



# RTBU NSW LOCO DIVISION NEWSFLASH

October 15, 2019

## PN COAL SHIFT LIMIT DISPUTE -FAIR WORK COMMISSION RECOMMENDATION

PN Coal members would be aware that for an extended period of time we have been trying to work with PN to resolve the issue of shift limits for qualified drivers working with non-qualified drivers/second persons. The parties were ultimately unable to resolve the matter informally, and as such, a formal dispute was lodged with the company which subsequently progressed to the Fair Work Commission.

Deputy President Saunders held a conciliation between Pacific National and the RTBU yesterday in relation to the dispute. The Deputy President asked both parties if, in the event that the dispute could not be resolved through conciliation, both parties would consent to having the matter arbitrated. The RTBU would have been happy for this to occur so as to resolve the issue, but Pacific National refused.

After hearing both the position of the RTBU and Pacific National regarding the application of Clause C9.1(a)(iii) of the Pacific National Bulk Rail Enterprise Agreement 2018, the Deputy President made a recommendation as allowed for under the enterprise agreement. Specifically, his recommendation stated as follows:

*"I recommend that the parties to the present dispute apply clause C9.1(a)(iii) of the Agreement such that it imposes a maximum shift limit of 9 hours in circumstances where a Driver has worked with a Trainee for more than two consecutive shifts and the 9 hour shift limit continues to apply until the Driver ceases working consecutive shifts with a Trainee.*

*[14] In accordance with clause A32.2(i) of the Agreement, the parties have agreed that this recommendation will be treated as "highly influential". "*

The recommendation supported the contentions of the RTBU and affirmed that our interpretation of the Agreement was correct. It is now up to Pacific National to roster accordingly.

A copy of the full recommendation is attached.

**AUTHORISED: R Hayden Locomotive Divisional Secretary**

Level 4, 321 Pitt St Sydney.NSW 2000



# RECOMMENDATION

*Fair Work Act 2009*

s.739 - Application to deal with a dispute

**Australian Rail Tram and Bus Industry Union**

**v**

**Pacific National Services Pty Ltd**

(C2019/6101)

DEPUTY PRESIDENT SAUNDERS

NEWCASTLE, 15 OCTOBER 2019

[1] Yesterday the parties participated in a conciliation conference in relation to this dispute before Deputy President Saunders. The parties were unable to agree on an outcome to resolve the dispute.

[2] Pacific National Services Pty Ltd (*Pacific National*) does not consent to the Fair Work Commission arbitrating the dispute.

[3] The dispute concerns the proper construction of clause C9.1(a)(iii), Appendix D of the Pacific National Bulk Rail NSW Enterprise Agreement 2018 (*Agreement*).

## **“C9 SHIFT LENGTHS (TRAIN CREW)**

### **C9.1 Maximum Shift Lengths**

(a) The maximum shift length shall be eleven (11) hours, subject to the limits prescribed below and depot specific arrangements:

- (i) Driver only (Mainline/Terminal) – 9 hours as prescribed in legislation
- (ii) 3 Person Push Pull – 9 hours

- (iii) Route Qualified Level 5 or 6 driver and Second Person/Level 4 are not to be rostered together for more than two consecutive shifts. Following the second consecutive shift the shift limit will be 9 hours.
- (iv) Any shift over eleven (11) hours will be treated as a twelve (12) hour shift for fatigue management purposes.”

[4] Pacific National contends that clause C9.1(a)(iii) allows for the resetting of the shift limit back to 11 hour maximum shift lengths after a third consecutive shift is complete. In other words, the fourth consecutive shift worked by a Route Qualified Level 5 or 6 driver (*Driver*) and Second Person/Level 4 (*Trainee*) reverts back to 11 hours.

[5] Pacific National also contends that the custom and practice in the business since the clause was introduced in 2010 (in an earlier enterprise agreement) has been to apply clause C9.1(a)(iii) in a manner consistent with its interpretation of the provision.

[6] The Australian Rail, Tram and Bus Industry Union (*ARTBIU*) contends that any consecutive shifts worked by a Driver and a Trainee after the first two consecutive shifts have a maximum shift length of 9 hours. The ARTBIU disputes the existence of any custom or practice of the type for which Pacific National contends and says the dispute over the proper construction of clause C9.1(a)(iii) has been brought up and discussed at a number of internal meetings and discussions.

[7] There is no dispute between the parties about the principles to be applied to the proper construction of the Agreement.

### **Consideration**

[8] I was not able to resolve the factual dispute concerning the alleged custom and practice in conciliation, and my recommendation below is given subject to any argument which may be put in a court relating to the existence of such a custom and practice.

[9] A Trainee is not qualified to drive a train. When a Trainee works with a Driver, it is the Driver who does all the driving and the Trainee assists the Driver by looking out for various signals and undertaking other tasks. In comparison, when a Driver works with another Driver, they share the driving of the train. In this context, it is not surprising that both parties agree the purpose of clause C9.1(a)(iii) is to address the question of fatigue for Drivers when they work with a Trainee. The parties disagree, however, in relation to the duration of the benefit which clause C9.1(a)(iii) provides to Drivers.

[10] The final sentence of clause C9.1(a)(iii) does not expressly deal with how long the reduced maximum shift limit of 9 hours applies for following two consecutive shifts worked by a Driver and a Trainee. The clause is therefore ambiguous.

[11] The context is, as always, important. Clause C9.1(a) establishes a general rule that the maximum shift length will be 11 hours, but the general rule is subject to various exceptions. One such exception is that which is addressed in clause C9.1(a)(iii), namely, where a Driver and a Trainee work more than two consecutive shifts together. In those circumstances, the “shift limit” is reduced from 11 hours to 9 hours. It is significant that the “shift limit” is reduced, rather than the maximum shift length for the following shift or specified number of shifts. A

reduction in the usual “shift limit” of 11 hours to 9 hours suggests that the new limit of 9 hours continues until some event occurs. There is no textual or contextual support for limiting the new “shift limit” of 9 hours to a single shift. Whereas the context of clause C9.1(a)(iii), which addresses circumstances in which a Driver and a Trainee are being rostered to work together on consecutive shifts, indicates that the new “shift limit” of 9 hours should apply until the Driver ceases to be rostered to work with a Trainee on consecutive shifts.

[12] In my view, unlike the interpretation favoured by the ARTBIU, it would be necessary to read words into clause C9.1(a)(iii) to interpret it in the way contended for by Pacific National.

### **Recommendation**

[13] For the reasons given, I recommend that the parties to the present dispute apply clause C9.1(a)(iii) of the Agreement such that it imposes a maximum shift limit of 9 hours in circumstances where a Driver has worked with a Trainee for more than two consecutive shifts and the 9 hour shift limit continues to apply until the Driver ceases working consecutive shifts with a Trainee.

[14] In accordance with clause A32.2(i) of the Agreement, the parties have agreed that this recommendation will be treated as “highly influential”.



DEPUTY PRESIDENT