DECISION

Fair Work Act 2009
s.739 - Application to deal with a dispute

Australian Rail, Tram and Bus Industry Union
v
Freightliner Australia Coal Haulage Pty Ltd
(C2016/6674)

Rail industry

COMMISSIONER SAUNDERS NEWCASTLE, 24 FEBRUARY 2017

Application to deal with a dispute – proper construction of an enterprise agreement – right to lift up or lay back shift commencement times.

[1] There is a dispute between the Australian Rail, Tram and Bus Industry Union (RTBU) and Freightliner Australia Coal Haulage Pty Ltd (Freightliner) in relation to the circumstances in which Freightliner can change the commencement time of an employee's shift (the Dispute) under the Freightliner Australia Coal Haulage Pty Ltd Enterprise Agreement 2015 (the Enterprise Agreement).

[2] The RTBU filed an application to deal with the Dispute pursuant to s.739 of the *Fair Work Act* 2009 (Cth) (Act). The RTBU named Freightliner Australia Pty Ltd as the respondent to the Dispute. However, I am satisfied that the respondent should be Freightliner, the employer party to the Enterprise Agreement. In accordance with s.586(a) of the Act, I amend the s.739 application filed by the RTBU to replace Freightliner Australia Pty Ltd with Freightliner as the respondent to the Dispute.

[3] There is no dispute between the parties and I am satisfied on the evidence that the Dispute is one which falls within the scope of disputes that may be dealt with in accordance with the dispute settlement procedure in clause 54 of the Enterprise Agreement. Clause 54.7.2 of the Enterprise Agreement empowers the Fair Work Commission (Commission) to arbitrate a dispute and make a determination that is binding on the parties in the event that the dispute is not resolved after conciliation (or a similar process) by the Commission.

[4] The parties participated in conciliation of the Dispute before the Commission, but were unable to resolve the Dispute by agreement. Accordingly, the parties requested that I arbitrate the Dispute and make a binding "determination" in relation to it in accordance with clause 54.7.2 of the Enterprise Agreement.

[5] I heard the case on 20 February 2017. At the hearing the RTBU tendered a number of documents, but did not call any witnesses. Freightliner adduced evidence from Mr John Williams, Operations Director for Freightliner Australia Pty Ltd and Operations Manager for Freightliner.

The Dispute

[6] Freightliner operates a business in which it hauls coal by rail. The employees covered by the Enterprise Agreement are Drivers, Assistant Drivers, and Trainee Drivers of the trains used by Freightliner to haul coal from mines in the Hunter Valley (as far as Mudgee) to the port of Newcastle.

[7] At the heart of the Dispute is a controversy as to whether the "advice periods" set out in clause 37 of the Enterprise Agreement apply to circumstances where Freightliner wishes to bring forward the commencement time of the shift for a particular employee by up to two hours (a lift up) or delay the employee's commencement time by up to four hours (a lay back). The RTBU contends that Freightliner must notify employees of a lift up or lay back within the "advice periods" set out in clause 37 of the Enterprise Agreement, unless the employee consents to the change. Freightliner contends that the "advice periods" in clause 37 do not apply to lift ups or lay backs, with the result that Freightliner can notify an employee of a lift up or lay back at any time prior to the commencement of their shift, subject to the prohibition in clause 36.9.

[8] Employees covered by the Enterprise Agreement are provided with a Master Roster, which covers a period of 28 days, after which the roster repeats itself unless it is varied in accordance with the relevant provisions of the Enterprise Agreement. The Master Roster sets out the forecast starting times for each shift.

[9] Mr Williams gave unchallenged evidence, which I accept, that the nature of the work Freightliner undertakes, and has been undertaking since at least the previous enterprise agreement[1], in hauling coal by rail gives rise, on occasions, to the need to make adjustments to Freightliner's planned operations. Freightliner is issued with a timetable by Australian Rail Track Corporation Limited (ARTC), the manager of the train network from the port of Newcastle to the Hunter Valley, at midday each day for trains commencing to operate on the rail network from midnight that night. The timetable shows the departure time at the port and the arrival time at the relevant mine for each train on the network. However, changes may be required at any time to the timetable and therefore the manning requirements of Freightliner for a range of reasons, including the following:

- a train failure or breakdown of a train operated by another train operator on the network;
- a heatwave, with the result that lower track speeds are required; or
- congestion for one reason or another on the network.

[1] Freightliner Australia Coal Haulage Pty Ltd Enterprise Agreement 2011 (2011 EA)

[10] These unplanned events give rise, from time to time, to a need on Freightliner's part to lift up or lay back the commencement time for employees.

Relevant provisions of the Enterprise Agreement

[11] The following provisions of the Enterprise Agreement are relevant to the Dispute:

> **5. Definitions**
> …
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> **Lift up/Lay back**: The time Employees may be called in early (lifted up) to an earlier sign on time or have their shift commencement delayed laid back) to a later time than shown on the roster.
> …
>
> **Roster period**: A period of four (4) weeks over which 152 Ordinary Hours are averaged.
> …
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> **PART F HOURS OF WORK**
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> **30. Principles**
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> 30.1 In recognition of the particular circumstances of the Company's operations, the overriding concerns in determining hours of work shall be the needs of the Company's clients and safety of operations, including the management of fatigue for Employees, and a reasonable balance of Employee work and social commitments.
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> 30.2 The rail industry is subject to extensive regulation in terms of restrictions on working hours for rail safety workers under Rail Safety and other relevant legislation. Accordingly, the parties agree that working hours for Employees under this agreement are always subject to the regulatory framework that the Employer operates in.
>
> 30.3 Employees are expected to be available to work their Ordinary Hours in accordance with the requirements below.
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> **31. Ordinary Hours of Work**
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> 31.1: The Ordinary Hours of work for a full-time Employee are 152 hours averaged over a 4 week roster period.
>
> 31.2: The Ordinary Hours of work for a part-time Employee are a maximum of 152 hours averaged over a 4 week roster period.
>
> 31.3: The Ordinary Hours of work for a casual Employee are a maximum of 152 hours averaged over a 4 week roster period.

31.4: Ordinary hours of work may be worked on any day at any time.

31.5: The Ordinary Hours will include a number of public holidays to which the Employee is entitled.

31.5.1: While public holiday hours are included in the total hours outlined above, where an Employee is scheduled to work on a public holiday they are required to attend for work and undertake activities as scheduled.

31.5.2: An Employee may refuse to work on a public holiday only if the refusal is reasonable.

31.6: Loss of Ordinary Hours component: Employees who have made themselves unavailable (including by taking leave without pay or absent without leave or unable to be contacted during advice periods) to perform their duties in any Roster Period may be scheduled on for less than 152 hours. To be clear, In such cases the Employee will forfeit the Ordinary Hours component for hours not worked for that particular period that they made themselves unavailable in the Roster Period.

31.7: No loss of Ordinary Hours component: Employees who have been engaged as fulltime Employees who are scheduled for less than 152 hours in a Roster Period as a result of their not being required to perform driving duties in that Roster Period will be paid for 152 hours in the Roster Period.

32. Reasonable Additional Hours

32.1: Employees may be requested to work reasonable additional hours as are necessary.

32.2: Employees may refuse a request to work more than 152 hours in a Roster Period, in circumstances where to work the requested hours if they are unreasonable, taking into account:

(a) any risk to health and safety from working the additional hours;

(b) the personal circumstances of the Employee, including any family responsibilities;

(c) the needs of the workplace;

(d) the entitlement to payment of overtime rates, the notice given by the Employer; and

(e) the Employee's notice of intention to refuse it;

(f) the usual patterns of work, the nature of the role;.

33. Establishment of an Hours Cycle

33.1: All hours worked must be approved by the Employer and the hours actually worked shall be recorded. An Employee shall record actual hours worked.

33.2: Payment of salary for Ordinary Hours for full-time Employees will be assumed to be 152 hours over a 4 week Roster Period and will be paid in equal fortnightly instalments throughout the year.

33.3: Payment for part-time Employees will be on the basis of their agreed Ordinary Hours and adjusted where hours actually worked exceeds the agreed hours to be worked.

33.4: Payments for casual Employees will be based on the number of hours worked in the relevant fortnightly period.

34. Overtime

34.1 In addition to the Ordinary Hours specified above, an Employee may be required to work reasonable additional hours for payment of Overtime penalty rates.

34.2: Overtime will be paid at 1.7 times the Hourly Rate for the applicable classification and shall Stand Alone.

34.4: All time counted as Overtime must be approved by the Employer.

34.5: Excess hours worked: Where an Employee is required to perform hours in excess of 152 hours in a four (4) week period, all such time shall be deemed to be Overtime.

34.6: Overtime payable for excess hours worked will be paid at the end of the second fortnightly pay cycle in the Roster Period in which the Overtime was worked.

34.7: Work on a Book Off Day: Where an Employee is requested to work on a Book Off Day, and the Employee agrees to work, all such work shall be counted as Stand Alone. Employees have the right to refuse work Overtime on a Book Off Day for any reason.

35. Meal Breaks

Meal break conditions: Employees shall be entitled to a paid meal break of thirty minutes during each scheduled work task. Where possible the break should, to be taken between the third and fifth hours of the shift, but should fit in with the business and individual needs. All breaks should be taken so that they do not interfere with the smooth running of trains/services.

36. Shift Changes including Lift Up *I* Lay Back

36.1: The Master Roster will be used to create all shifts.

Any change to the start time of a rostered shift from the Master Roster is considered to be a Shift Change. A change to an allocated task is not considered to be a Shift Change.

An Employee may also be advised of a shift change to a scheduled shift in the Roster Period by receiving a call in the appropriate advice period the day/s prior to the commencement of the shift.

36.2: Lift up and Lay back will apply to the original sign on time. Any Shift change in the advice period which is outside of the parameters of Lift Up or Lay Back hours can only take place by agreement between the Company and the individual Employee.

36.3: Lay Back: The Employer may lay back Employees to a maximum of four (4) hours from the original time the shift was to commence.

36.4: Lift up: The Employer may lift up Employees to a maximum of two (2) hours from the original time the shift was to commence.

36.5: Maximum of 2 changes: There is to be only a maximum of 2 changes to a shift (within lift up *I* lay back provisions for the sign on advice for the day), unless mutually agreed to by the individual Employees affected to more than two changes.

36.6: Lift up/lay back period may be extended: Should an Employee agree to a lift up/lay back outside the conditions agreed above (ie 2 or 4 hrs), the Ordinary Hours for that Roster Period will be credited with an equivalent number of hours equal to the extra hours at the ordinary rate.

36.7: Lift Up following a book off day: An Employee cannot be lifted up before 06:00 following a Book Off day scheduled in accordance with clause 41, unless by mutual agreement.

36.8: Employee Requirement: For the purposes of clause 36, Employees must take all reasonable measures to ensure they are contactable prior to the scheduled commencement of their shift. If an Employee is not, or will not be contactable by the normal means utilised by the Employer (including on the phone numbers provided and updated by the Employee), that Employee is required to call the Employer, to confirm their shift start time.

36.9: The Employer will not Lift Up or Lay Back an Employee for a shift that is scheduled to commence between the hours of 22:00- 04:00, unless there is mutual agreement prior to 22:00.

37. Advice Periods

37.1: Employees will be advised of changes to their next shift within the relevant advice period:

37.1.1: The "AM" advice period will be between the hours of 09:00 and 11:30 (for shifts commencing after 06:00 and prior to 11:59 the following day); and

37.1.2: the "PM" advice period will be between 16:00 and 17:30 (for shifts commencing on or after 12:00 up to 05:59 for the following 2 days).

Call Period (Day 0)	Times on Day 1	Times on Day 2
09:00 to 11:30	06:00 to 11:59	
16:00 to 17:30	After 12:00	Up to 05:59

37.2: An Employee can be advised of a change to their next sign on time at the end of a shift. If the Employee chooses not to accept the advice, they will be contacted in line with clause 37. 1.1 and 37 .1.2.

37.3: All Employees must be available to be contacted during advice periods. Alternate means of communication will be considered under individual arrangements. Employees must confirm receipt of this communication.

37.4: Where an Employee makes themselves unavailable during an advice period the provisions of clause 31.6 will apply.

37.5: If an Employee has not been contacted by the end of the relevant advice period, the Available Day will be taken as an additional Book Off Day.

37.6: All Employees are responsible for checking their email accounts (and/or other agreed communication mechanisms) to check roster changes for the next or subsequent days. All Employees are responsible for notifying their Manager/Supervisor of any email/system outages that may impact their ability to receive notifications or any other communication, so that alternate arrangements can be made.

37.8: Where it is operationally necessary to extend a previously advised shift, the Employee may be advised at any time during that shift, so long as fatigue limitations are not breached, and on the fitness of the Employee to continue.

37. 9: All Employees must be available during the advice periods on the last Book Off day, and on the last day of Annual Leave to receive advice of their next shift.

38. Shift Cancellations

38.1: If no alternate work is available and a shift is cancelled outside the advice periods, and with less than 3 hours before the commencement of a shift, then 50% of the shift length will be credited to the Ordinary Hours for that Roster Period.

38.2: Where an Employee is shown on duty, and the shift is cancelled part way through that tum of duty, the Ordinary Hours cycle will be credit to the full number of hours originally scheduled.

39. Shift Limits

39.1: Shift Limits for Types of Working

- Driver /Driver: Maximum 12 hour shift
- Driver *I* Assistant Driver: Maximum 11 hour shift.
- Shunting Shift limit: Maximum 10 hour shift. A definition of what "shunting" means will be determined within 6 months of the commencement of this Agreement.

39.2: Inclusions in shift limits: The time taken to travel from sign on points and from the sign off points is included in the scheduled work task.

39.3: Maximum Hours on Duty during Emergencies

In the event of an Emergency, shift limits may be extended up to 16 hours. However, any extension of Employees hours is subject to indication of their fitness to continue.

In an Emergency, Employees should not drive motor vehicles when they have worked for more than 12 hours.

During an Emergency, Safeworking duties may only be performed after 12 hours where the Employee has indicated their fitness to continue.

39.4: Minimum Shift Provisions: Permanent Full-Time Employees will be paid a minimum of 4 hours if the scheduled shift length is less than 4 hours.

39.4.1 Where an Employee is asked to work on an Overtime shift for a period of no more than 4 hours, this clause will apply. Refer to clause 41.5 where an Employee works for more than 4 hours on a Book Off Day.

39.5: Rest Periods: The following minimum intervals between shifts shall apply:

39.5.1: Resting at home: 12 continuous hours rest between each shift.

39.5.2: Resting away from home: 8 continuous hours rest between each shift.

39.6: Limits on shifts in a 14 day period:

An Employee can work a maximum of 6 x 12 hour shifts in any 14-day period. Where a shift that exceeds 11 hours, but is less than 12 hours is taken to be a 12 hour shift.

39.7: Mandatory Day Off (MOO):

A Mandatory Day Off will occur if an Employee works 12 consecutive shifts in a rolling 14 day period. A Mandatory Day Off will conform to the same terms and conditions as a Book Off Day, and is in addition to rostered Book Off Days.

Where an Employee works an Overtime shift, and this results in the Employee not being able to work a previously rostered shift, a number of hours equal to the rostered shift hours will be credited to the Roster Period.

40. Rosters

40.1: Roster Principles: Employee master roster will be determined by the relevant Manager, based on the principles contained in clause 30.

40.2: All Rosters will use the 24 hour clock, and will be available to the relevant Employee.

40.3: All Rosters will show:

(a) Scheduled work tasks where known, including training days

(b) Book Off Days

(c) Transition Days

(d) Available Days

40.4: Signing on/off: All Employees are required to 'sign on and off' at the locations listed in clause 29.3. As part of the 'signing on' procedure, all Employees will be required to report any drug, alcohol or fatigue related issue to their supervisor/manager immediately. Any other issues that may impact the operation should also be reported to the supervisor/manager immediately they are known.

40.5 The master roster will provide for 1 weekend off in 3.2, averaged over the master roster but shall occur in no greater than 1 in 4. A weekend means from 23:59 on Friday to 06:00 on Monday.

40.6 Where a change to the master roster is required, the Employer will seek volunteers to form a Working Group.

41. Book-Off Days

41.1: In any one four (4) weekly Roster period there is to be at least eight (8) duty free days of which two (2) are to be consecutive in each fortnight.

41.2: All Book Off days will commence at 00:00 hours for a duration of 30 hours ending at 06:00 hours the following day.

Any subsequent Book Off day will have a duration of 24 hours.

41.3: Book Off days are not to be infringed by either lift up or lay back.

41.4: Where, as a result of an out of course event, a Book Off day is infringed all time after midnight will be treated as Overtime and will Stand Alone in accordance with clause 34.

41. 5 Unless agreed in accordance with clause 39 .4. 1 , the mini mum shift length for working an Overtime shift will be 7.6 hours.

42. Resting Away from Home

42. 1: Provision of Accommodation

Where Employees covered by this agreement are scheduled to rest at a site away from their home area, the site accommodation will be provided for by the Employer and will be equivalent to three star accommodation where available, and where this standard is unavailable the accommodation provided will be the nearest possible to this standard and agreed to by the parties.

42.2: Rosters for Train Crew with shifts involving rest away from the initial sign on location will optimise crew utilisation and minimise Employee dwell time away from home and will include a scheduled return.

42.3: Employees are only to be rested away from home once before returning back to their home.

42.4: Payment for resting away from home in excess of 12 hours: Where a rest period away from home extends by more than 12 hours, from the commencement of the 13th hour, each hour or part thereof, until the commencement of the next shift, will be paid at Overtime rates until the Employee is signed back on. Once the Employee is signed back on the Ordinary Hours Rate will apply.

42.5: Accommodation Standards

Where accommodation is organised it should meet standards that comply with the Company's fatigue management program as a minimum whenever possible. For avoidance of doubt, a check list should be completed prior to use and the following items should be provided as a minimum:

- Dining facilities on site or within walking distance;
- Convenient parking on site or within walking distance;
- Double or Queen size bed;
- 24 hour check in faclities or ability to arrange secure access arrangements;
- Air conditioning and heating;
- Suitable window coverings.

Applicable principles of construction

[12] There is no dispute between the parties as to the principles that apply to the proper construction of an enterprise agreement. Those principles were summarised by the Full Bench in *The Australasian Meat Industry Employees' Union* v *Golden Cockrell Pty Limited:*[2]

"[41] From the foregoing, the following principles may be distilled:

1. The AI Act does not apply to the construction of an enterprise agreement made under the Act.
2. In construing an enterprise agreement it is first necessary to determine whether an agreement has a plain meaning or contains an ambiguity.
3. Regard may be had to evidence of surrounding circumstances to assist in determining whether an ambiguity exists.
4. If the agreement has a plain meaning, evidence of the surrounding circumstances will not be admitted to contradict the plain language of the agreement.
5. If the language of the agreement is ambiguous or susceptible to more than one meaning then evidence of the surrounding circumstance will be admissible to aide the interpretation of the agreement.
6. Admissible evidence of the surrounding circumstances is evidence of the objective framework of fact and will include:

[2] [2014] FWCFB 7447 at [41]

(a) evidence of prior negotiations to the extent that the negotiations tend to establish objective background facts known to all parties and the subject matter of the agreement;

(b) notorious facts of which knowledge is to be presumed;

(c) evidence of matters in common contemplation and constituting a common assumption.

7. The resolution of a disputed construction of an agreement will turn on the language of the Agreement understood having regard to its context and purpose.

8. Context might appear from:

(a) the text of the agreement viewed as a whole;

(b) the disputed provision's place and arrangement in the agreement;

(c) the legislative context under which the agreement was made and in which it operates.

9. Where the common intention of the parties is sought to be identified, regard is not to be had to the subjective intentions or expectations of the parties. A common intention is identified objectively, that is by reference to that which a reasonable person would understand by the language the parties have used to express their agreement.

10. The task of interpreting an agreement does not involve rewriting the agreement to achieve what might be regarded as a fair or just outcome. The task is always one of interpreting the agreement produced by parties."

[13] Two further principles of construction are relevant:

(a) First, it is not permissible to take into account the conduct of parties which occurs *after* an industrial instrument is made as an aid to interpret that industrial instrument;[3] and

(b) Secondly, guidance as to the construction of industrial instruments may also be obtained by reference to principles which courts apply to the construction of commercial contracts.[4] An interpretation of a commercial contract which accords with business common sense will be preferred to one which does not.[5] Put another way, a commercial contract will be construed so as to avoid it making commercial nonsense

[3] *Essential Energy v CEPU & Ors* [2015] FWCFB 1981 at [23]

[4] *TWU v Linfox Australia Pty Ltd* [2014] FCA 829 at [34]

[5] Ibid

> or working commercial inconvenience.[6] However, the task of interpretation does not involve rewriting the agreement to achieve what might be regarded as a fair or just outcome. The task is always one of interpreting the agreement produced by the parties.[7]

[14] In addition, although the relevant principles are summarised in paragraph [41] of *Golden Cockerel*, it is relevant, in the context of the present Dispute, to have regard to paragraph [12] of the decision of the Full Bench in *SDA v Woolworths Limited*:[8]

> "[12] It is undoubtedly the case that, in resolving a dispute as to the interpretation of a provision of an enterprise agreement approved under the *Fair Work Act 2009*, it is permissible to take into account the industrial context and purpose of the agreement. However, there are two important limitations upon this approach relevant to the determination of this appeal. The first is that the process of interpretative analysis must focus, first and foremost, upon the language of the agreement itself. For example, in *Amcor Limited v CFMEU*, the process was described by Gleeson CJ and McHugh J in the following terms: "The resolution of the issue turns upon the language of the particular agreement, understood in the light of its industrial context and purpose ...". Or, as Kirby J put it in the same case, "Interpretation is always a text-based activity". Admissible extrinsic material may be used to aid the interpretation of a provision in an enterprise agreement with a disputed meaning, but it cannot be used to disregard or re-write the provision in order to give effect to an externally derived conception of what the parties' intention or purpose was. The oft-quoted statement of Madgwick J in *Kucks v CSR Limited* makes this clear:
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> > 'But the task remains one of interpreting a document produced by another or others. A court is not free to give effect to some anteriorly derived notion of what would be fair or just, regardless of what has been written into the award. Deciding what an existing award means is a process quite different from deciding, as an arbitral body does, what might fairly be put into an award. So, for example, ordinary or well-understood words are in general to be accorded their ordinary or usual meaning.'"

Consideration

[15] There is no express provision in the Enterprise Agreement requiring Freightliner to give employees any period of notice to lift up or lay back their next shift. However, a lift up or lay back does alter the commencement time of a rostered shift, with the result that it is a shift change within the meaning of clause 36.1 of the Enterprise Agreement. Clause 37.1 provides that employees "will be advised of changes to their next shift within the relevant advice period". This supports the RTBU's view that employees must be advised of a lift up or lay back within the advice times specified in clause 37.1. On the other hand, clause 36.1 states that an employee "may also be advised of a shift change to a scheduled shift in the Roster Period by receiving a call in the appropriate advice period the day/s prior to the

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[6] *Golden Cockerel* at [27]

[7] *Golden Cockerel* at [41(10)]

[8] [2013] FWCFB 2814

commencement of the shift". The expression "may also be advised" suggests that there is one or more alternative means of making a shift change which does not require advice to employees within the "advice periods" specified in clause 37.1.

[16] It is apparent from my analysis in the previous paragraph of the relevant provisions of the Enterprise Agreement concerning lift ups and lay backs that the language of the Enterprise Agreement is ambiguous or susceptible to more than one meaning. Accordingly, evidence of the surrounding circumstances is admissible to aid in the interpretation of the Enterprise Agreement.

[17] The facts set out in paragraphs [8] to [10] above constitute objective background facts known to all parties and the subject matter of the agreement. They are part of the surrounding circumstances and are admissible to aid the interpretation of the Enterprise Agreement

[18] Evidence was adduced of communications between the RTBU and Freightliner during bargaining negotiations for the Enterprise Agreement. However, that evidence comprises, for the most part, evidence of the subjective intentions of a particular party and does not constitute, or form a part of, evidence of the mutual subjective intention of the parties.[9] I cannot use such evidence as an aid to the interpretation of the Enterprise Agreement.

[19] The RTBU submits that a lift up or a lay back change the start time for a shift, with the result that employees must be advised of such a change within the relevant "advice periods" specified in clause 37.1. If an employee is not notified in those times, they may consent to a change in their shift time. Otherwise, the RTBU contends that Freightliner can deal with last minute changes on the rail network by giving the employees covered by the Enterprise Agreement alternative work to do if they arrive at work and a train is not ready for them to drive.

[20] 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.[10]

[21] It is important to note, on the question of "commercial inconvenience", that both parties accept that under the 2011 EA Freightliner had the right to lift up or lay back the commencement time of an employee's shift at any time prior to the start of the shift. The RTBU believes that they achieved a change to that regime in the negotiations for the

[9] *Golden Cockerel* at [23]-[26]

[10] *Essential Energy v CEPU & Ors* [2015] FWCFB 1981 at [23]

Enterprise Agreement. Freightliner believes that the only change of substance agreed to in negotiations concerning the lift up and lay back provisions from the 2011 EA was the prohibition in the Enterprise Agreement on lifting up or laying back a shift starting between 10pm and 4am, subject to the consent of the employee involved. However, the actual intentions and expectations of the parties must be excluded from consideration in the construction of enterprise agreements.[11] The focus in interpreting the Enterprise Agreement must be upon the language of the agreement, understood in the light of its industrial context and purpose.[12]

[22] The RTBU also submits that the use of a lift up provision to bring forward the commencement time for a particular shift could have a negative impact on the ability of an employee to deal with fatigue. For example, if an employee went to bed at a particular time in order to get sufficient sleep to commence their next shift at the scheduled time and the employer had the right to contact them during their period of sleep and require them to come into work up to two hours earlier than planned, that could have a negative impact on the fatigue levels felt by the employee at work during the shift which had been the subject of the lift up.

[23] Notwithstanding the force of some of the submissions made by the RTBU, I am of the view that the preferred construction of the lift up and lay back provisions in the Enterprise Agreement is the one for which Freightliner contends. I have reached that conclusion for the following reasons:

(a) First, clauses 36 and 37 of the Enterprise Agreements read as a whole establish a regime in which there are different types of shift changes, some of which require notification within the "advice periods" in clause 37.1 and others of which do not. The availability of different types of shift changes is apparent from the heading to clause 36 ("Shift Changes including Lift Up / Lay Back). Further, the expression "an employee may also be advised of a shift change … by receiving a call in the appropriate advice period the day/s prior to the commencement of the shift" in the second subparagraph of clause 36.1 suggests that some shift changes require advice to an employee in the "advice periods" set out in clause 37.1, whereas others do not. The right of Freightliner to lift up or lay back the commencement time of a shift for an employee pursuant to clause 36.3 or 36.4 is not expressly contingent upon, or subject to, the giving of notice or advice within the "advice periods" stipulated in clause 37.1;

(b) Secondly, the RTBU contends that all non-consensual shift changes, including those within the parameters of a lay back or lift up, must be the subject of advice or notification in one of the "advice periods" specified in clause 37.1. The corollary of that proposition is that Freightliner has the right to impose a non-consensual shift change, including a change to the starting time of a rostered shift, by giving notice or advice to an employee in one of the "advice periods". If that were correct, the lift up and lay back provisions would have no work to do. That is, if the RTBU had to give notice or advice of any shift change, including a change to the commencement time for a shift, in one of the "advice periods", it would not matter whether the change was

[11] Ibid at [26]

[12] *SDA v Woolworths Limited* [2013] FWCFB 2814 at [12]

within the scope of a lift up or lay back or outside that scope; the same regime would apply and there would be no point defining a lift up as being a maximum of two hours prior to the commencement of the shift and a lay back as being a maximum of four hours after the commencement of the shift. Further, on the RTBU's argument, clause 36.9 would have no work to do, because the prohibition on lifting up or laying back a shift commencing between 10pm and 4am would not apply if notification or advice of the shift change was given in one of the "advice periods". However, if Freightliner's construction of the Enterprise Agreement is correct and the "advice periods" in clause 37.1 apply to shift changes other than lift ups, lay backs or changes by consent, then clause 36.9 has work to do. In particular, under Freightliner's construction of the Enterprise Agreement, it may change the commencement time of a shift commencing between 10pm and 4am by either giving notice of the change in an "advice period" or seeking the consent of the employee prior to 10pm on the relevant day, but, absent consent, it is prohibited from lifting up or laying back the commencement time by giving the employee notice outside an "advice period";

(c) Thirdly, I reject any contention put on behalf of the RTBU to the effect that the regime established by the Enterprise Agreement for shift changes is such that, absent the consent of the employee, Freightliner can only change a shift scheduled on the Master Roster within the scope of a lift up or lay back (i.e. by moving the commencement time forward by up to two hours or back by up to four hours) and on the condition that notification or advice is given to the employee during one of the "advice periods" specified in clause 37.1. Clauses 37.9 and 38.1 of the Enterprise Agreement suggest that significant changes to a shift (such as a shift cancellation) scheduled on the Master Roster may be made provided advice or notice is given to the employee in one of the "advice periods" specified in clause 37.1;

(d) Fourthly, clause 36.8 requires, for the purpose of clause 36 (which predominantly deals with lift ups and lay backs), employees to take "all reasonable measures to ensure they are contactable prior to the scheduled commencement of their shift." If an employee will not be contactable on their usual number, they must call Freightliner to confirm their shift start time. There is no temporal limitation on the requirement for employees to be "contactable prior to the scheduled commencement of their shift." This suggests that the commencement time may be lifted up or laid back at any time prior to the start of the shift. The fact that clause 37.3 imposes a separate obligation for employees to be contactable during the "advice periods" specified in clause 37.1 is also telling. It suggests a different type of shift change than a lift up or lay back. That is, employees must remain contactable at all times prior to their commencement time so they can be lifted up or laid back, and they must remain contactable during the "advice periods" so changes can be made to their next shift, such as cancelling the shift[13] or bringing the commencement time forward by more than two hours or back by more than four hours.

It could be argued that the obligation to remain contactable at all times prior to the commencement of the shift is so that the employer can contact the employee and seek their consent outside the "advice periods" specified in clause 37.1 of the Enterprise

[13] See clause 38.1 of the Enterprise Agreement for cancellations outside the "advice periods"

Agreement to start earlier or later than scheduled. However, the fact that lift ups or lay backs can, in certain circumstances, take place without the consent of the employee tells against such a construction. In my view, a reasonable person would be more likely to construe the language of clauses 36 and 37 of the Enterprise Agreement read as a whole as imposing an obligation on the employees to remain contactable at all times prior to the commencement of a shift so that they can be lifted up or laid back, if required;

(e) Fifthly, the purpose of the lift up and lay back provisions in the Enterprise Agreement is to enable Freightliner to deal with, and manage efficiently, immediate issues in the workplace, most of which are outside the control of Freightliner. For example, it may be necessary or at least desirable for Freightliner to change the commencement time of an employee's shift for one of the following reasons:

- a train failure or breakdown of a train operated by another train operator on the network;
- a heatwave, with the result that lower track speeds are required; or
- congestion for one reason or another on the network.

These types of events often occur without previous notice and within 18 hours of the commencement of a particular shift. Putting to one side the issue of consensual shift changes, if Freightliner could not lift up or lay back the commencement time of an employee's shift unless they gave notice or advice to the employee in the relevant "advice periods' specified in clause 37.1, Freightliner would not be able to deal in an efficient way with such immediate issues in the workplace, most of which are outside its control. This point is made good by reference to an example. Take an employee starting a day shift at 6am tomorrow. Unless that employee is given notice or advice by Freightliner between 9am and 11:30am today, being the relevant "advice period", Freightliner could not, on the RTBU's argument, lift up or lay back the commencement time for the shift unless the employee consented to the change. As a result, any issue on the train network between 11:30am today and 6am tomorrow that gave rise to a need or a desire on Freightliner's part to, say, lay back the commencement time of the shift for the employee to, say, 8am tomorrow, would not be possible without the employee's consent. Absent such consent, the employee would attend work at 6am and either have no work to do for the first two hours of their shift or, if possible, be given other work to do; and

(f) Sixthly, clause 36.9 of the Enterprise Agreement prohibits Freightliner from lifting up or laying back a shift scheduled to commence between "22:00 – 04:00", subject to one exception. The exception is if there is "mutual agreement" and the agreement is made "prior to 22:00". The fact that clause 36.9 permits the change to be made, by consent, up to 10pm, which is potentially the commencement time for the shift, provides some support for the contention that the Enterprise Agreement permits lift ups or lay backs to a shift scheduled to commence outside the prohibited time, namely between 04:01 and 21:59, to take place at any time prior to the commencement of the shift (without consent or prior notice).

[24] I have reviewed the terms of the 2011 EA and considered the differences between the relevant provisions of it and the Enterprise Agreement for the purpose of assessing whether the objective intention of the parties can be discerned from such changes. In my view, they cannot. The relevant provisions of the 2011 EA are quite different. They contain separate provisions dealing with lift ups and lay backs, on the one hand, and shift changes, on the other hand. There is no equivalent to clause 36.9 in the 2011 EA. Further, clause 41.5 of the 2011 EA contains a provision dealing with advice to employees during an "agreed personal call period", but only for lift ups or lay backs "outside the above hours", which I interpret to mean a lift up of more than two hours or a lay back of more than four hours.

[25] As to the RTBU's concern about fatigue risks associated with employees having the commencement time of their shift lifted up, that was the rationale for the parties agreeing on the prohibition, subject to consent, on an employee having a shift commencing between 10pm and 4am lifted up or laid back. Further, 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.

Determination

[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.

COMMISSIONER

Appearances:

Mr S Wright, Organiser on behalf of the Australian Rail, Tram and Bus Industry Union;
Mr D Houlihan, Principal Workplace Relations Advisor from First IR Consultancy Pty Ltd, on behalf of the respondent.

Hearing details:

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