is to start. The respondent's evidence certainly agreed that the sign on time is a commencement time.

PN441

And we've seen from the respondent's evidence as well that lift-up or lay-back is a process that occurs before the commencement of a shift, and in this dispute we're talking about when a shift would commence. We say that there's no ambiguity that arises from the text, and that the language used in the 2022 agreement hasn't changed from 2013. It remained consistent. And the only objective evidence accessible to the Commission - I will catch my thought in a second.

PN442

THE DEPUTY PRESIDENT: That's okay.

PN443

MS MBELE: I will just take you a step back to the case and the principles that are relevant in the task before the Commission today. Firstly, the principles requiring of the Commission, rely on the text, and if no ambiguity arises then the language of the agreement should take precedence.

PN444

In this sort of matter where we have seen some evidence arising from the respondent and the applicant the only evidence before the Commission we would say from the applicant's perspective is evidence of objective facts (indistinct) facts, and we say that the Commission, if they were to find that there was any ambiguity, that the evidence provided shows a common intention of what the parties were trying to achieve in the making of the agreement.

PN445

We note that Mr Crowe's evidence in the proceedings today has certainly made some sort of a differentiation between what his email correspondence back to Mr Pryor was through a telephone conversation that the Commission doesn't have any access to. So we say that the only other evidence that would assist the Commission is that of Mr Pryor that's already before the Commission.

PN446

Our view is that the answer to question 1 to these proceedings is 'Yes'. The text has adopted plain language. B6.1(g) plainly outlines an absolute measure of when a shift must commence regardless of any changes being made through the process of scheduling or the process of lift-up and lay-back, which the respondent has

conceded that both of those need to occur before the commencement of a shift. Those are my submissions.

PN447

THE DEPUTY PRESIDENT: Thank you very much. Mr Izzo.

PN448

MR IZZO: Thank you, Deputy President. Deputy President, I'd like to deal with four topics in closing. So I will just tell you what they are so you have some road map. The first is I just want to talk about rostering generally. Not necessarily in relation to this dispute. I just want to ensure everyone's on the same page about the various steps in the rostering process. So it's background in essence.

PN449

Then turning to the issue in dispute I'd like to take you to the text of the EA and demonstrate how it supports our position. Then I'd like to talk about the purpose and context for the EA provisions. And then finally, fourthly, I just want to respond to some discrete elements, or discrete matters that have been raised by the RTBU in their closing and in their reply submissions.

PN450

In relation to the first topic, which is rostering generally, I have done this with a couple of the witnesses, but I think it helps now to actually put some flesh on it in terms of the EA provisions, so we have a very clear understanding of the different points in time that things happen and how that sits in the EA. So if I could ask you to open the EA, Deputy President, to clause B6.1(a). Yes, so if I could just take you to B6 to begin with. It's called 'Rostering guidelines', and the very first thing it deals with is this master roster. So you will see at 6.1(a) it says:

PN451

There is a master roster to be exhibited primarily for the purpose of indicating RDOs.

PN452

We also know from 6.1(g) that the master roster should also indicate time zones one returns from RDOs, and that's confirmed in 6.1(g). The next thing to note is that there's limitations on how you change the master roster. So at 6.1(c) you can change it, but you can only change it four times a year. That's what 6.1(c) says. It also says you've got to consult. And at 6.1(d) we're told that you need 28 days formal consultation.

PN453

So there's this master roster that sets a broad framework just of RDOs. It doesn't tell you when the shift is that you're working, whether you're doing forecast working or blank line. You don't necessarily have the shift times, but you know when you will be rostered off.

PN454

We then get to B6.2, and that deals with working rosters. Now, these are exchangeably referred to as working rosters or forecast rosters. It's not relevant to this dispute, but it's important to understand the context of the EA. Where there is

an ability to forecast and you're doing a working roster the roster needs to be posted nine days in advance of the Sunday where the week will start.

PN455

So there's this kind of notification process where a minimum of nine days out forecast workers will know when they're working. It does not apply to blank line workers. That's not in contest in these proceedings. But that's your next kind of notification point.

PN456

You then have at 6.3 the daily work plan. Now, daily work plan is what is generated - we've had evidence about this being 30 hours in advance of the work to be performed. That was given by Mr Crowe, and I will show you where that sits in the EA. But the daily work plan is effectively given the day before the shifts are due, and where you will see that - so 6.3 says there's got to be a daily work plan, and then you actually have to move much further down the EA to B10.3, which is on page 74 of the EA, and you will see the daily work plan needs to be posted by 1730 hours on each day. It then says:

PN457

The work plan will contain advice for at least the following shift/s up to 0600 hours the subsequent day, i.e. 30 hours of notice.

PN458

So it's going to notify work for the next day and up to 0600 on the following day, and Mr Crowe, you might recall his evidence, he talked about a 30 hour window. That's what he's talking about is the daily work plan, and he gives the next 30 hours worth of work.

PN459

So that's addressed both at 6.3, but then again at 10.3 there's some provision, and you will in fact see at 10.6 there's some extra provision about the advice for the daily work plan then to be given between 1600 and 1730 hours. But in any event you get told by 1730 the next day shifts. That's the daily work plan.

PN460

There is then a next notification point, which is very important, which is the call time, and that's at B10.10, and it says, 10.10(a):

PN461

Employees will be called by the nominated phone number to advise of the start time for shifts relating to train operations.

PN462

So notwithstanding that they had a daily work plan, you know, only 10 or 15 hours before, they then actually get called to be told when they start.

PN463

There's some rules at 10.10(b) and (c) about how you call and when you call. So the employee gives the phone number. The employee actually elects the time that they want to be called in the day period and the night period. So obviously with

shift workers this is to try and maximise their ability to rest and deal with their own personal circumstances. So they elect the call time.

PN464

You will see at 10.10(d) the call times are specified a number of minutes until they are required to present for work. So this notion is you have a daily work plan that's saying you've got to present say at 1500. You have also got though this call time that you know up to three hours before, four hours before, whatever it is, you can be called and told to be lifted up or laid back. Quite aside from RDOs.

PN465

And you can understand the convenience of why the employees can nominate. Depending where they live, depending what their rest arrangements are, they may be able to deal with shorter or longer call periods, and that's why it's left to them. But ultimately there is this phone call which finally tells you after all of this rostering when you're actually going to work, and the reason for that is it's at this time when the phone call is made that lift-up and lay-back can occur, and that's at 10.10(g). It talks about the shift being altered by way of lift-up or lay-back, and it talks about the call time being based on being shifted depending on the lift-up/lay-back.

PN466

Now, I will come to lift-up/lay-back in a moment again, but while we're on the call time importantly at 10.10(h) once they are called and told they are starting it cannot be altered thereafter. So once they have finally got a final confirmation by a phone call that their start time will be 'X' 10.10(h) is absolute, it cannot be altered once the advice has been made.

PN467

Now, if I can just take you to the next clause, 11.1. This is the lift-up/lay-back.

PN468

At home location train crew must be contactable to allow for a two hour lift-up and a four hour lay-back.

PN469

So that feeds into 10.10(g). So the two provisions work together. You've got to be available to be contactable for lift-up/lay-back, and 10.10(g) has got if you're altered by lift-up or lay-back the call time is slightly varied in accordance with 10.10(g). And all of that is designed to ensure that at the time of call, even though you had already just got a daily work plan, perhaps 12 hours or 18 or 24 hours earlier, you now are given your final start time.

PN470

Why I have taken you to all those provisions, and I put those provisions, although not with all the EA references to each witness, is to say this: I think everyone is agreed there is a master roster that sets RDOs and windows. For some there's a working roster that comes about nine days in advance. Then there's a daily work plan, and then finally there's the phone call, and that's when lift-up and lay-back is applied, and I just want to have that structure clear, and I put it to both witnesses who accepted that is the arrangement.

PN471

So that's the background. If I could now take you to the disputed text, clause 6.1(g). It says that the blank line master roster will indicate time zones where the shift will commence on returning from an RDO, and it sets out the time zones. I am more than content to concede if that clause is read solely without looking at any other provision in the EA, including express provisions to the contrary, but if that clause is read in isolation then one could only deduce that the shift is to commence in that time zone. That is the position that is being put to you by the RTBU. What I intend to show you is that there are a number of express carve-outs to that clause that sit elsewhere in the EA, and in addition to those express carve-outs there's actually other inferences that can be drawn from various provisions that demonstrate that that clause is subject to lift-up and lay-back.

PN472

So what we would say, and I will come to this when I deal with the RTBU's submissions, that they are focusing myopically on this clause. They have a laser like focus on this clause alone which is leading to a position that they are putting to you, but it doesn't take into account the whole context.

PN473

The first part of the context, and we do call out this in our submissions, is you have to understand the structure of clause 6. So 6.1 deals with master rosters. 6.2 deals with working rosters. 6.3, the work plan; 6.4 RDOs; 6.5 roster changes. Importantly, and this is important for something I am going to come to, 6.6 and 6.7 give you an ability to change the roster, but only in very specific ways. So if you look at 6.6(a) you've got to give nine days prior notice to the working roster. And if you look at 6.7 it's talking about changes to sign on times, minimum of 12 hours out. So 6.6 and 6.7 give limited ability to change once already been rostered.

PN474

You then get to 6.8, the heading 'Exception.' As you would be well aware, Deputy President, the task of construction ordinarily is one which is to give all words some meaning, some work to do. That's uncontroversial and is set out in Berri, and I can provide you a bit of reference in due course. It must be an exception to something, clause 6.8. Now, the very starting point says:

PN475

With the exception of the circumstances within 6.6 forecast rosters and 6.7 blank line when a subsequent change is required.

PN476

So what this is saying is we've already talked about changes in 6.6 and 6.7, but quite aside from them it goes on to say 'when a subsequent change is required the following will apply.' So it is mandating what needs to take place. And what you will see is that it's very contained. It says:

PN477

The sign or for any new or altered work must be within the lift-up and lay-back thresholds.

PN478

So it's allowing for a change to what's been rostered, but only within a very prescribed threshold, and it then goes on to give other conditions a whirl about alternative work and the right to deploy drivers, et cetera. But what it is setting out is that this lift-up and lay-back, quite separate to the changes in 6.6 and 6.7, this lift-up and lay-back is an exception. The question is what is it an exception to.

PN479

Given the structure of clause 6 it must be an exception to the other rules within B6. That's the only way to understand the structure of the heading, which is it's an exception, and then they carve-out, except for 6.6 and 6.7, because they're dealing with other types of changes, but otherwise subsequent changes will apply this way.

PN480

So we say that is an express condition for carve-out on 6.1(g), and we could rest our case now solely on that clause and we say we should succeed. However, we say there's a range of other provisions that will also be of assistance, but that in and of itself should result in the question being arbitrated in our favour.

PN481

The next point is clause 10.1. 10.1 talks about the next turn of duty being in accordance with the starting time shown on the master roster, working roster, daily work plan or advice period. Again if it stopped there that would be consistent with the RTBU's position, but it doesn't, it goes on to say, comma, 'subject to any lift-up or lay-back adjustment.' And so what this says is although you may have received a master roster and a daily work plan you need to start in accordance with that unless there's been lift-up or lay-back, and that gives us an express right to lift-up or lay-back.

PN482

And what we say, and the witnesses have agreed this, is that at the point the PM puts the daily work plan in, when it puts in your plan it cannot change your shift window. There is no provision in the EA that allows PM to have you return from an RDO outside your window when it does the daily work plan, and the witnesses for the RTBU accept that, and that's our position. But there is an ability to go outside what has been rostered later on and that's at the call time which is why it says subject to lift-up or lay-back. And, in fact, everything is subject to lift-up and lay-back. Not just the daily work plan. All the rosters issued. To the extent there's still doubt, we say this is then expressly dealt with at B11.3.

PN483

B11.3 actually confers a unqualified right on Pacific National. It's worded in such a manner as to confer a discretion and that discretion is not fettered. It says:

PN484

Pacific National Bulk Rail may make changes subject to lift-up and lay-back parameters which will be advised in the next call time.

PN485

There's no qualification on this. It is an express right to make changes – well actually I think – I take that back. There is a qualification, this is a very big qualification, it's got to be within the lift-up and lay-back thresholds. But that is the only qualification. And, again, it's very clear this is at the call time. It's actually put there in the very ending of the phrase, at the employee's call time is when you're told, so not at the daily work plan.

PN486

They are all the textual provisions that we say when read in context in harmony support the conclusion that lift-up and lay-back can be applied to any shift including one where you're returning from an RDO. What I'd now like to talk about is actually the purpose and context of the EA, the broader industrial context, the broader purpose. The RTBU – sorry, I'll go back a step. Mr Crowe has given evidence, and I will take you to that.

PN487

So at page 90 of the court book, at paragraph 13 he gives evidence about the nature of train operations and he talks about the fact – a couple of different matters. (1) He talks about the vicissitude of factors that can affect train operations, whether it's other operators having failures, infrastructure being affected by fire, flood, foliage, issues with track infrastructure, hot weather conditions even above 38 degrees, unauthorised animals or humans on the track, customers failing to deliver what they need to on time, breakdowns, et cetera.

PN488

You've got all of these vicissitudes that can affect a train running. He also talks about the fact at 14 that bulk rail's operating across all of New South Wales. You need to bear in mind, in particular when you talk about above 38 degrees, now that's something can be quite common in summer once you get out of metropolitan Sydney and start going west. The point that Mr Crowe makes is that this is a daily occurrence that there might be issues that arise that it cause a train to run late or run or need to be brought forward and that's what lift-up and lay-back's there to do.

PN489

Now before leaving the Crowe statement, Mr Gerstenmeier, in cross-examination, effectively conceded all of this. He gave evidence that this was just part and parcel to being a train operator. He volunteered that – just bear with me one moment. He volunteered something to the effect that, 'It would be ideal if your shift started on time but it simply can't due to the nature of train operations'. It was something to that effect.

PN490

I asked him what he meant by that and he effectively talked about the fact that it's just not possible for trains continually to run on time. That's why lift-up and lay-back exists. It therefore makes sense that any shift could be subject to lift-up and lay-back and what we're being told by the union is, 'No, shifts can be subject to lift-up and lay-back not just the ones when you're returning from an RDO' but just conceptually floods, fire, unauthorised access to trains, they don't distinguish between the shift.

PN491

The unauthorised human access or the customer failure doesn't know whether the day that the shift is being interrupted is the day someone's coming back from an RDO or if it's the very next day. The motivation for lift-up and lay-back applies equally regardless of whether you're coming back from an RDO or not and so we say it's artificial to draw a distinction between the two when you look at the purpose.

PN492

The RTBU have also said that the text – and this is in their reply submissions. The text of the agreement, used as a whole, supports that it's about certainty and stability of work pattern. I agree. I agree that there is a whole regime of rostering rules designed to give a effect to a level of certainty and stability. But it is also conditioned, and this is what they don't mention, by one fundamental flexibility and that is the ability to move at the last minute the train forward or backwards and that's what evident in the text provisions they showed you.

PN493

Is that every time – there's all these provisions about master roster either years out or weeks out, and working rosters nine days out, a daily work plan. There's notification after notification after notification which is designed to help the employees manage their personal circumstances and rest but it's all subject to one important caveat which is a train might run early or might run late and that applies throughout and so we say you - yes, there is a regime, a thorough regime in place but that thorough regime incorporates inherently a last minute flexibility which is confined and it's confined to two hours forward and four hours back.

PN494

We say that's the overarching industrial context and purpose and that all of those matters I've just referred to reinforce our analysis of the text. I'd then like to deal with some of the matters raised in the RTBU's submissions. I think their most ardent point is that the clause that you're being asked or directed towards, 6.1(g), is a clause that is unambiguous in nature and therefore you shouldn't have regard to anything further.

PN495

It can be construed on its face, it's clear. I've already identified that it's subject to express carve outs and what I just want to make clear is that this isn't a question of ambiguity. We don't say 6.1(g) itself necessarily can't be understood. There's other provisions that qualify it and I suppose where the question arises is how do all these provisions interact together and there may be – well the parties certainly have different views. I don't know if that gets you to ambiguity, we think it's quite clear.

PN496

But it's not that we have a difficulty with the plain language of the clause, we understand it. It's about the other clauses and what impact they have on it. There is some contrast in the language elsewhere that we could also draw your attention to demonstrate that the clause is not intended to be some absolute statement as the

RTBU puts it, so if I take you to clause B14.3 which is at page 80 of the EA. Now 14.3 is about terminal operators.

PN497

The RTBU make this position – point clear in their reply submissions and these aren't train drivers and you'll see there's a roster clause at 14.3 for terminal operators. It's very different. At 14.3(a) it starts the same, talks about master roster, talks about RDOs being inserted. At (c) there's a reference to consultation. At (f) - sorry, (g) there's more rules at (e), (f) and (g). But then at (h), this is the important one:

PN498

Rosters in place at the time of certification of the agreement will only be changed in accordance with the roster consultation process.

PN499

Then it says:

PN500

The commencement time of a shift of ordinary hours will be as per posted on the master roster or working roster.

PN501

That's saying the commencement time of the shift is as per the master roster or the working roster. If you compare that language to the language in 10.1 you'll find the equivalent provision B10.1 for train drivers and that language commences in the same way. It says:

PN502

Next ... (indistinct) ... in accordance with the starting time shown in the master roster or working roster, daily work plan.

PN503

But it has the caveat that follows and that's because lift-up and lay-back applies for train drivers but it doesn't for terminal operators. The other contextual matter that you can have regard to – and the reason I'm taking you to these is to show that this – there are, for instance, some sections which are more absolute. If you go to B10.10(h), which I've taken you to before:

PN504

An employee's start time cannot be altered once the advice call has been made.

PN505

That is much clearer and that it cannot be moved. The language of B6.1 is not the same and so what we say in response to the laser like focus the RTBU have on 6.1(g) is it's a rostering rule just like all the others but it needs to interact with the other rostering rules, it doesn't prevail. The next thing that's been put in the reply submissions is that our position invalidates the whole point of these return windows. Now that's a matter that was ventilated with both witnesses under cross-examination.

PN506

We say it doesn't do this for two reasons. Firstly, the window does need to be honoured. It's not a complete exemption from the window at all. It's just that at the - it needs to be honoured when you do the master roster, it needs to be honoured when you do the working roster and it needs to be honoured when you do the daily work plan. The point at – or, in fact, the working roster doesn't apply because of blank line workers but – so there is an obligation to follow the window.

PN507

It's just that when you make the phone call, the window can be shifted a small amount, two hours forward or four hours back, and the actual purpose is still satisfied. Mr Gerstenmeier conceded under cross-examination that if the window could be shifted forward or back it still gave some benefit to the employee in terms of rest, in terms of planning their personal circumstances. It's just not as good as if the window was not able to be crossed at all.

PN508

Mr Crowe was also cross-examined on this point. As best as I can recall I think he was initially quite resistant and I would say somewhat artificially resistant to this notion that there would still be benefit for an employee if the window was subject to lift-up and lay-back and I think ultimately he agreed in a hypothetical that yes - - -

PN509

THE DEPUTY PRESIDENT: Not Mr Crowe, Mr Pryor.

PN510

MR IZZO: Yes. Mr Pryor, so I would – thank you, deputy president. Mr Pryor initially was somewhat resistant and as I say somewhat artificially so but eventually he even considered that hypothetically yes, there may be still some benefit although he tried to disavow the nature of that benefit or diminish it. It cannot be said that a point of these windows is lost. It's not. It's just not quite as good as it otherwise would be but lift-up and lay-back is intrinsic in all of these rostering provisions and it just - - -

PN511

THE DEPUTY PRESIDENT: Well, in the particular example it was the genesis of this dispute. I'm still struggling to understand what the problem is. Mr Gerstenmeier was pushed back.

PN512

MR IZZO: Half an hour. There wouldn't be a problem and when you asked him that question he gave more of a hypothetical and esoteric answer about, 'My shift might move from' - - -

PN513

THE DEPUTY PRESIDENT: Seemed to be a payment issue rather than a - - -

PN514

MR IZZO: Well, that's right and if I could just deal with this. Let's forget we're returning from an RDO. Let's just say it's the next day. The very next day if someone is rostered to start work at 1500, they can be moved forward two hours or moved back four hours and no one contests that. There's no issue about all of a sudden being a morning worker or an afternoon worker. None of that's relevant. There's no debate that you can move them forward on the second day from when they come back.

PN515

But Mr Gerstenmeier started to put some position that no, it matters. Even though there was no personal loss on that occasion, 'Because now I'll be on afternoon shift'. But that could happen the very next day. There's no rhyme or reason as to your status as being put in the afternoon or the morning. The reality is if you're laid back four hours, whether you start at 1500 or whether you start at say 1300, if you're laid back four hours, then naturally there'll be rest break provisions that kick in to ensure fatigue's managed.

PN516

If you're brought forward, those rest provisions will come forward. There's an inbuilt structure that follows that. But that can happen on any day so trying to give some elevated disadvantage to this happening when you come back from the RDO, it doesn't exist. The only disadvantage is as Mr Pryor has tried to put in his statement that well people are planning their time off and they want to know exactly when they can come back.

PN517

The answer is they don't know exactly because it can still be shifted the time within the window even on their version but our answer is well, yes, they have an understanding but it's subject to some minor modification just the day before and I agree. There was no actual loss suffered by Mr Gerstenmeier and I think he conceded as such in his answer. He started talking more about principles than actual impact.

PN518

What I'd like to conclude on that is just from a purposive point. The window has work to do. We say under our interpretation it still has work to do, quite important work. I think we should address the Geoff – the email that much has been relied upon by the RTBU but we, in fact, view the email as being about a different matter entirely. If I could take you to exhibit KP4 which is on page 71 of the court book.

PN519

Mr Crowe, and I do mean Mr Crowe this time, has – he has given evidence in his reply statement and he's now given evidence consistently, despite numerous questions, quite consistently and plainly as to what he understood the email was talking about. He understood the email was talking about planning. That is, when we plan the shift, whether that be at the master roster stage, the working roster stage or the daily work plan. That is somewhat evident in the first line of the third paragraph or fourth paragraph where Mr Pryor says:

PN520

I understand they might advise for NR but I believe the intent behind the zones was that you sign up for the end of time zone allocated.

PN521

This whole process of being advised for an NR, I asked Mr Crowe what that meant and he said it's referring to not required. That is, that despite perhaps thinking they'll be rostered they won't be required and I asked him when is that done and he said at the daily work plan stage, at a planning stage, so they don't get told at the time of the call they're not required, that's the lift-up/lay-back, but at the daily work plan stage it may be that they're moved from working to not required.

PN522

This whole email accordingly really does appear to be about planning. I put it to Mr Pryor that the email could be understood as referring to the daily work plan stage and he agreed with me that it could be understood that way. I think he maintains he was talking about something else but he conceded under cross-examination that it could be read talking about the daily work plan. Mr Crowe has given evidence that his understanding was it was talking about the daily work plan and that they had a phone call in which that's what he was talking about, planning.

PN523

So in terms of what's to be drawn from this email, I think there's nothing that can be drawn to assist the RTBU case because, as I said, Mr Crowe says, 'I thought we were talking about planning and the daily work plan stage'. Mr Pryor agrees it could be understood that way. I mean, how could the commission draw an inference that actually Mr Crowe thought this was all about lift-up and lay-back when his evidence says that's not the case and it's been conceded by Mr Pryor that that might not be the case?

PN524

There is an additional complicating factor that Mr Crowe refers to which is the actual example is of someone who was rostered to come back at 0600 to 1500 being moved to 2000 hours. That is not permissible on anyone's view under any roster change scenario outside of master roster change so the very example being put, of course that's not permissible and that infects the interpretation of the reply by Mr Crowe as well because the example is not permissible on anyone's view and so it doesn't assist the RTBU in any way.

PN525

The next point I should probably deal with is the suggestion that there is a common practice that this is how the parties have – the way the RTBU says the provisions work is how the parties have applied it. We just don't get there on the evidence. So Mr Pryor conceded in his witness statement – sorry. Yes, in his witness statement Mr Pryor concedes at paragraph – just trying to find the paragraph reference if everyone just bear with me.

PN526

Might have to come back to you but I – here it is. That's why I couldn't find it. Paragraph 15 which was the paragraph – yes, so paragraph 15, towards the end of it he says:

PN527

There's this practice of people being paid overtime but to my knowledge it hasn't occurred very often.

PN528

Far from it being some notorious or commonplace practice, he says it doesn't happen much. He agreed with that under cross-examination. He agreed that this practice of paying overtime for shifts to windows doesn't happen very often in any event. But there's other factors at play here. (1) I put to him that it happens at the point the daily work plan's being made. He conceded yes, it happens then. He maintains it happens at lift-up and lay-back but even in relation to that, even though he says it's not common he also accepted under cross-examination that at places like Moss Vale people do allow their shifts to be changed and lift-up and lay-back, so all of this evidence just falls short of any notorious practice that evinces a common understanding which means it's all – just doesn't help you.

PN529

But whether it's the evidence I want to rely on or them, it just – there is not the sufficient commonly clear practice or notorious practice such that you can say yes, clearly both parties always understood the provision would work this way. Bear with me. The next point I'd like to make is that if we do accept the RTBU position, that the window cannot be crossed at all effectively – and I might make this point, deputy president, you can't be laid – you can't be lifted up before 0600 anyway.

PN530

There's separate provision that says RDOs themselves are inviolable. You can't go before 0600. There's a separate provision to that effect so we're not – and I can give you that reference. It's at 6.4(c), page 69 of the EA. You'll see the RDO, it's actually more than a day, so the RDO goes from 0001 and it concludes at 0600 the following day and the first return window is 0600, so if you were to bring them forward before 0600 you're actually infringing on the RDO which is not permissible and – well, in fact, it provides for that, it says – in subclause (d) it says:

PN531

From time to time train running might infringe but where this occurs you need agreement and you need an additional penalty payment.

PN532

Clearly the RDO itself is quite sacrosanct. So you can't be lifted up before 0600 but the RTBU position is also you can't be laid back so that you start after 1500 or if you're starting at 1500 you can't be lifted up into an earlier window, say 1.00 pm. The substantial impracticalities about this approach is this, the train movement still needs to be made. If the window cannot be crossed, it means there's just no active provision in the EA which allows the shift to run so what I mean by that is you have a train which forever – whatever reason needs to be pushed back or brought forward.

PN533

It's not as if this can be done by overtime. It won't be - you've got people that have been rostered, they're being told the day before, 'This is your window', so there's no one else that's been told it's their window, it's just these drivers, and then they get the call. If Pacific National cannot implement that call there's no ability to run that train and so whatever the problem is that's given rise to the lift-up or lay-back is going to remain, whether there's a train stuck somewhere, they've got to get the crew back, whatever it is, they can't then resolve that issue and that sits very uneasily with the evidence of Mr Crowe about the need for some flexibility to adjust rosters.

PN534

You're effectively looking at the whole train shift being cancelled. The only other matter – there's two other matters I'd like to address. The first is that the RTBU - and this was kind of more apparent to me today than previously – they're trying to elevate this reference to sign-on time as if that's clearly the time you actually start and they're trying to say that it was clearly within everyone's understanding that no matter what's been put in the EA the understanding was your sign-on, your actual start time, will be within the window.

PN535

I think there's two issues with that. The first is 6.1(g) itself doesn't refer to sign-on time so all of this emphasise on sign-on time, it talks about when shifts will commence. But additionally, if you look at where the phrase sign-on time is used, for instance at annexure KP2, so this is at page 55 of the court book – sorry, 56 of the court book.

PN536

This is what's – this is the evidence we have of what's being communicated not by Pacific National mind you but by the RTBU to its members in 2012, and I'm going to come to that in a moment. It says at the top of page 56 there's revised advice periods, 0600 to 1500 and 1500 thereafter:

PN537

The intent of this is so employees on blank line will approx know what time they'll be signing on duty.

PN538

Even the RTBU's own communication does not say it's an inviolate the time that can't be moved. They'll know approximately when they'll start which is our whole point. That's how we say it's intended to operate so I don't think this kind of emphasis on sign-on helps them in relation to that communication. But the other problem – and I'd just like to hand up a passage from Berri, so if I can just hand up a case.

PN539

The other problem with this communication is it's from 2012 and so in Berri they actually deal with this concept of what they describe as antecedent agreements and what the Bench says at – so it's at paragraph 80 of the judgement. So just by way of background, Berri relates to a laundry allowance that existed in an agreement a long, long time ago. It stayed in the back of the annexure. The operative provisions were removed.

PN540

Decades later Berri argues it's not payable. The union argues it is payable and Berri tried to rely on things that happened in 1999 to influence the construction of the 2014 agreement. At 80, the Full Bench says:

PN541

The deletion of the express reference to a laundry allowance provides some support for the contention that ...

PN542

and the italics:

PN543

... at that time there was an agreement to 'trade off' an entitlement for a wage increase. Berri contends that ... relies on evidence ...

PN544

et cetera about this. The Bench says:

PN545

There are two fundamental flaws in the argument advanced on behalf of Berri. The evidence does not carry Berri the required distance.

PN546

What they go on to say at paragraph 84 is this:

PN547

The second flaw in the argument put is that – at its highest – it may explain the contextual background to the 1999 Agreement and in the construction of ...

PN548

in italics:

PN549

... that agreement, but it is of very little assistance in ascertaining the proper construction of the 2014 Agreement. The parties to the 1999 and 2014 Agreements are very different.

PN550

The Bench has sought to distance itself from this notion that something that happened a decade ago in relation to an old agreement can automatically be transposed to help construe the modern agreement. That would be especially the case here when what we're being told to rely on is not even a communication Pacific National sent out but what the RTBU sent out to its members.

PN551

THE DEPUTY PRESIDENT: Yes, but one of the key points the Full Bench was alerting to was the transmission of business which is not apparent here.

PN552

MR IZZO: There is no transmission here, no that's right.

PN553

THE DEPUTY PRESIDENT: Yes.

PN554

MR IZZO: But I think when you say, deputy president, the reference to the transmission, i.e. the parties being different, I think what I will say though is there are other parts of this document that talk about the fact that now EAs are no longer made between a company and a union. They're made between a company and employees as well and I think there's – I don't know if that discussion precedes paragraph 84 or follows it but that's certainly something that was in the Bench's mind and which it commented on quite noticeably in the judgement. It's in fact the very next paragraph, 85:

PN555

It is important to bear in mind while the 2014 Agreement may have been negotiated by Berri, the agreement itself is 'made' when employees who are covered by it vote.

PN556

And so there's a distinction drawn about the statutory framework now as compared to back in 99 when a union may have made it.

PN557

THE DEPUTY PRESIDENT: Yes, but that's a different point.

PN558

MR IZZO: Yes. You just bear with me one moment. They're submissions.

PN559

THE DEPUTY PRESIDENT: Thank you.

PN560

MR IZZO: Can I – sorry. I – yes, so I've been instructed to put this. In relation to what Mr Gerstenmeier was seeking, I think he made the comment, it might have been about payments, and that is in relation to moving from zone 1 to zone 2. The reality is – and this is something that's important to note, is under the EA there's no overtime payment. The answer here – this is a binary exercise. We can either move them or we can't. The EA doesn't provide for any overtime payment so even what he's seeking - - -

PN561

THE DEPUTY PRESIDENT: Shift loading wasn't it?

PN562

MR IZZO: No, I don't – no, there's no shift loading. That's why this – this reference to morning and afternoon is a red herring effectively because there's no different payment if he'd started at 1.00 pm compared to if he'd started at 3.00 pm but I think he's seeking an overtime payment for the fact that his RDO window was crossed. There is no overtime payment provided for. If we can't cross, we can't cross and so he wouldn't get the payment anyway under the EA. That is – yes.

PN563

THE DEPUTY PRESIDENT: Yes. Because even on the case of the applicant, that's only by agreement.

PN564

MR IZZO: Yes.

PN565

THE DEPUTY PRESIDENT: Thank you. Ms Mbele.

PN566

MS MBELE: I'm going to make very – a very brief reply if I may. Certainly the respondent has taken us through the process of creating a roster and all the different times where employees are advised of when they are expected to return back to work. I just want to refer back to clause B6.1(a). It's page 68 of the enterprise agreement. It specifically outlines that the purpose of a master roster is to indicate rostered days off and any known work.

PN567

We say that the time zones would be represented in the master roster as the any time work, so if a master roster is meant to be a thing that's meant to be there for a long time, and I think Mr Pryor gave some evidence with regards to that, that the intention is so that you pretty much have an understanding of where you would either likely be working and where your RDOs would be falling and B6.1(a) certainly reflects that and coincides with Mr Pryor's evidence.

PN568

And, yes, as I said, the time zones would represent that any time – any known work to employees so they would have an understanding of when they would be rostered off for a long period of time and they would have an understanding of when they would be expected to return back to work after those RDOs for a long period of time. And any changes that are to be made to the master roster need to be by way of consultation and agreement with the employees. I think that's all I wanted to add.

PN569

THE DEPUTY PRESIDENT: Excellent. Thank you. I intend to reserve my decision. I thank the parties for their considered approach to this matter and the detailed submissions provided. As I say, I reserve my decision. Matter's adjourned.

ADJOURNED INDEFINITELY

[12.53 PM]

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