



February 27, 2017

Freightliner Coal - Lift Up Lay Back Dispute

Last Friday the FWC handed down its decision in relation to this dispute. The commissioner ruled that the construction of clause 36 allows for Freightliner to use the lift up and lay back provision, the exception being between the hours of 10pm and 4am as outlined in clause 36.9 of the agreement.

The determination made is as follows;

"[26] I resolve the Dispute by determining that, subject to the prohibition in clause 36.9, Freightliner has the right under the Enterprise Agreement to lift up (by up to two hours) and lay back (by up to four hours) the commencement time of a shift for an employee without giving notice or advice to the employee in one of the "advice periods" specified in clause 37.1 of the Enterprise Agreement"

A copy of the decision is attached; however your attention is drawn to two relevant paragraphs from the decision;

In paragraph 20 the Commissioner states;

*In support of the RTBU's argument is that, if Freightliner's construction of the Enterprise Agreement is correct, it would have the right to lift up or lay back the commencement time of a shift for an employee without notice. For example, Freightliner would, on its construction of the Enterprise Agreement, be entitled to inform an employee five minutes before the commencement of their shift of Freightliner's decision to lay back the commencement time for the employee by up to four hours. It could be suggested that such an interpretation of the Enterprise Agreement would give rise to "commercial inconvenience". **Freightliner says that such a situation does not, and would not, arise because it has a practice of informing employees during a notification time, which is prior to when the particular employee would leave home to drive to work, of any decision to lay back a shift.** However, it is not permissible to take into account the conduct of the parties which occurs after an industrial instrument is made as an aid to interpret that industrial instrument.*

Then in Paragraph 25 of the decision, the Commissioner states;

*"Freightliner is obliged under applicable occupational health and safety legislation to ensure that its employees work in a safe workplace. **Those obligations include ensuring employees are not rostered to work in a way that could expose them to an unreasonable risk of fatigue.** Accordingly, Freightliner does not have an unfettered right under the construction of the Enterprise Agreement I prefer to lift up an employee's shift by two hours. **Freightliner would not be able to exercise that right if lifting the employee up in that way would, or would be likely to, cause fatigue risks. An employee who was lifted up in such circumstances would be entitled to raise a dispute or take other action to deal with the issue.**"*

The RTBU has asked for a meeting with the management team to discuss the outcome and to ensure a sensible approach is taken to implement the decision, and that it is only used for legitimate reasons, and **NOT** for general rostering purposes.

Members will be kept informed once the requested meeting has been arranged.

AUTHORISED: R Hayden Locomotive Divisional Secretary

Level 4, 321 Pitt St Sydney.NSW 2000