

TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

25939-1

COMMISSIONER ASBURY

DR2010/193

s.709 - Application to Commission to have a dispute resolution process conducted (Div 5)

**Australian Rail, Tram and Bus Industry Union
and**

**QR Limited T/A QR National Coal
(DR2010/193)**

QR Limited Traincrew Union Collective Workplace Agreement 2009

[AC327905 Print]]

Brisbane

4.03PM, MONDAY, 19 APRIL 2010

PN1

THE COMMISSIONER: Thank you. Good afternoon. I might just take appearances for the record.

PN2

MR L. TILEY: Good afternoon, Commissioner. My name is Tiley, initials L.M. I appear on behalf of the Rail, Tram and Bus Union, the applicant in matter number DR2010/193. With me, on my right, is MR B. MACKIE, the president of our union. As you are aware, I'm a legal practitioner within this jurisdiction, but as I appear as an officer of the organisation, I'd seek leave to appear in that capacity.

PN3

THE COMMISSIONER: Thank you.

PN4

MS T. AITKEN: Good afternoon, Commissioner Asbury. My name is Tammy Aitken and I appear on behalf of the Australian Federated Union of Locomotive Employees, Queensland Union of Employees. Also appearing with me is MR G. SMITH.

PN5

THE COMMISSIONER: Thank you.

PN6

MS AITKEN: Thank you.

PN7

MR M. HEENAN: Good afternoon, Commissioner. My name is Mick Hennan, appearing on behalf of QR Ltd. With me, to my left, is MR M. BOURKE.

PN8

THE COMMISSIONER: Thank you. Thanks, Mr Heenan. Okay, Mr Tiley, you entered the first appearance. Do you want to kick off?

PN9

MR TILEY: Thank you, Commissioner. We have filed two affidavits in this matter.

PN10

THE COMMISSIONER: Yes.

PN11

MR TILEY: So if I can start, please, by reading those two affidavits of Malcolm Williams and Leslie Moffitt. If I could just hand up to your associate - I've now got the original of Mr Moffitt's affidavit. We were only - - -

PN12

THE COMMISSIONER: Okay.

PN13

MR TILEY: - - - able to file a faxed copy at the time because we swore it up in Townsville.

PN14

THE COMMISSIONER: Yes, but it was signed - - -

PN15

MR TILEY: It was, yes.

PN16

THE COMMISSIONER: It was a signed copy, yes. I understand, thanks.

PN17

MR TILEY: In relation to those two witnesses, I've not been advised by the respondent that it requires either of them for cross-examination. In any event, Mr Williams is currently on a locomotive en route to the Rolleston mine, so he's not available. Mr Moffitt is on annual leave and he's also, therefore, unavailable. So unfortunately, in any event, I can't provide either of those two by telephone for cross-examination.

PN18

THE COMMISSIONER: Okay.

PN19

MR TILEY: Perhaps you might like to hear from - - -

PN20

THE COMMISSIONER: From Mr Heenan to see what his view on that is.

PN21

MR TILEY: Sure.

PN22

THE COMMISSIONER: Mr Heenan?

PN23

MR HEENAN: Commissioner, we do require those two witnesses for cross-examination. I didn't expect that there would be a lengthy cross-examination, but certainly there were a couple of pertinent questions that needed to be asked - and we weren't put on notice that there would be any problem. So I'm not sure where that leaves us, Commissioner, because there doesn't seem to be any prospect of them being available.

PN24

THE COMMISSIONER: Probably leaves us with having to find a time they can be made available, I suspect. Mr Tiley, sorry, you said Mr Williams is on a locomotive at the moment?

PN25

MR TILEY: That's right, Commissioner, and Mr Moffitt is on annual leave this week. I should say in relation to Mr Williams - and I don't mean to be smart - but the respondent was, of course, aware that he was rostered on today. He is an employee of theirs.

PN26

THE COMMISSIONER: Yes.

PN27

MR TILEY: That's not a matter within our control. Mr Moffitt is a different kettle of fish of course. But perhaps if you would like to proceed with the matter this evening by way of cross-examination of the other witnesses, then we can come back at a later date for the short cross-examination of those two. I'm happy

for us to try and get one or both of them on the phone, but I'm reliably informed that we won't be able to.

PN28

THE COMMISSIONER: Okay, well, are you wanting to cross-examine the witnesses for Queensland Rail?

PN29

MR TILEY: I have no - yes, Commissioner.

PN30

THE COMMISSIONER: You are?

PN31

MR TILEY: Yes, I am. However, those affidavits were only provided to us very late this afternoon, so ideally that cross-examination would occur at a later date after we've had the benefit of obtaining some instructions upon those affidavits. For example, neither Mr Williams nor Mr Moffitt have been able to provide to me their comments upon those affidavits, which would assist, of course, the RTBU in the prosecution of its case and the cross-examination of those two witnesses upon those affidavits. Unfortunately, of course, Commissioner, it's the haste with which the parties have come before you today that has put us in the difficult position we're in now.

PN32

THE COMMISSIONER: All right. How long would you need to take some instructions about those two affidavits?

PN33

MR TILEY: Not very long at all once Mr Moffitt is back from annual leave. Mr Mackie has just informed me that he's overseas so - but certainly next week would be fine for Mr Moffitt. Mr Williams, it's just a matter of when he's not on the locomotive. His shift was rostered to commence at 10.55 this morning. It was brought forward by 55 minutes to 10.00. I spoke to him about 9.30. I, of course, didn't have the affidavit until several hours after that, and as you'll - - -

PN34

THE COMMISSIONER: To get some instructions to cross-examine Mr O'Brien and Mr King, do you need Mr Moffitt, or do you just need some time - - -

PN35

MR TILEY: No - - -

PN36

THE COMMISSIONER: - - - perhaps 24 hours - to have a look at the affidavits?

PN37

MR TILEY: Commissioner, ideally I would have the opportunity to speak to Mr Moffitt about those. If that would greatly inconvenience you, then we are willing to do our very best to proceed with some cross-examination this evening on those two affidavits. I'm simply stating that our preference - and I should also say that preference would have been able to be accommodated if we'd received the material in a more timely fashion.

PN38

THE COMMISSIONER: What I'm also conscious of, Mr Tiley, is that if QR is correct with its submission, then there's considerable cost at the moment associated with coal trains not being able to be deployed in the manner that QR contends that it wants to deploy them - - -

PN39

MR TILEY: Quite so.

PN40

THE COMMISSIONER: - - - and I don't think that's a matter that should go on for any length of time and that was the reason why listed these matters so quickly. So are you ready to proceed this evening?

PN41

MR TILEY: Yes, Commissioner, we are ready to proceed this evening.

PN42

THE COMMISSIONER: So you can proceed this evening on the basis that you're able - I should ask, Mr Heenan, are your witnesses available to be cross-examined?

PN43

MR HEENAN: Yes, Commissioner.

PN44

THE COMMISSIONER: All right.

PN45

MR HEENAN: Can I just also make a couple of short points - - -

PN46

THE COMMISSIONER: Yes.

PN47

MR HEENAN: - - - about Mr Tiley's submissions. The directions didn't require us to submit affidavit material by Friday. They required us to give an outline of what the evidence would be. That's what we did on Friday afternoon. The affidavits follow that outline very closely, albeit, in the case of Mr O'Brien, there is some additional evidence in the affidavit by way of rebuttal to the affidavits provided by the RTBU on Friday afternoon.

PN48

THE COMMISSIONER: Yes, I accept that. There wasn't any requirement to file and serve affidavits. There was just an outline of evidence. I think in the circumstances we'll proceed, and I guess we'll have to deal with the weight, if any, that should be put on the evidence of persons who aren't available within a reasonable time frame to be cross-examined, and also, Mr Tiley, whether you need some further time to develop some questions for the QR witnesses.

PN49

MR TILEY: That's right, Commissioner. I should also say that to the extent that the affidavits of Mr Moffitt and Mr Williams are in conflict with the evidence that's been filed by QR, certainly the RTBU anticipates that you would be greatly assisted in hearing the evidence from QR - that would greatly assist you in resolving that conflict. So it may well be the case that after hearing from Mr King

and after hearing from Mr O'Brien, that may well put those issues to bed and we may not need to come back for cross-examination of Moffitt and Williams, but I suppose we'll - that'll remain to be seen.

PN50

THE COMMISSIONER: I guess that's up to QR because - - -

PN51

MR TILEY: Of course.

PN52

THE COMMISSIONER: - - - realistically there wasn't - the concept was the witnesses would be present to be - because all that was required was an outline of their evidence. So the assumption, I guess, was that they would be here and they'd be available to be cross-examined. Now, an affidavit, I accept, substitutes for sworn evidence if a witness isn't reasonably available to give sworn evidence in person and to be cross-examined, but it might come down to the weight to be put on that person's evidence if they're not available for cross-examination.

PN53

MR TILEY: I understand that, Commissioner. I should just hasten to add, the reason why we produced it in the form of affidavits was to assist the commission as much as possible, knowing that certainly Mr Moffitt and, at the time, very likely Mr Williams would not have been able to testify by reason of their existing unavailability. I should also point out, Commissioner, that your directions specified that where personal notes were to be appended, they were to be done so via affidavit. Neither of these affidavits append anything at all.

PN54

THE COMMISSIONER: Yes.

PN55

MR TILEY: They shouldn't be quite so controversial in that regard. But in any event, we accept that the issue of weight is one that you'll have to determine.

PN56

THE COMMISSIONER: Yes, okay. All right, do you want to - I guess I envisage that you would call your evidence first. You don't have the witnesses available, so if we - you've sought leave to read the affidavits, and I'm prepared to accept them on the basis that we've just discussed - - -

PN57

MR TILEY: Thank you, Commissioner.

PN58

MR TILEY: - - - and subject to Mr Heenan either indicating he wants the witness for cross-examination at some convenient time or, alternatively, indicating that he doesn't want them for cross-examination and he'll just argue about the weight that should be put on their evidence, given that they're not available. That's a matter for Mr Heenan. So that's the evidence for your witnesses.

PN59

MR TILEY: If I could: also, Commissioner, the outline of submissions that we filed has several exhibits to it - - -

PN60

THE COMMISSIONER: Yes.

PN61

MR TILEY: - - - which I suppose, from a semantic perspective, may be described as evidence. The reason that they are in that form is, of course, they are not personal notes, and they are, we say, material that is common as amongst the parties, namely the final four proposals which were provided by QR in the course of the negotiations and the two coal train plans which are referred to in the affidavits and our submissions. So I don't know that, technically speaking, you need those to be read, but I simply draw your attention to that material.

PN62

THE COMMISSIONER: You're going to deal with them when you make your submissions - - -

PN63

MR TILEY: That's right.

PN64

THE COMMISSIONER: - - - so if we accept that that's your evidentiary case - - -

PN65

MR TILEY: Yes.

PN66

THE COMMISSIONER: - - - and perhaps if I hear from Ms Aitken as to hers. Ms Aitken, you've got an outline of submissions and you've got an affidavit of Mr David Matthew Ogg. Is Mr Ogg available?

PN67

MS AITKEN: All our witnesses should be available. I have asked them to be available today.

PN68

THE COMMISSIONER: Okay, so are they available by telephone?

PN69

MS AITKEN: Yes, and I've provided them in my covering letter to you.

PN70

THE COMMISSIONER: Okay, great. Do you require to cross-examine Mr Ogg, Mr Heenan?

PN71

MR HEENAN: Commissioner, we require Mr Mitchell and Mr Douce - - -

PN72

THE COMMISSIONER: Sorry, we've got?

PN73

MR HEENAN: - - - not Mr Ogg.

PN74

THE COMMISSIONER: Not Mr Ogg, okay, yes. All right, so Mr Douce and Mr Mitchell. Perhaps we need to get both of those witnesses on the phone and get

them to be sworn in and then Mr Heenan can cross-examine them, okay? So we'll try Mr Mitchell first. Yes, we might just have a short adjournment while we get him on the phone.

<SHORT ADJOURNMENT [4.16PM]

<RESUMED [4.23PM]

<EDWARD JOHN MITCHELL, AFFIRMED [4.23PM]

PN75

THE COMMISSIONER: Please be seated. Ms Aitken, you've got your first witness.

PN76

MS AITKEN: Yes.

PN77

THE COMMISSIONER: That is Mr Mitchell.

PN78

MS AITKEN: Yes.

PN79

THE COMMISSIONER: Mr Mitchell, can you hear us?---Yes, I can hear.

PN80

So you've taken an affirmation?---Yes.

PN81

This is Commissioner Asbury speaking. If I could just get you to identify - you've sworn an affidavit in connection with these proceedings. Have you got that affidavit with you?---I have. I'll just go and grab it. Yes, I've got it in front of me now.

PN82

That affidavit has nine paragraphs?---Yes.

PN83

A number of attachments?---Yes.

PN84

It was sworn on 13 April?---That's correct.

PN85

To the best of your knowledge the contents of that affidavit are true and correct? ---That's correct.

PN86

We will mark that as exhibit 3, and I should indicate the affidavit of Mr Tiley's witnesses, Mr Williams and Mr Moffitt we'll mark as exhibits 1 and 2. So Mr Mitchell's is exhibit 3.

**** EDWARD JOHN MITCHELL

XN

EXHIBIT #1 AFFIDAVIT OF MALCOLM WILLIAMS

EXHIBIT #2 AFFIDAVIT OF LESLIE MOFFITT

EXHIBIT #3 AFFIDAVIT OF EDWARD JOHN MITCHELL

PN87

THE COMMISSIONER: Ms Aitken, is that the evidence of this witness?

PN88

MS AITKEN: Yes, it is.

PN89

THE COMMISSIONER: There's nothing additional you want to ask him about?

PN90

MS AITKEN: No.

PN91

THE COMMISSIONER: All right. Thank you. Mr Heenan, you've got some cross-examination for Mr Mitchell.

PN92

MR HEENAN: Thank you.

PN93

THE COMMISSIONER: Mr Mitchell, Mr Heenan from Queensland Rail has got some questions that he is going to ask you?---Okay.

PN94

All right. Thanks.

PN95

MR HEENAN: Thank you, Commissioner.

<CROSS-EXAMINATION BY MR HEENAN

[4.25PM]

PN96

MR HEENAN: Good afternoon, Mr Mitchell?---How you going, mate?

PN97

In paragraph 3 of your affidavit, you say that you sat on the depot roster committee for Bluff with Mr O'Brien as a representative for QRNational Coal?
---Yes.

**** EDWARD JOHN MITCHELL

XXN MR HEENAN

PN98

During that process, did Mr O'Brien ever tell you that it was QR's intention to limit the length of available shifts to the length of the other shifts in the master roster?---All he told us at the time was our - our jobs were all under nine hours or nine hours - or sort of all under 10 hours, but the jobs that went from nine hours 20 to nine hours 40, we could take them up to 10 hours and the same with eight hours and nine hours.

PN99

Just to clarify, you're saying - so he didn't mention available shifts at all?---No, no.

PN100

Thank you, Mr Mitchell. That's the cross-examination, Commissioner.

PN101

THE COMMISSIONER: Thanks for that. Anything arising from that Ms Aitken that you want to clarify?

PN102

MS AITKEN: No, thank you.

PN103

THE COMMISSIONER: All right. Thanks for giving your evidence Mr Mitchell, you're excused?---Okay. Thank you.

PN104

Thank you. Good afternoon.

<THE WITNESS WITHDREW

[4.26PM]

<CASEY JAMES DOUCE, AFFIRMED

[4.28PM]

PN105

THE COMMISSIONER: Thanks, Mr Douce, it's Commissioner Asbury here. How are you?---Not too bad, thanks. How are you?

PN106

Good. Now, you've sworn an affidavit in connection with these proceedings? ---Yes, I have. Yes.

**** CASEY JAMES DOUCE

XN

PN107

Have you got a copy of that with you?---I do, but if I walk inside to get it, I'll probably lose you, that's how good my phone service is, but I will try, if that's all right.

PN108

You're just going to be asked some questions about it, so it might be a good idea if you had it with you?---All right. I'll just leave the phone here and I'll go and grab it.

PN109

That would be good?---All right. Yes, I've got the affidavit now, Commissioner.

PN110

Great. The copy that you've got there was sworn on 15 April 2010?---That's correct.

PN111

It's 15 paragraphs?---Yes, that's correct.

PN112

To the best of your knowledge, the contents of that are true and correct?---Yes, that's right.

PN113

All right. I'm now going to hand you over to Mr Heenan, who is representing Queensland Rail and he's got some questions for you about that affidavit?---Okay, thank you.

<CROSS-EXAMINATION BY MR HEENAN

[4.30PM]

PN114

MR HEENAN: Good afternoon, Mr Douce?---Good afternoon.

PN115

In your affidavit you make various assertions about discussions with Mr Warren Phillips, then of QR?---Yes, that's correct.

PN116

During those discussions did Mr Phillips ever indicate or tell you that available shifts were to be limited in length to the length of the other shifts in the master roster?---No.

**** CASEY JAMES DOUCE

XXN MR HEENAN

PN117

Thank you. That will be all, Commissioner.

PN118

THE COMMISSIONER: All right. Anything arising from that, Ms Aitken?

PN119

MS AITKEN: No, thank you, Commissioner.

PN120

THE COMMISSIONER: All right then. Thanks, Mr Douce, for giving your evidence. You're excused?---Thank you.

PN121

Thank you?---Bye.

PN122

Good afternoon.

<THE WITNESS WITHDREW

[4.30PM]

PN123

THE COMMISSIONER: We'll mark Mr Douce's affidavit as exhibit 4, and the other affidavit that you don't require to cross-examine the deponent on is the affidavit of Mr Ogg and we'll mark that as exhibit 5.

EXHIBIT #4 AFFIDAVIT OF CASEY JAMES DOUCE

EXHIBIT #5 AFFIDAVIT OF DAVID MATTHEW OGG

PN124

THE COMMISSIONER: Okay, so that's the evidence for your union, Ms Aitken, is it?

PN125

MS AITKEN: Yes.

PN126

THE COMMISSIONER: Yes, all right, thanks for that. Okay, Mr Heenan, do you want to make an opening submission or just call your first witness?

PN127

MR HEENAN: Commissioner, I'll just rely on the submissions that I provided on Friday.

PN128

THE COMMISSIONER: Yes, okay.

PN129

MR HEENAN: I will seek to read affidavits of Stephen King and Brendan O'Brien - - -

PN130

THE COMMISSIONER: Yes.

PN131

MR HEENAN: - - - filed electronically today. Unfortunately I don't have the originals just yet, Commissioner, but if you - - -

PN132

THE COMMISSIONER: We've got both of them with us, haven't we - - -

PN133

MR HEENAN: Yes.

PN134

THE COMMISSIONER: - - - to be cross-examined?

PN135

MR HEENAN: Yes.

PN136

THE COMMISSIONER: Yes, they can just identify it and we'll swear them in.

PN137

MR HEENAN: Okay.

PN138

THE COMMISSIONER: That's not a problem. Okay, so we'll get - who do you want first?

PN139

MR HEENAN: Sorry, I should say: are they required for cross-examination?

PN140

MR TILEY: They are, yes.

PN141

MR HEENAN: Okay, we'll start with Stephen King.

PN142

THE COMMISSIONER: Mr King?

PN143

MR HEENAN: No, he's - - -

PN144

THE COMMISSIONER: He's on the phone too?

PN145

MR HEENAN: Sorry, he's on the phone.

PN146

THE COMMISSIONER: That's all right.

PN147

MR HEENAN: I thought that's what you meant, Commissioner.

PN148

THE COMMISSIONER: All right, we need to get him.

<STEPHEN KING, AFFIRMED

[4.33PM]

PN149

THE COMMISSIONER: Thanks, Mr King. It's Commissioner Asbury here. How are you?---Good afternoon, Commissioner. I'm fine, thanks.

PN150

Good afternoon. Now, you've sworn an affidavit in connection with these proceedings?---Yes.

PN151

Hang on a minute, I'll just have to find it. Somewhere I've got it, Mr King. Just bear with me for a minute. Here we go. That affidavit was sworn on 19 April 2010?---Yes.

PN152

Thirteen paragraphs in length?---I beg your pardon?

PN153

It's 13 paragraphs in length?---Yes.

PN154

And to the best of your knowledge the contents of that affidavit are true and correct?---Yes.

PN155

Mr Heenan, was there anything you wanted to clarify or elaborate on in that affidavit?

PN156

MR HEENAN: No, thank you, Commissioner.

PN157

THE COMMISSIONER: Okay, thanks. Mr King, I'm going to hand over to Mr Tiley who is representing the RTBU, and Mr Tiley is going to cross-examine you in respect of your affidavit, okay?---Okay.

PN158

Thank you.

<CROSS-EXAMINATION BY MR TILEY

[4.35PM]

PN159

MR TILEY: Good afternoon, Mr King, Luke Tiley. How are you?---Yes, fine, Mr Tiley.

**** STEPHEN KING

XXN MR TILEY

PN160

Just a couple of questions for you this afternoon, Mr King. You mentioned in your affidavit that you've been employed with QR since September 2008. Is that correct?---Yes, it is.

PN161

And the dispute concerns the train crew collective agreement, doesn't it?---It would appear so.

PN162

Can you tell the commission whether you were involved in the negotiation of the traincrew agreement?---No, I wasn't.

PN163

Can you tell the commission whether you were involved in the production of the master diagram for the Bluff depot?---No, I wasn't.

PN164

It is in evidence that in January 2009 you had a conversation with Mr Mal Williams in which you represented to Mr Williams that a new master diagram would be developed in approximately March of 2010. Do you recall that conversation?---I note you've said 2009 and that's incorrect. But I do recall a conversation with a number of people earlier in 2010 where I indicated that I understood a new coal train plan - or CTP - would be developed early in the new year. Certainly I recall that.

PN165

Okay, thank you, Mr King. If I can take you, please, to paragraph 4 of your affidavit?---Yes.

PN166

You mention there you've undertaken an analysis of the impact of the speed restrictions in place on the network during the month of March?---Yes, we have.

PN167

Can you tell the commission where that analysis is or what that analysis says? Obviously, as you'll appreciate, we're trying to - can you explain what your analysis involved?---What I've done is I've had my logistics manager determine the impact of the speed restrictions and to tell me how many cancellations that we had a consequence of those speed restrictions that could be directly related to them, and also what other impacts there were, as a consequence of those speed restrictions, on things such as diversions and our inability to meet requests for customers.

**** STEPHEN KING

XXN MR TILEY

PN168

Did that analysis look at causes for the speed restrictions?---No, and the reason being is that typically the causes for the speed restrictions - at the time, from my point of view - were obvious, and that is there's issues with the track, particularly as a result of the ongoing rain periods that we'd had over a period of some six to eight weeks.

PN169

But isn't it the case, Mr King, that the state of the track is something that's within the control of Queensland Rail?---Drawing a long bow, I would suggest. But Queensland Rail owns the track. So, therefore, I suppose it's easy to say that if you own it, you're in control of it.

PN170

But the condition of the track - is it your evidence that the condition of the track is poor, at least in part, because of the wet weather?---The condition of the track as a consequence of the wet weather has been degraded. The track has been degraded. There's no doubt about that. I don't know whether it's fair to say it's poor. My understanding is that QR Network, you know, are doing their best - or have been over a period of time - to maintain (a) access and (b) access at best opportunity.

PN171

I put it to you, Mr King, that the reason why the track is in a poorer state is because of poor track maintenance by Queensland Rail. Is that correct?---No, I wouldn't - I'm not qualified to answer that question.

PN172

Okay, thank you, Mr King. You mention, Mr King, that during March there were 23 cancellations as a direct result of the speed restrictions. Did that figure emerge out of your so-called analysis?---From memory, I - look, I haven't got that figure in front of me - - -

PN173

Paragraph 7 of your affidavit, Mr King?---I beg your pardon?

PN174

**** STEPHEN KING

XXN MR TILEY

Can I take you to paragraph 7 of your affidavit, please?---I beg your pardon, yes. Yes, that's the advice I got.

PN175

How many cancellations were there in February, Mr King?---I can't tell you that. I don't know.

PN176

I have nothing further for Mr King, Commissioner.

PN177

THE COMMISSIONER: Mr King, it's Commissioner Asbury. With respect to the condition of the track, you talk about the track being degraded or something like - you used a term like that?---Yes.

PN178

Does that mean the track has deteriorated because of the rain. I take it that it's not that there's water over it; it's that some damage has been caused to it by the rain? ---In places there was water over it. The experience that we've had with the track in recent times, Commissioner, effectively started with a derailment of one of our opposition's trains on 1 February, and that was as a result of the track being washed out because of heavy rain. That heavy rain seemed to continue on and off over a period of the best part of two months and, by and large, whilst that particular site where the derailment took place was repaired, in lots of other places, you know, the reason the track is in the condition it's in was as a consequence of never being able to dry out, and more rain made it worse.

PN179

So it wasn't possible to repair it?---I don't think so in the time frame. We don't repair the track at QR National Coal. We don't own the track. The track is owned by QR Network and, whilst it's another part of QR, I'm not in the position and I have no knowledge of how they attack the various track issues that have been presented over the period of time.

PN180

Well, how long do you envisage that the track is going to be in the condition that it's in?---I don't know. I'm at the mercy of QR Network. I have no control over what parts of the track are repaired when.

**** STEPHEN KING

XXN MR TILEY

PN181

So essentially you're not waiting for water to go down now; you're waiting for the track to be repaired?---In lots of cases, yes, and my understanding that I've been - part of the understanding that I have from some conversations with people in QR Network is that the foundations are waterlogged as a consequence of all the rain. That's the advice that I got for lots of these problems and the ground just needed to dry out and, indeed, you know, the fact that we've had two weeks of dry weather now, I would hope that it would not be much longer before a number of these serious speed restrictions that we've encountered over the last couple of months are repaired - repair is completed and restrictions lifted.

PN182

So you're saying that in a number of cases the repairs can't be completed because the foundations of the track are waterlogged?---That's the advice that I've got.

PN183

Then the repairs can be carried out?---And there's a limit to the repairs that can be carried out in a time frame. It's not as if we can stop work tomorrow and they will all be fixed in three days. You know, I suppose Network have limited resources and they need to take those resources to the repairs that will provide the best return for us and, you know, try not be too complicated but some restrictions cost us more than others. Does that make sense?

PN184

Yes?---Okay. And some repairs will take longer to effect than others.

PN185

Anything arising from that, Mr Tiley?

PN186

MR TILEY: No, thank you, Commissioner.

<CROSS-EXAMINATION BY MS AITKEN

[4.43PM]

PN187

MS AITKEN: Hello, Mr King. Were there no speed restrictions prior to the recent flooding?---There would have been some speed restrictions in place prior to 1 February, I'm sure.

**** STEPHEN KING

XXN MS AITKEN

PN188

Were there other delays prior to the recent flooding?---Such as?

PN189

Well, would the lack of qualified drivers be causing delays on the network? ---Wouldn't be causing delays on the network. It would provide an inconvenience for our operation from time to time.

PN190

Would control letting in northern trains before the Bluff trains be causing delays on the network?---Sorry, could you just repeat that for me?

PN191

Would control letting in northern trains prior to the Bluff trains cause delays on the network?---I'm not quite sure exactly what you mean there. If you just take me a little bit slower.

PN192

I have a signed affidavit from Mr Mitchell which states that control lets in the northern trains and makes the Bluff trains wait?---From time to time - I beg your pardon, sorry, I didn't understand what you're looking for. We load trains out at, for argument's sake, Lake Vermont, which is, you know, the northern part of Coal South. Coal North also come down into Lake Vermont and, yes, there will be times when we will need to wait for a Coal North train or not even necessarily a Coal North train but a train working in Coal North with QR or PN. We will need to wait for them to complete loading and I would imagine from time to time that they will wait for us to complete loading.

PN193

So there are other factors causing delays besides the recent flooding?---If that's the central part of the argument, I can't say no. The answer is, yes, that from time to time we are delayed loading at places like Lake Vermont just as we delay others when we're loading and they've got to wait, yes.

PN194

I have a signed affidavit from Mr Mitchell which indicates that it is a regular occurrence for control to make the Bluff trains wait for the northern trains?---I would imagine that just about every single time we go there we are either waiting or we are causing others to wait.

PN195
Okay, thank you.

PN196
THE COMMISSIONER: Re-examination, Mr Heenan?

PN197
MR HEENAN: Nothing further, Commissioner.

PN198
THE COMMISSIONER: Thank you for giving your evidence, Mr King. You're excused?---Thank you very much, Commissioner.

<THE WITNESS WITHDREW [4.46PM]

PN199
THE COMMISSIONER: So that affidavit is going to be exhibit 6.

EXHIBIT #6 AFFIDAVIT OF STEPHEN KING DATED 10/4/2010

<BRENDAN O'BRIEN, AFFIRMED [4.48PM]

PN200
THE COMMISSIONER: Hello, this is Commissioner Asbury speaking?
---Afternoon, Commissioner.

PN201
How are you?---Not too bad, thank you.

PN202
Okay. Now, you've sworn an affidavit in connection with these proceedings?
---Yes, I have.

PN203
Mr O'Brien, your affidavit is 25 paragraphs long and it was sworn on 19 April 2010?---That's correct.

PN204
And to the best of your knowledge the contents of that affidavit are true and correct?---Yes.

PN205
Thank you. Anything further you wanted to elaborate on, Mr Heenan?

PN206
MR HEENAN: No, Commissioner.

PN207
THE COMMISSIONER: Okay, cross-examination. I'm going to hand over to Mr Tiley from the RTBU, who's going to cross-examine you, Mr O'Brien?
---Okay. Thank you.

<CROSS-EXAMINATION BY MR TILEY [4.50PM]

PN208

MR TILEY: Good afternoon, Mr O'Brien. Luke Tiley speaking?---Good afternoon.

PN209

Mr O'Brien, you have been employed by Queensland Rail since 1981. Correct? ---That's right.

PN210

**** BRENDAN O'BRIEN

XXN MR TILEY

You have been involved in and around rostering for how long?---Since 1982.

PN211

You weren't involved in the negotiations of this agreement, were you?---Not to any great extent, no.

PN212

But are you not the architect of the current coal train plan for the Coal South region?---No, I'm not the architect of the coal train plan. I am involved in the creation of the master diagrams, based on the crewing plan from the coal train plan.

PN213

Is it fair to say that the master diagram is aligned to the coal train plan?---The master diagram is aligned to the known workings of the crew train plan based on the coal train plan.

PN214

You are aware, aren't you, that, under the agreement, the master diagram is to align to the coal train plan or other master plan?---That's correct. We align the known workings in the crew plan in the master also.

PN215

Is it QR's position that what you described as the crewing plan is what the master diagram is aligned to? That is the other master plan for the purposes of clause 66. Is that correct?---Yes. The crewing plan - the coal train plan itself is the timetable, for lack of a better term. The crewing plan is what shift is deemed to be required for that specific depot's component of that working of the coal train plan.

PN216

THE COMMISSIONER: Sorry, can you just say that again, Mr O'Brien?---The coal train plan is the timetable of the trains, basically, from port to mine to port again.

PN217

Yes?---There are components within that where the crewing plan is required. So what part of that cycle of that train timetable is required to be worked by a specific crew in a specific depot.

**** BRENDAN O'BRIEN

XXN MR TILEY

PN218

Okay?---But it's impossible for one depot, one crew, to work a train from port to mine back to port. Each service in the Blackwater system has a Gladstone crewing component and a Bluff crewing component.

PN219

Okay?---And the master diagram is made on those components.

PN220

All right. Thank you?---A known working is created by those components.

PN221

MR TILEY: And those components as you described them, Mr O'Brien, they were reduced into a document that was given to the union representatives at the time that you sat down with them to discuss the master diagram, wasn't it?
---That's right. The crewing plan was given to us on the day we started construction on the master diagram.

PN222

Just to avoid confusion, Mr O'Brien, you prefer to refer to that as a crewing plan. Is that correct?---That's correct.

PN223

Again to clarify, for the purposes of clause 66 of the agreement that crewing plan is the relevant master plan to which you align the master diagram?---That's correct. We align the master diagram to the known workings within that crewing plan.

PN224

You had discussions with the representatives from the two unions in about October 2009. Is that correct?---That's true.

PN225

Partway through those discussions you - Queensland Rail tabled a revised crewing plan, didn't it?---That's true.

PN226

It was on the basis of that revised document that the current master diagram was created?---That's right.

**** BRENDAN O'BRIEN

XXN MR TILEY

PN227

It is in evidence that, when that document was generated, the master diagram was premised on three shift lengths. Can you tell the commission what those three shift lengths were?---The crew plan contains a variety of shift lengths. It needs a little bit of explanation, this question. Some shifts were deemed to be of less than eight hours, and the maximum in the known working component was nine hours 55, from sign-on to sign-off. The act clearly says that the minimum shift length is eight hours. All those shorter shift lengths were rounded up to eight hours, and all the other shifts were made at eight, nine - and in the case of the nine, 59, 55 hours. Because we have to roster to the half-hour, they were made to be 10-hour shifts.

PN228

But that doesn't answer my question, Mr O'Brien. Which were the three - - -?

---Eight, nine and 10 was the outcome.

PN229

Thank you. It is also in evidence that, when that master diagram was developed, the employees were to work 33 attendances over the eight-week cycle. Is that correct?---That's correct.

PN230

And that those employees were rostered to work an average of 318 hours in that eight-week cycle?---That's right. The target is an average of 320 hours per eight-week cycle. It came out as slightly less than that.

PN231

Slightly less than 318?---It came out as less than 320.

PN232

That's right. The master diagram that you developed did not contain any available shifts of greater than 10 hours, did it?---This needs a little explanation too. The crew plan contains no shifts in excess of 10 hours. Available shifts are given a weighted average for the calculation of - an estimated average for the calculation of cycle hours and for any fatigue scores.

PN233

**** BRENDAN O'BRIEN

XXN MR TILEY

But in the - - -?---Available shifts are not given a variety of shift lengths. They're all given one estimated shift length for the case of calculation of cycle hours, because we have to get an estimate of what the diagram may produce, and then we use a figure in the calculation of likely fatigue scores.

PN234

But when you look at the master diagram, Mr O'Brien, are there any employees who appear in that master diagram, when they are on an available shift, who have been required to work 11 or 12 hours - sorry, any more than 10 hours?---No. The weighted average for the diagram cycle allows a calculation of actually nine hours.

PN235

It is in evidence from Mr Williams that, based upon your current master diagram, all regular shifts are fatigue managed, aren't they?---That's true.

PN236

If an employee returns a FAID score of over 90, which is calculated over an accumulation of shifts, they therefore will not be able to work the next rostered shift, will they?---There may be adjustment necessary if the employee is deemed not to meet the fatigue guidelines as set out, yes.

PN237

Similarly, for available shifts, there is a factoring in done of the fatigue issue, isn't there?---Yes, there is, and the fatigue is calculated for each and every shift, master diagram or otherwise.

PN238

But when you created the master diagram, isn't it the case that the fatigue cut-off, if you like, for available shifts was 10 hours?---Yes. It was nine hours for estimated cycle-hour calculations, but that was an estimated average shift length for the depot, and 10 hours was more aligned for an outcome on fatigue scenarios, as the available shifts - they're not given a sign-on time or a shift length until the daily roster is actually compiled. I cannot tell you, sitting there looking at an available shift, when that shift will start or what shift length that shift, in reality, on the day, may be.

**** BRENDAN O'BRIEN

XXN MR TILEY

PN239

And if - - -?---It may be eight, it may be nine, it may be more.

PN240

Given the current master diagram, in respect of available shifts, has them being fatigued at 10 hours, if the employees were to commence working 11 or 12-hour available shifts, can you tell the commission what that would do to their fatigue scores?---It potentially would still be okay in a lot of cases, and if there were any cases where the 11-hour or 12-hour shift were rostered and it was deemed to break the fatigue guidelines, that shift would not be allocated at that shift length.

PN241

So a fatigue assessment, if you like, is done at the start of every shift or prior to an employee commencing every shift, isn't it?---The fatigue is done on each and every roster - daily roster - before it is what they call finalised and posted. So that the day roster people, when they compile their roster based on the daily requirements, ensure that nobody is posted on that roster in breach of the fatigue guidelines. So that may be even a master roster job. If somebody takes a lot of work or works an overtime shift, it may impact on a master roster shift which may need to be altered in some way; the sign-on or the shift length reduced. So it's not just availables that are taken into consideration. It's every shift that's rostered.

PN242

But given the current roster is premised on a 10-hour cut-off, if you like, for available shifts, if 11 and 12-hour shifts were worked, do you accept the premise that that would have a greater likelihood of impacting on their fatigue score than if the current master diagram was followed strictly?---It depends on a number of circumstances. For example, an available shift at 10 hours that has a fatigue score of 60 will not be impacted to any great extent by rostering 11 or 12. It is only if that shift impact goes above the agreed score of 90 that it would need to be addressed in the daily roster. It would be a case-by-case basis.

PN243

Thank you, Mr O'Brien. If I can just take you to paragraph 5 of your affidavit, you mention there that you are regarded as an expert on rostering within Coal South?---Yes.

**** BRENDAN O'BRIEN

XXN MR TILEY

PN244

The question is withdrawn. My apologies. In paragraph 7, Mr O'Brien, you mention that you've not been able to analyse every employee during that time? ---For the cycle-out performance, no.

PN245

How much time have you had to prepare your analysis, Mr O'Brien?---Only a couple of days.

PN246

Can you tell the commission why it is that your sample commences at employee Mutch?---It commences at Driver Mutch because it was just a selection of roughly a third of the depot based - picking a point of starting. There was no cherry picking, it was just that was a starting point, and moved on from there.

PN247

In your opinion, the sample you provided - the third of the workforce you've analysed - is representative of the entire workforce?---I would suggest, yes.

PN248

So you haven't chosen a sample, Mr O'Brien, that represents lower working hours across the cycle?---No.

PN249

In paragraph 10 of your affidavit you say that the master diagram for this group has diagrammed an average of 310 hours. That paragraph there, Mr O'Brien, can you see that paragraph?---Yes, I can.

PN250

You will recall moments ago we discussed that the diagram contains 318 hours? ---On average, yes.

PN251

How does that reconcile with paragraph 10 of your affidavit, Mr O'Brien? ---Because if you look at the sample taken, the total diagram hours that were across the 18 weeks of the sample is the second-last figure in the column. Even when that's weighted back to an eight-week average for the people in the sample, it came out at 310. So that figure could be variable. Another sample might come out at 314, but this particular sample - and not because it was selected for that, because it was an unknown quantity until we looked at the final figure - came out at 310.

**** BRENDAN O'BRIEN

XXN MR TILEY

PN252

But if the master diagram contains 318, and this sample is 310 and your other sample is 314, then obviously the third sample would be significantly greater. Is that correct, Mr O'Brien?---There would be areas where that would be greater and lower because no week is an exact 40-hour week due to the fact that some weeks have more days off than others. So in some weeks we can only put three shifts in, and others we can put in four or five. We only work on getting to an average figure. There are some higher, some slightly lower. The average figure is the final based on the total 156 or whatever people it is in the depot.

PN253

But in paragraph 10, Mr O'Brien, are you talking about the number of hours that they've worked or the number of hours they were rostered to work in the master diagram?---The number of hours that the diagram for which they went through in that 18-week period averaged.

PN254

Given your evidence that the average in the master diagram is 318 - - -?---That's in evidence from the - my actual recollection of the diagrams was it was slightly lower than that. I thought the average was around 314, actually, but I'm not going to argue about that.

PN255

I put it to you earlier that it was 318 and you accepted that?---Yes, I accept that because I haven't got that figure in front of me. I just know that it was lower than 320.

PN256

If that average is 314 or 318, or whatever, this isn't a representative sample, is it, if this only says 310?---That's how this sample came out. As I said, another 46 people, the average may be slightly higher. I don't know. I haven't done those figures.

PN257

Thank you, Mr O'Brien. If I can take you to paragraph 16 of your affidavit, please, Mr O'Brien - - -?---Yes.

**** BRENDAN O'BRIEN

XXN MR TILEY

PN258

- - - you depose to the fact that the balance of - paragraph 16 is about the available shifts in the master diagram?---That's right.

PN259

Can you tell the tribunal, please, what percentage of shifts in the Bluff master diagram are available shifts?---The target in our workforce plan is 19 per cent. We rarely achieve that. The Bluff outcome is approximately 16 per cent.

PN260

Thank you, Mr O'Brien?---That's 16 per cent of the total depot string.

PN261

Paragraph 20 of your affidavit, please, Mr O'Brien. It is in evidence from Mr Williams that you had discussions with him in and around October 2009 when you were constructing that master diagram that went to matters including the shift lengths for Bluff. Do you recall those discussions?---I recall some discussion on shift lengths, yes.

PN262

I might be able to short-cut this a little bit for you. Have you seen Mr Williams's affidavit, Mr O'Brien?---I know there was a question or discussion around 11-hour shifts being inserted in the diagram.

PN263

Do you recall Mr Williams inviting Queensland Rail, or you as Queensland Rail's representative, to include 11-hour shifts in the roster for the Lake Vermont route?
---Yes, and the information that we have - - -

PN264

And you recall - - -?--- - - - for the crewing plan has the maximum shift length at 10 hours. It is not my brief to insert a known working of anything outside the crew plan or to significantly alter what's in the crew plan. So my reply would have been along the lines that the crew plan says a maximum of 10 hours, and shifts eight, nine, 10, and that's what we'll be inserting as the known working in the master roster.

**** BRENDAN O'BRIEN

XXN MR TILEY

PN265

If you can just please try to limit your questions to yes or no for these couple, Mr O'Brien?---Some of them need a little bit of explanation. The conversation is basically - only a known working has a designated shift length. They need to clarify that the 11-hour discussion was on inserting a known working at 11 hours. There were no known workings in the crew plan provided to us that had 11 hours, so I'm not in a position to create a job out of nothing.

PN266

So to clarify, Mr Williams invited Queensland Rail to put 11-hour shifts in for Lake Vermont, didn't he?---As a known working.

PN267

Yes. And Queensland Rail did not accept that invitation?---No, because in the crew plan we were given - - -

PN268

That's fine. I've heard your evidence on that, thank you. Did you advise Mr Williams that the reason why you weren't able to put that in is because that wasn't your brief or you didn't have those instructions?---That's right. My instructions are to put the work in as per the crew plan.

PN269

But did you tell Mr Williams that the reason why you weren't putting that in is because you didn't have the authority to do that?---I imagine I would have said something along those lines, that's right.

PN270

I put it to you, Mr O'Brien, that in that discussion with Mr Williams your comment to him was that the maximum shift length for Bluff is 10 hours, and if you need 11 hours, Queensland Rail will use clause 56.2.2 to get that extra hour. Do you recall saying that?---I don't actually recall saying it, but that's correct. If there is some reason why there's a delay in service to their train they have that capability.

PN271

**** BRENDAN O'BRIEN

XXN MR TILEY

But you didn't qualify the comment about the maximum shift length for Bluff being 10 hours, did you?---Not that I recall. It was my recollection - - -

PN272

Thank you, Mr O'Brien?--- - - - there was discussion including a known working. I had no known workings in front of me that suggested 11 hours so there was no reason for us to insert a phoney or made up known working. The known workings were there in black and white.

PN273

But during those discussions Mr Williams also told you that Lake Vermont would not be able to get done in 10 hours, didn't he?---He suggested that it was cutting it fine or something along those lines.

PN274

And - - -?---And maybe it is, but that's what the scheduling tool and the running times told us, that the maximum shift length, sign-on to sign-off, in the known workings of the crew plan was nine hours and 55 minutes, which we rounded to 10.

PN275

In response to Mr Williams's suggestion that the Lake Vermont run was cutting it fine in trying to do it in 10 hours, you said, didn't you, Mr O'Brien - you said that, "The CTP is the CTP and the maximum shift length for Bluff is 10 hours"?---The maximum shift length in the crew plan we were given in the known workings was 10 hours.

PN276

But you referred to the CTP, didn't you?---The known workings are crew planner taking off a CTP. The CTP shift lengths are actually cycle times from port to port, which are more like 25 hours. The crew plan is a component of that timetable.

PN277

Yes, but again, with respect, Mr O'Brien, you're not answering my question - - -? ---The crew plan for Bluff to Lake Vermont from my recollection from sign-on to sign-off was deemed to be nine hours and 55 minutes. You don't put in anything other than a rounded figure to the hour or half-hour so those shifts were put in at 10 hours.

**** BRENDAN O'BRIEN

XXN MR TILEY

PN278

But in response to Mr Williams's question about the Lake Vermont run, cutting it fine, do it in 10 hours, yes or no, did you say, "The CTP is the CTP"? Did you refer to the CTP in your response?---I can't recall.

PN279

Okay, that's fine. Thank you. Just a final question, Mr O'Brien: we've discussed that the master diagram came out at - I think, to use your words - somewhere between 310, 320 hours. I put it to you that it was 318; Mr Williams says 318. You say 314?---That's my recollection. I haven't got those figures - - -

PN280

That's okay. That's fine?---I know it was several hours less than 320, on average.

PN281

The reason why it was calculated at that figure was because the agreement prescribed an average of 320 hours, didn't it - doesn't it, sorry?---Well, that's our target. Our target is always to have an average of 320 hours in the master diagram.

PN282

Yes. But the reason why that figure came out at 310 rather than 320 something is because of the agreement. Correct?---I don't quite understand that question. I just know it was done on the evaluation of the known working shifts plus an estimated average of the available shifts, and that was the outcome. Our target is 320. I don't recall anything that we tried to make it necessarily exactly in line with the EA.

PN283

Sure. But the reason why your target is 320 is because of the provisions of clause 66, isn't it, Mr O'Brien?---Yes, that's - the EA says that the target in the master roster is 320 hours on average - - -

PN284

Because the agreement, Mr O'Brien, says, doesn't it, the number of shifts in each roster cycle must reflect the number required to achieve the average hours required for that cycle?---Yes, and that's why we target 320.

**** BRENDAN O'BRIEN

XXN MR TILEY

PN285

That's right. So if you were to have done a master diagram which came out at 325, then that wouldn't comply with clause 66.2 which I just read to you, would it?---No, technically no. It's over 320 so the target would have been exceeded.

PN286

Thank you, Mr O'Brien. Just one final question I have for you - my apologies it's a bit out of sequence. But back to our discussion about your conversation with Mr Williams regarding the Lake Vermont route. He put it to you that the Lake Vermont route - it was cutting it fine to do that run in 10 hours. Yes? We discussed that: you remember that?---I recall some discussion along that line.

PN287

Yes. Okay. And after Mr Williams gave you that advice, did you take that back to your superiors within Queensland Rail?---I took it back to the planners. I suggest that the Lake Vermont run and some of the - actually some of the runs were potentially cutting it fine, but according to the shift planning tool from sign-on to sign-off, that was the capability in the plan.

PN288

So QR is more interested, Mr O'Brien in the shift planning tool than what the employees have to say. Is that correct?---I wouldn't say that. I'm not in a position to make a decision to suddenly change the plan. I am given plans to put into a master roster. I can only make suggestions myself.

PN289

But it's immaterial, Mr O'Brien, whether you had the power to make that decision, because you took the information back to those who had the power to make the decision, didn't you?---Yes, and the decision at the time - - -

PN290

And they didn't make the - - -?--- - - - was that those shifts would be within those hours.

PN291

So it's immaterial what authority you had on the day, isn't it?---I guess it is, yes. I couldn't make the decision anyway. That's right.

**** BRENDAN O'BRIEN

XXN MR TILEY

PN292

You might not know the answer to this, Mr O'Brien, so don't hesitate to say if you don't. Those to whom you took that information within the planning team, are they former drivers, Mr O'Brien?---Some are.

PN293

The individuals whom you advised?---Yes.

PN294

Okay. I've nothing further, Mr O'Brien. Thank you?---Okay. Thank you.

PN295

THE COMMISSIONER: Mr O'Brien, it's Commissioner Asbury. Can you just explain to me where you say "shifts are fatigue scored" - - -?---Yes.

PN296

- - - can you just explain that process?---We have what they call the FAID 2 model.

PN297

Sorry, the?---The FAID 2 model.

PN298

Yes?---It's a software model that calculates - does an analysis on shifts to give a fatigue-related score. It's actually based on the sleep opportunities, I'm told. It's quite a complex piece of software. But what we basically do is enter the start time, end time of the shift and build a profile of the roster and analyse it, and it gives us an individual score for each shift, and we assess - if there are any shifts we deem that go over the score of 90, we address that in the master roster.

PN299

This might sound like a silly question, but isn't it people who get fatigued instead of shifts? Like how - - -?---I beg your pardon?

PN300

Isn't it people who get fatigued, rather than shifts?---Yes, it is, but a master roster at that stage is an anonymous roster. There's no names on the master roster at the stage where we create it. So all we can do is say that - wherever I start in that roster, if I were the employee who worked week 17 to week 25, what would be the outcome based on the shifts we've got in that roster? So we assess the whole

roster from top to bottom and see if there's any scenarios in there where wherever I work through that roster I could build the potential of in excess of 90 as the fatigue score.

**** BRENDAN O'BRIEN

XXN MR TILEY

PN301

Then what's the process for looking at the fatigue of individual employees?
---That's done when the daily roster is compiled. Each day they compile - like, today being Monday, they would have posted Wednesday's roster today.

PN302

Yes?---They run that roster - prior to finalising it and posting it, they put that roster through the same model. It's actually done through a BrioQuery and transferred into the FAID 2 to ensure that no-one on that posted daily roster is outside the fatigue guidelines that they're given.

PN303

Okay. So they then look at the individual and what they work?---That's right. That's when the individual comes - because the individual at that stage, they know what he's actual - what the driver - - -

PN304

What he's actually worked?--- - - - actually did.

PN305

Yes, I understand. All right?---For example, some drivers may have worked additional working, some drivers may have had some leave. It might not be totally in line with the master roster.

PN306

Okay. So it's a two-phase approach. One is you analyse the roster and then the next one is you analyse the people that are going to then work those shifts?
---That's correct.

PN307

Now, with respect to this, when we talk about "known workings" - - -?---Yes.

PN308

- - - how long does a shift have to be a certain duration before it can be said to be a known working? Define "known" for me?---Yes. A "known working" is a shift that we anticipate that we will run on quite a regular basis at that time on that day. So if I say that I've got a 310 sign-on shift for nine hours on a Monday morning and that is in the plan on a regular basis and I anticipate that under normal operating circumstances I'll require that 310 shift to run for nine hours on a Monday, that's a known working.

**** BRENDAN O'BRIEN

XXN MR TILEY

PN309

But what does it take to transform - as I understand it, available shifts are used for workings that are not known at the point the - - -?---That's to cover vacancies.

This roster will have vacancies, in that people will be on leave and off ill and training and all types of things.

PN310

Yes?---So those vacancies have to be covered, and when a daily plan is put together there is pretty well always variations from the master plan - that is, ad hoc working, if you like, for lack of a better term. There's altered workings and additional workings and the available shifts are required to fill all the contingencies to make that daily roster happen on the day.

PN311

When does something stop being a contingency and start being known?---When it is something that happens consistently at the same time on the same day for the same shift.

PN312

Well, how many weeks does a train have to take 11 hours instead of 10 hours to get from point A to point B before someone will say, "Well, that's stopped being a contingency and it's started to be a known working for the train"?---When the people who develop the longer term plan see that that's a requirement and see that that's becoming part of the longer term plan, they would then want that as a known working.

PN313

Okay. So it's really up to whoever's developing the master plan to decide it's happened so many times it's a known working?---Well, the development of the master plan is, I guess if you like, an evolutionary process and, although this isn't my role, they develop the plan in line with the customer orders, the requirements, the known restrictions to the network rolling stock, et cetera, that may happen, and that plan may vary from plan to plan. This particular plan that we were given for the master roster this time around in Bluff contained a variety of shift lengths from somewhere around six hours to nine hours 55. Obviously, the six-hour shifts we made eight hours, because that's the agreement at the end of the day. A plan next time may contain a number of shifts anywhere in the range from six to 11. The way I think the plans are looking is that next time there may well be a requirement for no workings to be in excess of 10. That's up to the plants. They will give us that information when they've formulated their plans.

**** BRENDAN O'BRIEN

XXN MR TILEY

PN314

Okay. You can agree or disagree with this proposition. There tends to be a rainy period of the year, and a period of the year when it doesn't rain. Is that the case at Bluff?---That's true, yes. We definitely have a wet season in central Queensland - wet and dry seasons.

PN315

Does the wet season pretty much happen at a certain time every year?---From my knowledge on that, February seems to be one of the wettest months of the year.

PN316

Right, and that was the case this year?---It was a particularly wet year this year.

PN317

Yes, okay. All right. Anything arising from that, Mr Tiley?

PN318

MR TILEY: Just a moment, Commissioner, please.

PN319

Yes, just a couple of final questions for you, Mr O'Brien. Are you familiar with the document that is published to the workers at Bluff, that summarises the track delays?---No, I'm not.

PN320

Okay. Nothing further, Mr O'Brien, thank you.

PN321

THE COMMISSIONER: Ms Aitken, would you have any cross-examination?

PN322

MS AITKEN: Yes, I do.

<CROSS-EXAMINATION BY MS AITKEN

[5.21PM]

PN323

MS AITKEN: Good afternoon, Mr O'Brien?---Good afternoon.

PN324

Are you aware of clause 66 of the agreement?---I haven't got the agreement in front of me. Is that the - - -

**** BRENDAN O'BRIEN

XXN MS AITKEN

PN325

It's the roster management provision?---Okay. I would have read it, but I haven't got an agreement. I'm not in my office, but anyway.

PN326

In the Bluff master diagram, are there any available for duty shifts in excess of 10 hours?---I beg your pardon?

PN327

In the Bluff master diagram - - -?---Yes.

PN328

- - - are there any available for duty shifts in excess of 10 hours?---The estimated shift length on availables is set at nine, actually, for calculation of cycle hours. It's just taken on basically, okay, these are all the workings that we're putting in. What's a rounded estimation of the average shift length there, and it was, you know, rounded to nine. That was agreed. It was deemed to be a reasonable estimation of an average shift length, because the availables are not put in at, you know, like, this available will be eight, this available will be 10, this one will be 11, because if we knew that, they'd become a known working and then to save everyone problems, we'd put them in as a known working.

PN329

So the answer is "No", Mr O'Brien?---No. The average is nine.

PN330

Okay. Where in the agreement do you believe it allows to roster shifts in a daily roster in excess of the coal train plan?---In the provision of limitation of hours for crew configuration.

PN331

So it states in there that you can actually roster the daily roster in excess of the coal train plan?---The TDO configuration for coal crews - - -

PN332

MR HEENAN: Commissioner - - -

PN333

**** BRENDAN O'BRIEN

XXN MS AITKEN

THE COMMISSIONER: Sorry.

PN334

MR HEENAN: Sorry, Commissioner - - -?---- - - is between eight and 12 hours on half-hour increments.

PN335

THE COMMISSIONER: Mr King, sorry - sorry, Mr O'Brien, we've got an objection. Yes, Mr Heenan.

PN336

MR HEENAN: Commissioner, we've had a number of questions about interpretation of the agreement and, with respect, that's not the role of this witness to interpret the agreement.

PN337

THE COMMISSIONER: Well, if it's not his expertise, he can say so, but he seems to know about the agreement, Mr Heenan. He's answering the questions without apparent difficulty, so I'll let him.

PN338

Mr O'Brien, if it's not your area of expertise, you can say so, but if you can answer the question, if you wouldn't mind answering it?---I've answered the question in line with what I was asked, as I see it.

PN339

Yes?---Definitely I didn't write the enterprise agreement - - -

PN340

Yes?--- - - - and I wouldn't profess to be an expert on the enterprise agreement, but I was asked what provision allowed us to roster people in excess - or at what shift length, and that spells out the TDO shifts for coal crews are to be between eight and 12 hours on half-hour - - -

PN341

MS AITKEN: That wasn't my - - -?---It probably doesn't specifically say that's allowed, or for master or I don't know. The wording is based on limitation of hours by crew configuration.

**** BRENDAN O'BRIEN

XXN MS AITKEN

PN342

The question was, Mr O'Brien, where in the agreement do you believe it allows roster to roster shifts in the daily roster in excess of the coal train plan?---My belief is it would be under the provision of limitation of hours in that table. That's my belief.

PN343

Can you refer to a sentence where it states that?---No. I haven't got it in front of me, but my recollection is it's a table that gives the limitation of hours based on crew configurations for coal crews.

PN344

Okay, because I've got the provision in front of me, and it states nothing in there that actually says that you can roster in excess of the coal train plan?---Okay. I don't know. Does it say that we must roster in provision to the coal train plan? I don't know. You're getting out of my level of expertise. That to me is the area where I believe it relates to the ability. I really haven't got anything further to add to that.

PN345

Okay. Thank you, Mr O'Brien?---Yes.

PN346

THE COMMISSIONER: Re-examination, Mr Heenan?

PN347

MR HEENAN: Thank you, Commissioner.

<RE-EXAMINATION BY MR HEENAN

[5.26PM]

PN348

MR HEENAN: Good evening, Mr O'Brien?---Good evening.

PN349

Now, Mr O'Brien, you were asked a number of questions about available shifts in the master diagram. When are available shifts set?---Available shifts are set when the daily roster is compiled. The available shifts are basically what's left after all the known workings have gone into the roster. Wherever there are days or shifts required that don't have a known working, they become available. The target is to make those as viable as possible, so that we have availables that can basically commence a shift at any part of the day through the structure, to cover all vacancies which occur at any time of the day. Those available shifts are given a designated sign-on and shift length when the daily roster is compiled, not before.

**** BRENDAN O'BRIEN

RXN MR HEENAN

PN350

Thank you. Just a moment, Commissioner.

PN351

You've also been asked a number of questions about the so-called limit of 320 hours. It would be acceptable in your view, wouldn't it, that the master diagram would go over 320 hours in some eight-week cycles?---We average to target 320 hours, and there are some variations from week to week on those, for

the reasons I've given. No week contains the exact number of shift capabilities. Some weeks there's only capability to work three shifts; others there may be capability to work five. So obviously there's going to be some discrepancies week to week. The overall target is what the whole 152 weeks in the case is likely to come out as an average, and the target for that is 320.

PN352

The effect of your evidence-in-chief, Mr O'Brien, is that there aren't any employees or very few employees that actually hit 320 hours in any eight-week cycle?---That's correct, and there's a number of reasons why the actual working is reduced from what's anticipated in the master roster.

PN353

Thank you, Mr O'Brien. That's all.

PN354

THE COMMISSIONER: Thank you, Mr O'Brien, for giving your evidence. You're excused?---Thank you.

<THE WITNESS WITHDREW

[5.28PM]

PN355

THE COMMISSIONER: Okay. Ready to make submissions?

PN356

MR TILEY: Yes, thank you, Commissioner.

PN357

THE COMMISSIONER: Thanks million, Mr Tiley.

PN358

MR TILEY: Can I perhaps start by asking, Commissioner, whether you've had the benefit of reading the outline that - - -

PN359

THE COMMISSIONER: Yes.

PN360

MR TILEY: - - - we filed?

PN361

THE COMMISSIONER: I hope.

PN362

MR TILEY: Okay. Am I therefore safe to assume you don't need me to traverse in any detail the matters that are in that, and you would rather that I simply addressed the matters that have arisen this evening?

PN363

THE COMMISSIONER: No, I think I'd prefer you to go through the written submissions, because I might have some questions as you do. I don't need you to read it out, but - - -

PN364

MR TILEY: No, of course.

PN365

THE COMMISSIONER: - - - if you could just address the provisions of it.

PN366

MR TILEY: Of course, Commissioner. I certainly prefer that approach myself. If I just perhaps start off the bat, Commissioner, by drawing your attention to the fact that exhibits RTBU2 to 5 of that outline are certainly extrinsic material.

PN367

We say that material is - and I don't think there's any dispute between the parties about this, I'm sure, because we'd very quickly hear if there is; but that there's ambiguity about the meaning of this clause and therefore, in the event of that latent ambiguity, extrinsic material is relevant to your determination of the matter.

PN368

In any event, if I can just hand up to Carolyn, please - I've got a copy of the decision of Ives DP in AWU v Visy, which outlines the relevant principles for interpreting industrial instruments, with which I'm sure you're very familiar. I've highlighted paragraphs 11 to 14 in that for you. I don't know that you need to necessarily read those at the minute, simply to highlight that the final two points in paragraph 12, being (d) and (e), say that:

PN369

In interpreting industrial instruments, the court or tribunal should strive to give effect to the intent of the parties.

PN370

And finally that:

PN371

Resort to extrinsic material does not depend on the existence of ambiguity.

PN372

In any event, we say there is ambiguity here but even if, on the face of the agreement, there was no ambiguity, if the extrinsic material itself gives rise to ambiguity then this decision, we say, is authority for the proposition that you can consider that material. I'll come to that material shortly. I just want to deal with that as a threshold issue.

PN373

The evidence that the RTBU has provided primarily - the commonality between the two affidavits is that neither of the RTBU's representatives understood the clause to mean what the respondent now says it means. They are in roaring agreement that was not the intention. That's in both their affidavits and I'm certainly not seeking to cast any negative aspersions upon the material that's been provided by the respondent, but it is of course the case that there's been no evidence led to refute that that was the intention during the agreement.

PN374

The affidavit that Mr Williams has provided to assist you goes in some detail to the CTP and the master diagram for the Bluff depot. Now, the roster committee at the Bluff depot comprised some RTBU representatives and some AFULE representatives. They were provided with a document in early October which, it is in evidence from Mr Williams, was described as a coal train plan. They were then provided a revised document, and Mr O'Brien has confirmed this, which was

described as a revised coal train plan. Those documents are exhibit RTBU6 and 7 to our outline.

PN375

It's very important, Commissioner, that we revisit the evidence of Mr O'Brien in this regard because the relevant clause, clause 66, which by the bye is RTBU1 to that outline, says that:

PN376

Each master diagram will align with operational requirements based on the relevant master train plan, coal train plan or other master plan.

PN377

We have heard evidence from Mr O'Brien which arguably casts some doubt as to what documents RTBU6 and 7 in fact are, whether they are coal train plans or crewing plans or something else. Commissioner, we submit that you can resolve that matter quite easily by reference to the final words in the first bullet point in 66.1.2, those words being "or other master plan". Mr O'Brien conceded that, for the purposes of clause 66.1, the document they were provided was within the expression "or other master plan". So even if it wasn't a coal train plan, so described, which we submit it was - even if it was only a crewing plan and that was what the master diagram aligned to, that is the relevant document for the purposes of determining shift lengths. Now, you'll see when you have a look at those documents that it is oriented on the shift lengths of eight, nine and 10.

PN378

You've heard obviously evidence that the parties were conspicuously silent about the difference between available and regular shifts and Mr O'Brien I believe gave evidence-in-chief that he didn't discuss the fact that available shifts were - he did not include available shifts in those shift lengths. What is also in evidence is that he did not exclude those shifts from the shift lengths. To expand from that, Mr Williams and the RTBU's diagram committee certainly understood that they were. So the silence of the parties on that issue does not advance the matter, we submit, and that's quite unfortunate, but that it was not mentioned by Mr O'Brien is - that's all that can be drawn from that.

PN379

Certainly, the intent of the RTBU representatives at the table, if you like - or the understanding was that those available shifts would eight, nine and 10 hours and we submit that if available shifts were to be an exception, then that should have been said. The reason why it should have been said, Commissioner, is that in our submission nowhere in the agreement, specifically within clause 66, are there any words which expressly or impliedly exclude available shifts from the requirement to align to the CTP. If I can take you to RTBU1, please, clause 56.1.2, the second bullet point says:

PN380

The shifts in the diagram are to average 320 hours in each roster cycle.

PN381

That's the first part of it, so relevantly that doesn't qualify what sort of shifts. It then says:

PN382

Unless the ordinary hours are varied in accordance with clause 54.2 for a seasonal depot -

PN383

well, that's obviously not relevant here. We then go to 66.2 and we're told that:

PN384

The number of shifts in each roster cycle must reflect the number required to achieve the average hours required for that cycle.

PN385

The respondent has dealt with the average hours issue in isolation. They have said, "Average means average. Average gives us flexibility. We can go above or beyond 320." Now, we don't accept that submission but in any event the context in which those words appear in 66.2 is different to the context in which it appears - it has a different meaning in that context because of the word "must" by which it is preceded. It must align to that average. The word "average" is deprived of meaning, we submit, by the fact that that is a mandatory alignment with that figure as a maximum.

PN386

THE COMMISSIONER: Where's the word "must"?

PN387

MR TILEY: The word "must" is about the 10th word in, Commissioner, at 66.2, under the heading, Allocation of Shifts.

PN388

THE COMMISSIONER: Right, okay.

PN389

MR TILEY: Which is page 8 in my outline.

PN390

THE COMMISSIONER: Yes.

PN391

MR TILEY: Now, Commissioner, what we say about the matter is, as it's tried to observe, but the clause of the agreement doesn't include or exclude available shifts. We say that available shifts were to be outside of the status quo of regular shifts - if I can call it the status quo; that might be a bit of a crude summary. But in the absence of words saying that they were any different, why are they any different, we ask the question. And it is submitted by the RTBU that that hasn't been satisfactorily established by the respondent.

PN392

If we can then just stand a little further away from the agreement and have a look at the extrinsic material, Commissioner - if I can take you please, to start with, to RTBU2. This was, I am instructed, the fourth-last proposal that was put by QR during the negotiations regarding the agreement and under the heading, Set Shift Rosters, which is about halfway down the page, there is a bullet point there, and I've traversed in my submission the evolution of QR's proposals from 3 February through 5 February, 12 February and 19 February. If I can just have you please

read, Commissioner, that first bullet point in RTBU2 under the heading Set Shift Rosters. It's reproduced in a slightly different form in RTBU3.

PN393

THE COMMISSIONER: Yes.

PN394

MR TILEY: And the big change comes in RTBU4. RTBU4 includes the words:

PN395

Provided that the diagram will contain only three different operational shift lengths.

PN396

That is a drastic change, we submit, from the prior proposal. Unfortunately, Commissioner, I can't enlighten you as to the genesis of those words or what motivated QR to put that in, but that would be merely of narrative value, we submit, because the words there survived into the fourth and final proposal which is RTBU5, Commissioner.

PN397

Again, RTBU5 did contain some changes, which are in - in paragraph 23 of my outline I've sort of tracked those with some strike-through and underline, which may assist you when you come to consider the matter in more detail, but relevantly the words which first arose in the penultimate proposal, RTBU4:

PN398

The diagram will only contain three different operational shift lengths survived into RTBU5 -

PN399

The 19 February proposal, the final proposal -

PN400

on which the parties agree to then go away and discuss the draft and the agreement.

PN401

That is the last and the only relevant reference document for that issue - the rostering issue - in the negotiations, we submit. And I can say, Commissioner, from the bar table with certainty that the balance of this proposal - that this is the only part of that proposal that touches upon that issue. I've reviewed that material extensively.

PN402

We submit that the clause that currently sits in the enterprise agreement - collective agreement - is to be interpreted in light of this proposal. The clause was built upon, constructed upon, this proposal, because this proposal reflects what was agreed upon by the parties, not only in terms of the material content of the clause but the intent, Commissioner.

PN403

To go back to the affidavits that we've filed, Mr Williams and Moffitt each say that they participated in the whole of the negotiations, some 20 meetings each regarding - sorry, they were both at some 20 meetings regarding the agreement

where the rostering was discussed. They culminated in late February, early March, and in late March I believe the proposal - the draft was dated 27 March. QR has provided its draft of the relevant clause, which is now 466, and I'm instructed that that clause didn't change in any significant manner between the first draft and that which was ultimately certified and commenced operating in December of last year.

PN404

THE COMMISSIONER: So are you saying that because the master - that at Bluff the available shifts are in the master diagram at 9?

PN405

MR TILEY: No. What I'm saying is that the - the agreement says that shifts will align to the master CTP - sorry, master coal train plan or other master plan - - -

PN406

THE COMMISSIONER: Yes.

PN407

MR TILEY: - - - and that what the negotiations provided for was that at each depot there would be three shift lengths only. So that is why, Commissioner, after the coal train plan and the master diagram were developed premised on eight, nine and 10 hours - that is why QR cannot now have 11 or 12-hour shifts at this depot. It was their intent at the time of negotiating the agreement that there would only be three shift lengths. That much is reflected very clearly in that proposal, which was agreed to by our union, and certainly - I'm sure the AFULE would say the same.

PN408

THE COMMISSIONER: But to take that interpretation, you have to accept then that "the shifts" includes the available shifts.

PN409

MR TILEY: Exactly, and that's the second - I actually probably transposed the two. That's the second tranche of my argument, Commissioner, which I've addressed, which is that this extrinsic material and clause 66 itself does not exclude available shifts from the requirement to align.

PN410

THE COMMISSIONER: In fact, Mr Williams' evidence was, they're in the master diagram - - -

PN411

MR TILEY: Exactly, Commissioner.

PN412

THE COMMISSIONER: - - - at a nominal length.

PN413

MR TILEY: That's right, but - - -

PN414

THE COMMISSIONER: So you would say they're restricted to that.

PN415

MR TILEY: That's exactly what we say, Commissioner. I should also say, just to avoid any confusion, it is definitely the case that, when the master diagram was developed in relation to available shifts, Mr Williams's evidence - there's no secret about the fact that the nomenclature here is just slightly different. Mr Williams talks about - and Mr O'Brien confirmed this - that they were targeted at or averaged at nine hours and fatigued at 10. But Mr Williams's evidence also says that the reason why those numbers were reached was with reference to the content of the coal train plan.

PN416

THE COMMISSIONER: And the result of putting the shifts in the master diagram at 11 hours - if the Lake Vermont route was put into the master diagram at 11 hours, the result would be, people would come to work on less occasions during the roster cycle.

PN417

MR TILEY: That should be the result, yes, Commissioner. You will recall - and this certainly was said as an open remark, if you like - that the workers are prepared to do that, Commissioner. Mr Williams says in his affidavit - toward the back end of his affidavit where he says, if I can paraphrase, "We're pulling our hair out here. We've been trying to help QR and we're prepared to do the longer shifts if we can do less attendances and still work to our average of 320.

PN418

Mr O'Brien, Commissioner, conceded that, if that master diagram were to be targeted at 325 hours per cycle, that would be, in his words, a technical breach of clause 66.2 of the agreement. As I took you to earlier, 66.2 elevates the importance, we say, of the 320-hour average because of the word "must".

PN419

THE COMMISSIONER: But by its nature, the 320-hour average over eight - it's not over eight weeks, surely. It's a longer period than eight weeks?

PN420

MR TILEY: No, no, it's eight weeks, Commissioner, because they work a 40-hour week, on average.

PN421

THE COMMISSIONER: But to say that they're to average 320 hours in each roster cycle - doesn't that mean that the average can be taken over a longer period than eight weeks? What's the point of - - -

PN422

MR TILEY: I understand, Commissioner.

PN423

THE COMMISSIONER: Isn't it so that - because it goes on with a maximum of 2080 hours in each year. So doesn't that mean that the averaging can occur over a year rather than an eight-week - because if it's 320 hours in eight weeks, there's no basis for averaging, is there?

PN424

MR TILEY: Commissioner, our argument is not with the effluxion of hours between cycles. Evidently some cycles will be 315, some cycles might be 322,

but it is imperative - the respondent must orient its diagram to 320 as a maximum, otherwise they will inevitably go over 320. If this diagram, with its current number of attendances, was to include available shifts of 11 or more hours, then very quickly these employees would exceed 320.

PN425

THE COMMISSIONER: They might exceed 320 in a month, but they may not exceed an average of 320 over a longer period than a month.

PN426

MR TILEY: Commissioner, who can say? We can only speculate, and I don't think that advances the matter too far. The reality is that the shift length itself is not the problem, it's the flow-on consequences of that. To allay your concern that the employees are simply not being flexible about the matter, if that is your concern, you will recall it being discussed that: "Provide a new master diagram, provide a new coal train plan. Where we had the security over a longer term, we'll stick to, as an average, 320," and that is okay. But the concern of the employees is that at this rate they will get to 2080, they will exceed 2080, and, irrespective of the fact that that would then offer them additional remuneration, they would not have the ability to decline to do that and the respondent will stand here and tell you that that's reasonable overtime.

PN427

My instructions, Commissioner, are that the intent certainly of the RTBU at the time this agreement was settled upon was that the - that 66.2 mandated that that 320 was included in the master diagram as a maximum. Indeed, Commissioner, the parties' activities in relation to this master diagram reflect that intent.

PN428

THE COMMISSIONER: But, Mr Tiley, the point I'm making - and I'll make it again - is that the second dot point in 66.1.2 doesn't set a maximum of 320 hours in an eight-week cycle. What it says is that it is an average of 320 hours in each roster cycle, with a maximum of 2080 hours in a year. So what that means is, theoretically the roster could roster people in excess of 320 hours for some months of the year, provided that over the whole of the year they don't exceed the average of 320 per month or the maximum of 2080 in the year.

PN429

MR TILEY: I understand what you are saying, Commissioner, and why. Our interpretation of the agreement, which is founded in the negotiations, is that, yes, 320 - is that, when you read those two in conjunction with the firmer language of 66.2, that 320 number takes on a greater importance than that which is being attached to it by the respondent. That's my submission, Commissioner, and I won't flog a dead horse on that issue.

PN430

THE COMMISSIONER: Because if what was intended was that they could only work 320 hours in each roster cycle, you wouldn't need the word "average".

PN431

MR TILEY: That's right, Commissioner. The language of the agreement betrays the union's intention in the negotiations. That's my submission. Commissioner, can I - Mr O'Brien himself applied that interpretation when they prepared the

master diagram. Mr O'Brien himself today said, "Yes, that would be a technical breach of the agreement. The words do nobody any favours, Commissioner. That's the reality of this matter.

PN432

THE COMMISSIONER: Whether there has been a technical breach of the agreement, it's really not a matter for Mr O'Brien to - - -

PN433

MR TILEY: No, but I'm talking about the understanding - - -

PN434

THE COMMISSIONER: Yes.

PN435

MR TILEY: - - - that in QR's mind's eye it knows that the 320 is what it has to work to. If you were to determine in their favour and they were to get 11 or even 12-hour available shifts - heaven forbid - then that 320 would be exceeded or could be exceeded on a regular basis - - -

PN436

THE COMMISSIONER: Yes.

PN437

MR TILEY: - - - and the employees - and to conclude that point, Commissioner, I direct you to the end of Mr Williams's affidavit. He says that the employees are not prepared to do it. "I'm aware of at least six employees who will resign."

PN438

The delays, Commissioner - neither Mr O'Brien nor Mr King were able to justify, explain or speak to the delays in the track in any great detail. The reality is, Commissioner - and this much is clear from Mr Williams's affidavit, a man of over 20 years' standing as a QR employee - that the track is in poor condition and that is the fault of the respondent. That's what his evidence says. That was not contested today, Commissioner.

PN439

The delays are due primarily - there are several reasons and several of these appear in the affidavit of Mr Douce - but the primary reason for the delays is the poor condition of the track. That could be ameliorated or alleviated were QR to invest more money in track maintenance. That's what Mr Williams's evidence says.

PN440

If I can just take you now, Commissioner - having discussed what is at clause 56, the extrinsic material, and the evidence of Mr O'Brien, can I also just take you to the part of my outline where we talk about the reasons why, in our submission, you should determine this matter in favour of the applicants. I won't make too much of these issues because you've told me that you've read the outline, but on page 6 of the outline I mention three circumstances - I mention, in conclusion, some final arguments there, Commissioner.

PN441

There's nothing that has been put in evidence by the respondent which controverts the evidence of Williams or Moffitt or the AFULE evidence that the intended

meaning was that available shifts would also be within - would align with the CTP. So we submit that QR is trying to circumvent the agreed meaning of the agreement - the intended meaning of the agreement, and to get these extra hours.

PN442

Now, there are three circumstances, Commissioner, about which the workers are particularly aggrieved - and whether or not you're persuaded by them, I certainly would be a brave man if I didn't mention them to you this evening. The matter was brought on by stealth, we say. It was raised with Mr Zesson on a Saturday, and at that point it had not been raised with any official or representative of our union. Mr Zesson, of course, is a member of our union - and the background of the dispute is set out in rather fulsome detail in Mr Williams's affidavit. So we submit that that conduct by QR is unsatisfactory and should disentitle it to the relief that is sought by QR.

PN443

Secondly - although it appears as firstly in my paragraph 47 - the respondent was invited to include 11-hour shifts, including for the Lake Vermont route. It declined that invitation. What more can the workers have done, your Honour? They are simply seeking to hold QR to the agreed outcome. Finally, the route delays are, to a large extent, the fault of the respondent.

PN444

What we come here seeking from you, Commissioner, is a determination which gives effect to the bargain struck by the parties. The workers are not seeking to gain any more or any less than that. Indeed, they have made attempts to accommodate QR's concerns, because they don't want to see services cancelled either, they don't want to see contracts lost either, because ultimately, Commissioner, that would affect their livelihood too. But the matter has not been able to be resolved, because the understanding of the workers - sorry, the view of the workers about the correct meaning of the agreement is so unanimous - as evidenced in Mr Williams's affidavit of unanimous resolution being carried by those attending a union meeting last week.

PN445

THE COMMISSIONER: If you're right - - -

PN446

MR TILEY: Yes.

PN447

THE COMMISSIONER: - - - then QR can simply amend the coal train plan, can't it, so that it puts in an 11-hour shift?

PN448

MR TILEY: That's exactly correct, Commissioner, and you will recall we've invited QR to do so and we've tried to work with them to do so, provided that, as Mr O'Brien said, the 320 hours is worked to in the new diagram. QR's Mr O'Brien says, "That's how we do a diagram." If they do that, a diagram in that manner, with 320 hour shifts as a - so the shifts would then become nine, 10, 11 hours, I would have thought - there needs to be less attendances, Commissioner. That's the issue in the eyes of the workers.

PN449

If I can just have a moment, Commissioner. I just want to also raise three more matters, Commissioner, and then I'll hand over to the AFULE. In relation to Mr O'Brien's evidence, Mr O'Brien has appended to his affidavit something of an analysis, yet he did not - which he tells us was a representative sample of approximately one-third of the workforce. Mr O'Brien conceded that, whether 314 or 318, there was an average number of hours across the master diagram which is greater than 310.

PN450

The sample he provided, he says, has an average of 310. So we say that's not a representative sample and we're not prepared to concede that that's evidence of anything, given it is only a fraction of less than half of the relevant workers. It's in Mr Williams's affidavit that there's some 150 employees at Bluff - I believe it's 154, if I'm not mistaken - and Mr O'Brien's sample goes nowhere near that number.

PN451

Secondly, Mr O'Brien has revealed that any argument that - sorry, I'll go back a step. The argument will be made - or has been made by QR - that Mr O'Brien is only an expert in relation to a discrete area of rostering, and that it wasn't his brief - to use Mr O'Brien's words - to discuss the inadequacy or otherwise of the coal train plan. That's fine, Commissioner, except for two points: (1) Mr Williams says in his affidavit that at no point did Mr O'Brien advise the diagram committee members of any limit on his authority. He did not say, "I'm only here to represent QR in relation to this issue." He did not say, when subject to questioning by Mr Williams about the Lake Vermont route, "That's not my brief. I don't have those instructions." He simply took the matter under advisement.

PN452

Now, in any event, we say in the absence of that advice he had the authority - certainly ostensibly he had the authority - but that does not matter, given he has now given evidence to the fact that he took it back to QR's Coal South planning team and they weren't satisfied that it needed to be included. So it certainly can't be said that Mr Williams's invitation fell on deaf ears. It was remitted and ignored and QR has preferred to follow its program that dealt with the matter rather than listen to the concerns of workers, Mr Williams being a longstanding workplace representative at Bluff.

PN453

Finally, Commissioner, Mr O'Brien told us that he is not an expert in the relevant clause of the collective agreement, yet he claims, in his affidavit, to be regarded as an expert about rostering within QR. Without trying to cast any negative aspersions on Mr O'Brien personally, Commissioner, we certainly have concerns that if Mr O'Brien is so capricious in his language in his affidavit regarding his degree of expertise, certainly rostering - knowledge - being conversant in the relevant clause is, one would think, essential to being an expert in rostering. What that says about Mr O'Brien's relative familiarity with the requirements of the clause and in applying those is certainly a matter for some debate.

PN454

Unless I can assist you any further, Commissioner, with questions that you may have - - -

PN455

THE COMMISSIONER: Again, coming back to 66.1.2 - - -

PN456

MR TILEY: Yes.

PN457

THE COMMISSIONER: What, in this agreement, would stop QR from saying, "All right, we accept that at certain times of the year, because there's - I don't know, wet weather, degradation of the track arising from wet weather, we're going to program some 11-hour shifts into the coal train plan between Lake Vermont and Bluff or wherever", but some shifts in excess - they put them into the coal train plan and - - -

PN458

MR TILEY: Available shifts or regular shifts, Commissioner?

PN459

THE COMMISSIONER: No, they program them into the plan so they're not available shifts, they're no-one working, so they put them in for a couple of months at 11 hours, and in those couple of months the average goes over 320, but over the rest of the year the average is 320 hours. What I'm putting to you, Mr Tiley, is I cannot see where this agreement says that the maximum number of hours in each roster cycle is 320. What it says is it's an average of 320. I accept there's shift lengths and I accept there's got to be hours off duty between working, all of that. There are restrictions, I accept that, but I can't see where it says it is a maximum of 320 hours, because by using the word "average" it means the average has to be outside - it has to be over a period of greater than eight weeks or else what's the point of the word "average"?

PN460

MR TILEY: I understand precisely where you're coming from, Commissioner, and nobody here at the bar table can point you to the words which answer that question one way or the other. The authority or the support for my submissions comes from the clause when read as a whole and our evidence as to the intent of that clause and the parties' negotiations. I confess, Commissioner, that there is not a clause which alters the meaning of the words "average 320" to mean "maximum 320". What I can submit and have submitted is that our interpretation is that each roster cycle must reflect the number required to achieve the average hours.

PN461

The number of shifts under the heading Allocation of Shifts in 66.2, that's the number of attendances, Commissioner. So we're actually talking about how many times they come to work, not how many hours they do. In 66.2 - - -

PN462

THE COMMISSIONER: But there's a limit on that, isn't there? There's a limit of how many times they can come - somewhere I saw that.

PN463

MR TILEY: What must reflect the 320, Commissioner, is not the actual hours that are input for them in the master diagram; it's the number of times they come to work. And the number of times they come to work in this cycle is 33. That comes out at 318 as an average if they are not working 11 and 12 hours. If the

shifts became 11 and 12 hours at 33 (indistinct) the number of shifts would not reflect the average hours.

PN464

THE COMMISSIONER: That would depend on what you did with the rest of the year, wouldn't it, because it might.

PN465

MR TILEY: But - - -

PN466

THE COMMISSIONER: If the averaging is over a longer period than a month - - -

PN467

MR TILEY: No, Commissioner. If I can just take you to 66.3 in isolation from the rest of the clause - - -

PN468

THE COMMISSIONER: Yes.

PN469

MR TILEY: - - - unlike the 320 average which, as you say, can be calculated over multiple cycles, in 66.2 it is specific to that cycle because the words say "in each roster cycle". So that means, when they sit down to draw the diagram, they cannot put more than 320 in the master diagram. The diagram must reflect that average. That alone - that stands alone - is different to the rest of the clause because it's tied to the roster cycle itself and it's about that roster cycle, not the average. Do you follow?

PN470

THE COMMISSIONER: Yes, I do, but anyway - - -

PN471

MR TILEY: So we say quite simply if these shifts are going to be increased - sorry, if the duration of the shifts at Bluff are going to be increased, the proper way to do that and the only way to do that in accordance with the agreement is to develop a new coal train plan, align a new master diagram to that coal train plan, and that coal train plan must have no more than three operational shift lengths as was intended and agreed by the parties in negotiations, and again RTBU5 is the document where that is set out. So these lengths would then need to be, one would have thought, nine, 10 and 11 or even - - -

PN472

THE COMMISSIONER: What does that mean because it says these can be hourly or half - provided that the diagram will contain only three different operational shift length, plus a local shift length of eight hours or nine hours is designated for that depot, so does that mean four shift lengths?

PN473

MR TILEY: No. As I understand it, the local shift length, and I'm - - -

PN474

THE COMMISSIONER: What is that?

PN475

MR TILEY: I believe it's nine for Bluff - - -

PN476

THE COMMISSIONER: Yes, but what is it?

PN477

MR TILEY: - - - at the moment in this master diagram. So it effectively is the nominal or the median - sorry the mode time that the employees will work.

PN478

THE COMMISSIONER: So if it's nine, can it be - if that's nine hours, then can't they have three other operational shift lengths, because why is the plus there?

PN479

MR TILEY: Mr Heenan has just informed me that a local shift length hasn't been set for Bluff so - - -

PN480

THE COMMISSIONER: I don't know that that was there. I'm just looking back - - -

PN481

MR TILEY: Just so that I don't lead you astray, Commissioner, we have not said in our evidence that the local shift length of Bluff is nine hours. My non-Bluff train-driving understanding was that nine hours - but perhaps I'm confusing that with the average for the cycle which the 33 and the 318 has been premised upon. But, in any event, QR's position - QR's advice - is that no local shift length has been set. But what we say - - -

PN482

MR HEENAN: (indistinct)

PN483

MR TILEY: Do you want to explain that?

PN484

MR HEENAN: Commissioner, at Bluff there is no local working in the diagram.

PN485

THE COMMISSIONER: Okay. I just thought someone said there was.

PN486

MR HEENAN: In other QR depots we have what we call local working, but in Bluff in the construction and implementation of the master diagram there is no requirement for local working.

PN487

THE COMMISSIONER: So that you would say then that it's only three operational shift lengths?

PN488

MR TILEY: That's right, Commissioner. So where currently the lengths of eight, nine and 10 are prescribed, new lengths would need to be supplanted in their place of, for example, nine, 10 and 11. I should emphasise, Commissioner, that that is not the outcome which we are seeking. We are seeking that the current

arrangements of eight, nine and 10 - QR is held to those, if you like. However, in answer to your question of wouldn't that be what has to happen? Yes, that is what would have to happen. There would need to be no more than three new operational shift lengths nominated and they would need to - and we've gone through 66.2 - the number of shifts, the number of attendances would need to be reduced to that they align in that cycle to the average of 320.

PN489

THE COMMISSIONER: All right. And so your submission is that the intent was that the maximum in a roster cycle would be 320 hours?

PN490

MR TILEY: Those are my instructions, Commissioner. Hang on, I should - the maximum which would be included in a master diagram would be 320. However, we can see that on occasion there will be an effluxion which may - because obviously if you're rostered at 318 and five of your shifts are extended by an hour pursuant to 56.2.2, then you get to 322. Also, if you're rostered for 318 you can be signed off early and end up going to 315. What we say is the maximum that you can put in a diagram, because of 66.2, is 320. The average occurs after the master diagram is done.

PN491

THE COMMISSIONER: And I guess if you look at clause 54 where it talks about types of depots, it seems to suggest that a seasonal depot has the longer averaging period than a non-seasonal depot.

PN492

MR TILEY: That's right, Commissioner. There's the variation there in 54.2, but obviously we at Bluff - sorry, our members at Bluff - being non-seasonal depots, are not within the 54.2 category.

PN493

THE COMMISSIONER: Yes, but it's arguably indicative that there is a difference, that 320 - - -

PN494

MR TILEY: The difference between leave at different - where it's seasonal or non-seasonal?

PN495

THE COMMISSIONER: If there was an intention to allow you to average over longer periods than the eight weeks - - -

PN496

MR TILEY: 54.1 would say something different?

PN497

THE COMMISSIONER: Yes.

PN498

MR TILEY: Certainly. I'm more than happy to accept that submission, Commissioner, because it is correct. The meaning - and I don't mean to harp on the point - but the meaning of the average of 320 over an eight-week cycle totalling 2080 is much clearer when you look at it through the prism of the master diagram and the prism of 66.2. We are here talking about what goes in the master

diagram. The master diagram must - for each roster cycle, the number of shifts must reflect the number required to achieve. Okay? I won't - - -

PN499

THE COMMISSIONER: I understand. And so if the shifts are longer, then the number of shifts required to achieve it is fewer?

PN500

MR TILEY: That's right, that's right.

PN501

THE COMMISSIONER: And what do you say QR's options are if they don't - I mean, if it's found that the maximum is 10 hours and they need 11 or longer to get from Lake Vermont to Bluff, what do they have to do to achieve that?

PN502

MR TILEY: Commissioner, there's any number of things on my instructions that they could do. They could invest a lot more money in track-maintenance is the primary one I'm told. I'm, of course, no expert in these matters, but Commissioner, with all due respect, I don't think it's our responsibility to make those submissions. Those matters are solely within the contemplation and control of the respondent. The respondent's obligations are to comply with this workplace agreement and we don't care with all due respect to the respondent whether the track is underwater or not. They must do whatever it take to comply with the agreement. Their customer's requirements or their lack of investment in particular things is something which the workers can't be punished for. They must control those variables as best they can.

PN503

We can see in Mr Williams' affidavit that they are 30 drivers lighter than when the master diagram was done. You can see in Mr Williams' affidavit - I beg your pardon. That's in the submissions, rather than in the affidavit, because that information came to me after Mr Williams had deposed to those matters. I can only speculate about what impact, if any, that's having. Perhaps you might like to hear from QR about what impact the absence of those - - -

PN504

THE COMMISSIONER: You've got an affidavit about impact it's having.

PN505

MR TILEY: No. I hasten to add, Commissioner, my affidavits do not go to any consequence of there being less staff.

PN506

THE COMMISSIONER: No, QR's do. QR's have got the consequences of it - - -

PN507

MR TILEY: No. They don't talk about the impact of staffing on their current operational situation. There is no evidence of that. The submission I make is that there are some 30-less employees than when the master diagram was created. One would hazard a guess that that's a having an impact. I can't take the matter any further than that, Commissioner, from the bar table.

PN508

THE COMMISSIONER: Thank you.

PN509

MR TILEY: Do you have any further questions?

PN510

THE COMMISSIONER: No, thanks.

PN511

MR TILEY: Thank you, Commissioner.

PN512

THE COMMISSIONER: Ms Aitken.

PN513

MS AITKEN: Commissioner, I'd like to clarify a point or a question that you raised with respect to pointing to a clause which talks about 320 hours per cycle.

PN514

THE COMMISSIONER: Yes.

PN515

MS AITKEN: The clause that you read out, clause 54.1. says:

PN516

In non-seasonal depots each eight-week roster cycle will contain an average of 320 ordinary hours.

PN517

THE COMMISSIONER: Yes.

PN518

MS AITKEN: So our contentions of what that means is one week - the train crew have a guarantee of 40 hours a week or 80 hours a fortnight.

PN519

THE COMMISSIONER: Yes.

PN520

MS AITKEN: So one week they might work 45 hours, the next week 42, the next week 38, the next week 35, but at the end of the roster cycle it should be an average of 320 ordinary hours.

PN521

THE COMMISSIONER: So you're saying the averaging relates to within the eight weeks, not in excess of it?

PN522

MS AITKEN: Yes and I emphasise the words "each eight week cycle".

PN523

THE COMMISSIONER: Yes, I understand.

PN524

MS AITKEN: Clause 66.4.1 of the agreement states that set shifts were aligned to the coal train plan. QRNational Coal utilises set shifts in their master diagram, therefore the master diagram should align to the CTP. There appears to be no dispute between the parties with respect to the master diagram aligning to the CTP. What appears to be in dispute is whether QRNational Coal is available to roster

available shifts on the daily roster up to 12 hours. QR contends in their written submissions that this issue has arisen due to speed restrictions being imposed on the network and QR National Coal wanting to roster 11-hour shifts to accommodate these speed restrictions.

PN525

We acknowledge that the agreement is silent, with respect to whether QR National Coal can roster available shifts on the daily roster up to 12 hours, therefore we refer to extrinsic material. Mr Casey Douce did an affidavit. In point 9 of his affidavit it states that QR National Coal representative, Mr Warren Phillips, approached the unions with respect to negotiating provision in the agreement whereby train crew workings would align to the CTP. In his evidence, Mr Douce has stated that it was his understanding that the intent of the parties at the time of making the agreement was that QR National Coal would align both the master diagram and the daily roster to the CTP.

PN526

So for example, if an employee on an available shift is working the Lake Vermont route, that shift length should be 10 hours, as that's the designated shift length for the Lake Vermont route on the CTP. QR National Coal contends in their written submissions that this issue arose with respect to the recent flooding and the speed restrictions. Whilst the AFULE acknowledges the recent flooding has caused some damage to the network, which has resulted in the speed restrictions, there are other delays that QR National Coal are yet to address.

PN527

I refer to the affidavits by Mr Ogg and Mr Mitchell. Both Mr Ogg and Mr Mitchell have provided evidence that there are non-roster-related delays on the network. These are caused by one-on-one briefings, maintenance of track, drivers not being RAT-qualified, rolling stock reliability, control allowing northern trains to pass before Bluff trains and post-shift briefings. Mr King concurred today that there are other factors that are causing delays on the route besides the recent flooding.

PN528

Mr Mitchell has provided evidence in point 6 of his affidavit that in his opinion the CTP is correct, provided there are no delays either before train crew leave the depot, on route or no speed restrictions. It is the contention of the AFULE that QR National Coal are wanting the flexibility of rostering available shifts on the daily roster up to 12 hours, despite what is specified in the master diagram and the CTP, to compensate for these non-roster related delays. In closing the AFULE contends that the agreement is ambiguous as it is silent with respect to rostering availables on the daily roster. Accordingly, we ask the Fair Work Australia to consider the evidence provided by Mr Douce with respect to the intent of the parties at the time of making the agreement.

PN529

The AFULE contends that it was the intention of the parties at the time of making the agreement for both the master diagram and the daily roster to align to the CTP. So with respect to the Bluff dispute, we contend that this would mean QR National Coal only have the ability to roster available shifts on the daily roster as 10 hours, as per the CTP.

PN530

THE COMMISSIONER: Thanks for that.

PN531

MS AITKEN: Thanks.

PN532

THE COMMISSIONER: Mr Heenan.

PN533

MR HEENAN: Before I make my submissions, I suppose I should request that given Mr Tiley's reliance on Mr Williams' affidavit in his submissions, that Mr Williams be available for cross-examination.

PN534

THE COMMISSIONER: Do you want to cross-examine Mr Williams before you make your submissions or do you want to make your submissions and then revisit them in the event that something comes out in the cross-examination? We could try and get him. We'll just stand the matter down for a few minutes.

<SHORT ADJOURNMENT

[6.17PM]

<RESUMED

[6.32PM]

<MALCOLM WILLIAMS, AFFIRMED

[6.32PM]

PN535

THE COMMISSIONER: Hello, Mr Williams. This is Commissioner Asbury. How are you?---Hello, Asbury. How are you going?

PN536

Thanks for making yourself available this afternoon or this evening. Now, you've prepared an affidavit in connection with this matter?---That's correct, Commissioner, yes.

PN537

Have you got that with you?---I have, yes.

PN538

The affidavit was sworn on 13 April 2010?---That's correct.

PN539

And it has 95 paragraphs?---95. I think that's correct, yes.

PN540

To the best of your knowledge the contents of that are true and correct?---Yes, Commissioner, yes, most of it but a few dates might be a little bit iffy but, yes, no, to the best of my knowledge, yes.

PN541

Do you want to tell me where you think it might be a bit iffy?

PN542

MR TILEY: Perhaps I can assist there, Commissioner.

PN543

THE COMMISSIONER: Yes, sure.

PN544

MR TILEY: Mr Williams, if I can just take you - it's Luke Tiley from the RTBU of course. If I can just take you to paragraph 29 of your affidavit?---Hang on, mate. I'll just get there, eh. Just hold on. Yes.

PN545

In that paragraph you've made a typographical error and it actually should read 26 October 2009, shouldn't it?---Yes, that's correct, yes.

PN546

Okay. I believe that's the date discrepancy to which Mr Williams - - -?---Yes, okay, yes.

PN547

THE COMMISSIONER: Okay, Mr Williams, thanks for that. Now, what's going to happen now is Mr Heenan from QR is going to cross-examine you about the affidavit?---Okay.

<CROSS-EXAMINATION BY MR HEENAN

[6.34PM]

PN548

MR HEENAN: Good evening, Mr Williams?---How you going?

PN549

Thanks for making yourself available. Now, I'll take you to your affidavit?---Yes.

PN550

You talk about the negotiations for the agreement?---Yes.

PN551

Now, it's the case, isn't it, that during the negotiations for the agreement that there were no specific discussions about available shifts and nor were there discussions which indicated that available shifts would be limited by the other shifts in the master diagram?---No. Can you repeat that question, mate? I'm just - - -

PN552

Sorry, there were two questions. It's probably a bit difficult for you?---Yes.

PN553

First of all, there weren't any discussions about available shifts during the negotiations for the agreement?---There were general discussions, yes, but not wholly, solely around the available shifts. That's correct.

PN554

Secondly, there were never any discussions which indicated that available shifts would be limited to the other shifts for known workings in the master diagram? ---No, there were general discussions regarding that with a couple of the coal managers regarding, as it says in the agreement, that in a few of the draft issues where if we had three shifts in a depot, that would be the maximum shifts that we'd be rostered and that was inclusive of available-for-duty shifts.

PN555

Sorry, so where in your affidavit does it say that there were discussions with - - -? ---I think it was pretty broad in there. We said in general terms we discussed it. I didn't have any handwritten notes but it was a general discussion. There were a few meetings with Coal. It was a Coal issue obviously.

PN556

So it's the case, isn't it, that you had no conversation during the negotiations or no QR manager during those negotiations indicated to you directly that available shifts were to be limited by the length of the shifts for the known workings. That's the case, isn't it?---No, I wouldn't agree with that, no.

PN557

So where are they? Where are those discussions?---Mate, as I said, there were some general discussions with a few of the Coal managers. It was in broad terms. I'm not saying that we didn't have any notes or anything in there but because it was such a large issue and because the rostering was going to be - because the roster code of practice from the previous agreement was a massive document and it caused a lot of angst between both parties and, like I said, there was a lot of discussion over how that could be - you know, how that could be remedied and obviously 66 of this new agreement was a step in the right direction to try and fix that.

PN558

So you had a lot of discussions about it but you can't point to any discussions that indicated that available shifts would be limited by the other shifts in the master diagram - did you?---Mate, we had a lot of discussion about a lot of things that weren't documented in the duration - - -

PN559

I'm not asking whether they were documented. I'm asking you whether you had the discussions?---Where or when did we have the discussion?

PN560

Well, if you had the discussions and, if so, when?---As I said, there were a lot of discussions in - we drew up into a couple of groups - FAID and Coal specifically separated to try and fast track the agreement. We were separated into a couple of rooms with some Coal managers and a lot of those meetings were just off-the-cuff discussions to try and get some sort of resolution to take back to the meeting. Now, it wasn't only the rostering of shifts. We had a numerous number of meetings like that that were just off the cuff and trying to get some sort of level ground, if I could say that, to find out where we'd go with rostering and how we would improve the rostering and available-for-duty shifts and the maximum number of shifts were mentioned several times.

PN561

Yes, but what I'm putting to you is that available shifts were never limited to a length which was commensurate with the shifts for the known workings in the master diagram?---No, I don't think we ever, ever said they were going to be unlimited. As far as I was under the impression that we had those discussions, they were limited to and only three shifts per day, whether they were available shifts or regular shifts. There was never any discussion earlier in the piece under the withdrawal from the roster code of practice that we would separate those. That was going to be a bit of finetuning once we got to the final drafting of the document.

PN562

Yes, okay. Well, I think we might move on. I'll put that contention to you, Mr Williams. I'll take you to paragraph 43 of your affidavit?---Yes, 43.

PN563

Now, in paragraph 43 you refer to the revised QR proposal for the deal dated 19 February 2009 which says in bold, "Provided that the diagram will contain only three different operational shift lengths"?---Yes.

PN564

That didn't survive into the agreement, did it, Mr Williams?---Mate, there's a lot of stuff that didn't go through to the wording in the agreement and I think my learned colleague, Mr Paul Lucas, has said that numerous times at numerous meetings that during the drafting stages for some reason or other a lot of that wording didn't come across to the agreement and that's at no fault to QR and no fault of the unions. It was overlooked but the intent is the intent.

PN565

The intent from QR, and agreed to by the unions, was that we would have only three shifts in the diagram, and if that didn't transgress into the new agreement, then that's obviously a flaw by both QR and both unions. But, as we've said, the intent was clearly stated by QR in the early part of it - and the intent from the unions was to support QR - that we would have three shifts and three shifts only in the master diagram.

PN566

I put it to you, Mr Williams, that there was never an intention, when the agreement was struck, for there to be only three different operational shift lengths. There are many depots within QR that have up to five operational shift lengths. That's correct, isn't it?---I'm not aware of what the other depots do. I'm only working in Bluff, so I couldn't comment on the other depots.

PN567

Thank you, Mr Williams. Just one moment. In paragraph 53 of your affidavit - - -?---53. That's correct.

PN568

- - - you suggest it wouldn't be safe to work available shifts on the basis that it's contemplated - and that refers back to paragraph 52 of the affidavit?---That's correct. I don't believe it would be. If we're going to have a variety of 11 rostered work up to 12-hour shifts unless on the day of operation the shift roster clerk and the SDS - which is our bloke that obviously gives out the workings that we do on that day - if for some chance that I'm rostered 11 and work up to 12, and that's overlooked, I may accede my fatigue, which is a big thing from QR, but I don't accede my fatigue score at 90 - - -

PN569

Mr Williams - - -?---If it's not monitored closely, I believe we could breach our fatigue score, and yes, it's unsafe.

PN570

Mr Williams, you are aware that the daily roster is fatigue scored?---Mate, I've got incidents out here where QR management has been raised - - -

PN571

Mr Williams, can you answer the question?---Beg your pardon?

PN572

Can you answer the question. You're aware that the daily roster is fatigue scored, aren't you?---Yes, mate, and that still doesn't stop anyone from working in excess of a 100 fatigue score on the day of operation.

PN573

That's the question?---No, let me finish - and we're relieved in-route, on a train, because you haven't fatigued him at 90. He's got halfway through a shift and he's breached 100, so we've had to take him off the train. So don't tell me that we're fatigued on a daily basis.

PN574

Thank you, Mr Williams. Moving on to paragraph 57?---Yes.

PN575

Do you accept, in paragraph 57, that wet weather caused, or at least was part of the cause, for the poor track condition, don't you?---Yes, that's correct. Part of it.

PN576

That's the extent of my cross-examination, Commissioner.

PN577

THE COMMISSIONER: Thanks for that. Any re-examination, Mr Tiley?

PN578

MR TILEY: Just briefly, thank you, Commissioner.

<RE-EXAMINATION BY MR TILEY

[6.43PM]

PN579

MR TILEY: Mr Williams, Luke Tiley?---Yes, Luke.

PN580

You were asked about the shift lengths at other depots. Do you recall that?
---That's correct.

PN581

Can you tell the commission whether there's anything at all in your affidavit about the shift lengths at other depots?---Not that I can recall, no.

PN582

Do you know anything at all about shift lengths at other depots?---Only what goes on the rumour mill, mate. Whether they've got three, four, five diagrams, that's the only thing we can ascertain is they may have more than what Bluff has got. They may have less. I'm not 100 per cent sure on what goes on in the other depots.

PN583

Based upon your participation in the negotiations, what is your view about the number of shift lengths that there should be at other coal depots?---Mate, as far as I'm concerned - and I was under the impression, in the construction of our diagram, there would be no more than three.

PN584

Thank you, Mr Williams. Just a final question. In relation to paragraph 53 of your affidavit - -?---That's correct.

PN585

Are you back there now?---Yes.

PN586

Were you told that shifts are fatigued on a daily basis?---I was told they were fatigued on a daily basis. That's correct.

PN587

Is it the case that, despite the fact that they are fatigued on a daily basis, breaches of the fatigue principles do still occur?---They can and they do occur, yes, that's correct.

PN588

Thank you, Mr Williams. I have nothing further. Thank you for your evidence this evening?---Thank you.

PN589

THE COMMISSIONER: Thanks for giving your evidence, Mr Williams. You're excused?---Thanks for taking the time, Commissioner.

PN590

Thank you. Good afternoon?---Goodbye.

<THE WITNESS WITHDREW

[6.44PM]

PN591

THE COMMISSIONER: Mr Heenan, submissions. Sorry.

PN592

MR TILEY: I was just going to say that I don't need to make any further submissions after having had that, so I'm happy to - - -

PN593

THE COMMISSIONER: Okay. Thank you. Mr Heenan.

PN594

MR HEENAN: Thank you, Commissioner. I understand you've had the opportunity to read our outline of submissions.

PN595

THE COMMISSIONER: Yes.

PN596

MR HEENAN: I will take you through those. There has been evidence led today, and it has been accepted by all parties, in my submission, that, at least in part, there have been speed restrictions which have caused delays on the network. You've heard from Mr King that the restriction on shift lengths is having a significant adverse commercial impact on QR.

PN597

Commissioner, there have been a number of other submissions and matters placed in evidence by the unions - or the applicants, I should say - which obscure the real nature of the dispute. We've had some debate about what should or shouldn't go into the CTP. We've had some debate about what should or shouldn't have gone into the master diagram. The reality is that there is a coal train plan. There is a

master diagram which all of the parties agreed to and implemented in accordance with the agreement, and the master diagram contains available shifts.

PN598

You've heard it contended by the unions that available shifts should be governed by clause 66 of the agreement, and that because there are other shifts with known workings in the agreement that result in a maximum shift length of 10 hours that available shifts should be similarly limited.

PN599

The silence is deafening regarding clause 12 of the agreement. Clause 12 of course is the glossary, and it's instructive in this case. "Available" is a notation placed on the master diagram for a day no specific work has been allocated. A specific worker will be allocated on the formulation of the daily roster.

PN600

The reality is that clause 66 has no work to do in relation to available shifts. Available shifts are set by the daily roster. There is no other limit in the agreement, apart from the general limitations, on length of shifts contained in clauses 55 and 56 relating to available shifts.

PN601

One of the planks of the applicant's objection is that working available shifts above 10 hours will necessarily result in working above 320 hours. Well, Commissioner, our submission is that the agreement specifically contemplates working above 320 hours in any roster cycle and it's contemplated by the use of the term "average". I take you to clause 54.1, which we've already discussed. It also specifically provides for employees to work a reasonable amount of excess time, which is time above 2080 hours in a calendar year.

PN602

So there's nothing in the agreement that actually supports a contention that employees are somehow limited to 320 hours in any roster cycle. The agreement makes quite detailed provisions for employees to work over that figure in any one roster cycle. In fact it makes a quite detailed provision for employees to work over 2080 calendar hours in a year.

PN603

We've heard from Mr O'Brien regarding what employees are actually working. The clear evidence from Mr O'Brien is that it's only in very rare occasions that employees are actually ever working above 320 hours in any event on a roster cycle.

PN604

Now, there's no evidence apart from being led from the bar table from Mr Tiley that working some available shifts at 11 or even 12 hours would result in a breach of even 320 hours in any one roster cycle. Even if that were the case, our submission is the agreement specifically provides for employees to be working above 320 hours in some roster cycles at least. In fact, it specifically provides for employees to work above 2080 hours in a calendar year. Just to be clear, it's not our submission that working available shifts in the way we seek to work them would result in working above 320 hours regularly or would result in working

above 2080 hours in a calendar year. It's simply the case that the agreement specifically contemplates that outcome and provides a mechanism for resolving it.

PN605

One of the matters that's been referred to tonight and placed some store in is the safety effects. We've heard the statement that the shift lengths aren't really the problem, it's the flow-on effects that are the problem. Again, there are mechanisms in place to deal with that. The daily roster, which is where the available shifts are set, is fatigue-managed. If rostering an available shift to an employee at - indeed rostering any shift in a daily roster would result in a score that takes them above the fatigue management guidelines, they're simply not rostered for that length of shift. That is managed perfectly well by the fatigue management guidelines.

PN606

Again, it's been said that the language betrays the intention of the unions. It's been conceded in fact that the language doesn't accord with what the unions are contending the outcome of this arbitration should be. The reality is that the agreement was recommended to the members, it was voted on, and that's what we all work with. Again, there is no clause in the agreement that anyone has pointed to that limits available shift lengths. In fact, it would be an absurd conclusion in our submission that QR couldn't have even this small amount of flexibility in relation to what is a very involved process for the construction of the master diagram.

PN607

It's also contended that what should occur is that QR should go through a process of changing the CTP and then changing the master diagram. In the end it may well be the case that the CTP is changed. It may well be the case that the master diagram is consequently changed, but we don't avoid the issue which is here and we'll still have the issue of how we're going to roster available shifts. We say that available shifts are clearly for the purposes outlined by Mr O'Brien, which are to cover absences and to cover any altered or ad hoc or additional workings on the day of operation.

PN608

THE COMMISSIONER: See, that's what I'm grappling with, Mr Heenan. Even if that's right, isn't the argument that QR is using a provision that's meant to cover ad hoc situations that arise on a day-to-day basis to in fact cover what is an ongoing requirement?

PN609

MR HEENAN: If it's an ongoing requirement then that will be covered by the process which is contemplated by the agreement for the development of a new master diagram. We're not - - -

PN610

THE COMMISSIONER: But there's nothing compelling you to develop a new master diagram. If you can use these hours as your saying, that your only limitation is 12 hours and you can use them in the circumstances that you're using them, why do you need to develop master diagrams? You could just keep on rostering available hours at 11 or 12 - - -

PN611

MR HEENAN: It's a question of degree I suppose, Commissioner. I mean, there's only 16 per cent, as we've heard, available shifts in the master diagram. There are 100 per cent of known workings in the master diagram. It may well be the case, as I say, that we go through a process to change the master diagram. In fact, we've heard already at the conciliation on this matter that there is a new CTP under construction as we speak. I'm not quibbling that that is something that may occur, but the point is that available shifts offer flexibility which is simply not able to be accessed by changing the CTP or the master diagram. By the time you go through that process it's too late.

PN612

THE COMMISSIONER: But these aren't ad hoc things, are they? What's been happening is that regularly there are shifts being rostered of 11 hours between Lake Vermont and Bluff. Isn't that - - -

PN613

MR HEENAN: No, they haven't been rostered, that's the point. That's why we're in dispute.

PN614

THE COMMISSIONER: What is ad hoc about it? There's no time frame over which it all happened. Given that you're always going to be behind the eight ball with track maintenance, you're going to have a wet season. If it was being used because a section of the rail line was flooded and that would - or a tree was down or something like that, that would be an ad hoc occurrence, but when it's just an ongoing - - -

PN615

MR HEENAN: I suppose there hasn't been any evidence led from anyone that it is ongoing. This is a matter which we've always said is temporary. It may well be that speed restrictions are lifted. QR National Coal doesn't have control over the speed restrictions. QR Network Pty Ltd, which is a completely separate company, and ring fence in accordance with all of the Trade Practices Act obligations.

PN616

THE COMMISSIONER: When does something stop being ad hoc?

PN617

MR HEENAN: It's a question of degree, Commissioner.

PN618

THE COMMISSIONER: Yes, it is.

PN619

MR HEENAN: But that doesn't get away from the issue of how we roster available shifts. If it's not in this context it will arise in another context.

PN620

THE COMMISSIONER: If available shifts are supposed to be used on an ad hoc basis to cover daily circumstances that arise, then when do they stop being ad hoc?

PN621

MR HEENAN: We don't concede that it's limited to daily circumstances. We're simply saying the available shifts are defined and set by the daily roster. There's nothing in the agreement that says they're confined to ad hoc workings. We're simply proposing that that's how they've been used in the past, for altered or additional workings. We're not suggesting that it just happens on a day-to-day basis, but in this case it's arisen because of a temporary need on the track. Again, it's a question of degree, and I'm not sure whether there's - what you're getting to, perhaps, Commissioner, is that at one end there are known workings that we all know about and go into the master diagram as set shifts; at the other end are things that arise five minutes before the shift.

PN622

THE COMMISSIONER: The evidence of Mr O'Brien is historically available shifts have been used to - among other things:

PN623

Cover absences or cover any altered or additional workings due to requirements on the day of operation. Available shifts have been used in this way since I commenced working at QR.

PN624

MR HEENAN: That's right.

PN625

THE COMMISSIONER: It's one thing to use them in that way, but it's quite another thing - and if you get what you're asking for, what stops you from just having carte blanche to roster available shifts when and how you like to meet ongoing requirements rather than to meet things like absences or altered or additional workings due to requirements on the day of the operation?

PN626

PN627

MR HEENAN: There isn't anything that limits it in the agreement, Commissioner, but I suppose the issue is that putting the longer shift times into the CTP just takes too long to deal with a matter that's arisen in this case. We say that the available shifts provide the only flexibility in the agreement in relation to a matter like the one that's contributed to this dispute.

PN628

THE COMMISSIONER: Why does it take too long?

PN629

MR HEENAN: I think we've heard that the CTP is a plan - - -

PN630

THE COMMISSIONER: Yes.

PN631

MR HEENAN: - - - that covers the entirety of the network. It doesn't just involve QR National Coal; it also involves our competitors and the trains that they run on the network. There are various factors that come into play when developing a coal train plan and, as I said, it's under construction at the moment. There's a master diagram implementation process that takes a period of time. I

accept that that can be circumvented. However, at the moment we've got a coal train plan and the question is how we deal with available shifts, because available shifts aren't set by either the coal train plan or the master diagram as set by the daily roster.

PN632

THE COMMISSIONER: But realistically, if you wanted to change the coal train plan, it would take four weeks, wouldn't it - maximum?

PN633

MR HEENAN: Sorry, I - - -

PN634

THE COMMISSIONER: If you wanted to change the coal train plan, you have to give one month's notice, don't you?

PN635

MR HEENAN: Sorry. No, I - - -

PN636

THE COMMISSIONER: What notice do you say - I mean, why do you say it takes so long? Take me to where - - -

PN637

MR HEENAN: The coal train plan isn't something that's developed pursuant to the agreement.

PN638

THE COMMISSIONER: No.

PN639

MR HEENAN: The coal train plan is something that QR develops for its own plan.

PN640

THE COMMISSIONER: So why does it take long to change it? Like you said, it takes too long to change it to deal with the circumstances that have arisen. Well, the wet weather and the track degradation is still in place, isn't it, and it was in place at the time this dispute arose.

PN641

MR HEENAN: Mm'hm.

PN642

THE COMMISSIONER: So what are the time frames for changing the coal train plan? You said it takes too long. Why?

PN643

MR HEENAN: Well, the coal train plan is something that is a multifaceted document.

PN644

THE COMMISSIONER: Yes.

PN645

MR HEENAN: It's used for a number of things, not just the train crew plan which then results in the master diagram. It's used for rolling stock issues, it's used for a maintenance plan.

PN646

THE COMMISSIONER: But if you wanted to stick an 11-hour shift in it, between Lake Vermont and Bluff, what would take so long to just do a brief change to it on the basis that, "This is an ongoing issue rather than an ad hoc issue. We'll stick an 11-hour shift in it"? What stops you doing that?

PN647

MR HEENAN: Again - sorry - we're talking about the coal train plan. The coal train plan has a number of impacts across the business.

PN648

THE COMMISSIONER: Yes.

PN649

MR HEENAN: It's a process that takes some time to implement. The master diagram then - - -

PN650

THE COMMISSIONER: Yes.

PN651

MR HEENAN: - - - which aligns to the coal train plan has another process, a six-step process in 67.1.

PN652

THE COMMISSIONER: Yes.

PN653

MR HEENAN: So that will take at least - if you look at step 2, there's one month's notice with the proposed diagram; at step 3 there's 14 days to object; and then there's the steps which follow. So while I accept that that could be by agreement shortened, there's still the matter of the coal train plan which isn't developed pursuant to this agreement.

PN654

THE COMMISSIONER: Yes. Okay.

PN655

MR HEENAN: And the issue still remains on how we're able to roster available shifts.

PN656

THE COMMISSIONER: Okay.

PN657

MR HEENAN: It's also been conceded by the applicants in submissions that we are talking about what goes into the master diagram. This dispute is about what goes into the master diagram. With respect, that's misconceived. What we're talking about is something that doesn't - that isn't set by the master diagram. It's set by the daily roster. Unless there are any further questions, Commissioner, those are my submissions.

PN658

THE COMMISSIONER: All right. I understand your submissions. Thank you. Anything in reply, Mr Tiley?

PN659

MR TILEY: Yes, thank you, Commissioner. Only one thing of great substance but a couple of corrections which I'd like to make perhaps to some of the matters which we've been said to have conceded, and then after that we can discuss Mr Moffitt's affidavit and how to deal with that, Commissioner.

PN660

THE COMMISSIONER: Yes.

PN661

MR TILEY: The first point that I would make is that, in relation to the submission that there are commercial factors or exigencies that are weighing upon QR in this matter - and I believe that was a reference to Mr King's affidavit - Commissioner, that's not relevant to this dispute. What you are here to determine is: what is the correct interpretation of the agreement in respect of this proposed change? Nothing in the agreement makes those commercial matters a relevant consideration. Nothing that the employees - certainly RTU members - have done in this dispute is other than in accordance with their rights in the workplace agreement, and any effect that has on QR commercially is not a matter which is properly within, we submit, should be properly within your consideration when determining this matter.

PN662

In relation to the definition of "available" in clause 12, I'm greatly assisted by my learned friend Mr Heenan's words - "The silence by the unions is deafening" - because, Commissioner, those words are particularly pertinent here because the definition of "available" is used nowhere else in the agreement. The agreement's silence in respect of "available" is deafening. Clause 66 does not rely upon, does not pick up that definition of "available" and it is anomalous, it is obsolete and it is isolated. It does not have relevance, we submit, to your determination of this issue in relation to the construction of clause 66; that is, to the extent - I'll rephrase. Yes, there is a definition of "available" in the agreement. However, in our submission, in the absence of specific words in clause 66 that use that definition to put those shifts outside of the requirement to align, then it simply does not advance the matter. It is merely a definition and no more.

PN663

Mr Heenan has discussed that - has again placed stock in the so-called average of 320 and, with respect to him and the respondent, they have conflated again the issue, Commissioner, because there is - as I pointed out, there are two contexts in which 320 is used here. There is the average of 320 which is to be aspired to and can necessarily involve some fluctuation in the hours worked, and there is the clause 66.2 requirement that the number of shifts must align to that average of 320 in the master diagram.

PN664

So again, to labour the point, the master diagram will contain a number of hours that does not go beyond 320 and they could, yes, go beyond 320 during the cycle or below 320, but the master diagram itself is oriented on in this case 318.

Mr Williams' evidence makes that very clear and Mr O'Brien wasn't able to dispute that. So it's very important that the two contexts for the 320 not be conflated, because there is what you may call the master diagram 320 and the actual 320. One is something which is planned around in a master diagram and one is the ultimate outcome, which is largely an aspirational one because there are factors which have an impact on the ability to realise that goal. That's my submission on that point.

PN665

It's been said that we have led no evidence, or that the unions have led no evidence, of employees working greater than 320 hours. That is in general terms correct, Commissioner. However, it's a mathematical equation. If this diagram is premised on 10 hours as we've led evidence, and the same number of attendances occurred with longer shifts, it is possible - indeed, likely - that that would be exceeded. We're not saying it's being exceeded now, because this change has never been implemented.

PN666

The change was disputed and never got off the ground. So that's why there's no evidence of 320 being exceeded, because we haven't had a period of 11 or even 11 and a half or 12-hour available shifts.

PN667

Similarly, the point about fatigue is not anything we've - the unions are not saying, "We've come before you with a swathe of evidence of fatigue breaches", Commissioner, because again, the change has not been implemented. What we say is that where your current diagram is premised on 10 hours and you start to roster to 10 and a half, 11, 11 and a half or 12, that will cause problems in terms of team management.

PN668

Now, we're not saying that we think the respondent is a reckless manager of fatigue and is going to work these employees while they're fatigued, but what we certainly say, Commissioner, is that they will cause themselves further problems, because, necessarily, working those extra hours in light of the current master diagram will cause employees to have to be fatigue-managed. Employees will have to have their next shift put off, or have their shift shortened, or whatever the relevant management tools are. There will be a flow-on impact is what we're saying.

PN669

We're not taking the matter any further than that, because there's no data about the matter because it hasn't been implemented - but where you've got a structure planned around a particular fatigue number and that number is affected by a subsequent change to length of hours, it defies belief that that would not have a significant likelihood of a potential impact on fatigue management.

PN670

It has been suggested that the RTBU has conceded that the language doesn't support our position. With respect to my friend, that's not what has been conceded, Commissioner. What has been conceded is that the agreement - the agreement is ambiguous and it is ambiguous in both directions. I'm not standing here before you saying that Queensland Rail has conceded that the agreement

does not support their position. With respect, that's something of a - it doesn't advance the matter, Commissioner. Quite simply, there are no explicit words one way or the other. That's the only concession that I've made and that we can make - and that, one would think, goes both ways. Certainly that's the conclusion we invite you to draw.

PN671

It has also been said that we've been able to point to no clause in the agreement which limits the length of available shifts. Again, no, we have not, because we say available shifts are treated, for the purposes of clause 66, the same as regular shifts. Certainly the absence of words to the contrary support us in that regard. I'm instructed by Mr Mackie that the relationship between QR Ltd and QR Network is such that QR Ltd can make requests for track upgrades and track maintenance and that the relationship - QR Ltd certainly does have the ability to have some impact on the quality of the track, and I think - and we submit - in a manner greater than what was perhaps suggested by Mr Heenan. Given that is, effectively, a new point, I'm happy to hear from him in rebuttal to that in a moment, but those are my instructions on that point.

PN672

Mr O'Brien's understanding of the definition of "available shifts" and how they've been used historically is certainly relevant here and we, indeed, support that conception of available shifts - that is, the one which the unions have now and had at the time of the negotiations. Perhaps, taking that approach, that goes some way to explaining why we are taking the interpretation we're taking of this issue.

PN673

It's been suggested that the CTP was separate to the agreement - or was not developed pursuant to the agreement, I believe were the words. Commissioner, we big to differ. The clause in question, clause 66, creates, for the purposes of the agreement, a coal train plan. Now, the RTBU is not interested with whether there was such a thing as a CTP before the agreement and whether that was codified in any award agreement, rostering code or otherwise. In this case there's a CTP for the purposes of the agreement and a CTP - master coal plan, CTP or other master plan - and to suggest that it has a life quite apart from the agreement and can be severed from the agreement for the purposes of making excuses about the delay - the period of time they had to produce a new one, we don't accept that submission at all.

PN674

The question of why the CTP is taking so long to develop: Mr Williams's evidence - which was conceded by Mr King - was that in January there was a discussion, and at that time it was discussed that the goal was to have a new diagram in place in March, or at least to have those discussions. Even if we conceded it was to have those discussions to commence, that's only a two-month period. We've now had this matter in dispute - the dispute commenced on 20 March. The matter has now being going for more than four weeks - 30 days by my count, Commissioner. QR is a large organisation with significant resources, and we don't concede that it is appropriate that it is still braying about the length of time it's going to take it to develop a new master plan and master diagram.

PN675

The reality is, Commissioner - to look at the matter more holistically - we wouldn't be here if not for the fact that QR had ignored the advice, certainly of our representative, in October 2009, "You will not get this, it's cutting it fine" - and that was in good weather. We've had bad weather, we've had poor track maintenance, and the workers should not be punished for QR's lack of foresight, in our submission.

PN676

Just finally, Commissioner, one final point before I take you to the issue about Mr Moffitt's affidavit. You and I had a discussion, Commissioner, in which I did say that what this is about is what goes into the master diagram. That was just to clarify Mr Heenan's representation of my concession. You asked me a question about what would happen if there were 11-hour shifts implemented, and we discussed the need to reduce attendances in our submission and so on.

PN677

We do not concede - we're not saying that this dispute is about the master diagram and it's inadequacy. The dispute is about the current master diagram and QR's attempt to circumvent it. We say the available shifts are in the master diagram and therefore must align, and therefore can't be longer than 10 hours. But we digressed and discussed perhaps the way that it would work if that matter were to ultimately be fixed, if you like, by the creation of 11-hour shifts. Unless you have any questions on those reply submissions, Commissioner - - -

PN678

THE COMMISSIONER: No, thanks.

PN679

MR TILEY: In relation to Mr Moffitt's affidavit, our position is that if its content is disputed, then we are more than happy to come back here and have some cross-examination of Mr Moffitt on that point - and we say we're entitled to do so - and Mr Heenan can tell you whether that's disputed or not, or whether they intend to let it go in uncontested. But we also hasten to add that from a weight perspective, in Mr Moffitt's absence we can give you no more weighty evidence than an affidavit certainly.

PN680

THE COMMISSIONER: All right, thank you.

PN681

MR TILEY: Thank you, Commissioner.

PN682

THE COMMISSIONER: Ms Aitken, did you have any further submissions - - -

PN683

MS AITKEN: Yes.

PN684

THE COMMISSIONER: - - - or submissions in reply?

PN685

MS AITKEN: Just two points in relation to Mr Heenan. The first one is Mr Heenan spoke about the recent flooding being the reasons for the delay. As

evidence provided by Mr Mitchell and Mr Ogg, there are other delays on the network - and I asked Mr King a series of questions and he agreed that there are other factors causing delays, there were speed restrictions before the recent flooding. So there's definitely other problems that QR are yet to address before the recent flooding.

PN686

With respect to Mr Heenan's comments about they can average over 320 per cycle as long as it's averaged out over 2080 hours per annum, I refer you to clause 67.6.1 of the agreement, in which it states, "The company and the depot roster committee will regularly review the number of attendances in each roster cycle to ensure that the attendances are delivering as close as possible to 320 hours in each roster cycle." The second dot point refers to seasonal depots, which is not in relation to Bluff.

PN687

THE COMMISSIONER: Okay.

PN688

MS AITKEN: Thank you, Commissioner.

PN689

THE COMMISSIONER: Thank you. Mr Heenan, did you have anything you want to say about the affidavit of Mr Moffitt?

PN690

MR HEENAN: Yes, Commissioner. I just have one comment to make prior to that, about the new point raised by Ms Aitken, if I may?

PN691

THE COMMISSIONER: Sure, yes.

PN692

MR HEENAN: Clause 67.6.1, "the attendances are delivering as close as possible to 320 hours" - that, of course, could be above or below.

PN693

THE COMMISSIONER: Yes.

PN694

MR HEENAN: Commissioner, regarding Mr Moffitt's evidence - - -

PN695

THE COMMISSIONER: Yes, or his affidavit.

PN696

MR HEENAN: Or his affidavit, I should say.

PN697

THE COMMISSIONER: Yes.

PN698

MR HEENAN: Unfortunately the time constraints that we have mean that we simply don't have time to wait for Mr Moffitt to come back, whenever that is, next week.

PN699

MR MACKIE: Mr Moffitt is on prearranged leave and will return to the country - he's in Norfolk Island - he'll return to the country on Saturday and would be available from Sunday night onwards via phone.

PN700

MR HEENAN: We simply don't have the luxury of waiting for Mr Moffitt's evidence, we'd submit, for Mr Moffitt to be available for cross-examination. There are a number of points that we would have been prepared to cross-examine Mr Moffitt on. Given that we weren't on notice that Mr Moffitt wouldn't be in attendance, we would submit that Mr Moffitt's affidavit shouldn't be accepted into evidence, or secondly, if it is accepted into evidence, shouldn't be given any or any significant weight.

PN701

THE COMMISSIONER: Is there anything in it that's not dealt with elsewhere or, in fact, not in contention, because if it's not in contention the revised QR proposal dated 19 February said something because the proposal is here, isn't it?

PN702

MR HEENAN: No, that's not a contention that that said that, those particular words. However, it is in contention that that was intended when the agreement was struck that to have the result that there would be only three shift lengths. Mr Moffitt would be well aware, because of the variety of his duties, in terms of the geographic reach of his duties, that there are many or other depots within the coal business that have more than three operational shift lengths.

PN703

THE COMMISSIONER: There's evidence about that and that's been put to witnesses. I guess it's a question of weight to be put on the affidavit. I'm not of a mind to strike it out, Mr Heenan. I think it's a matter really of weight.

PN704

MR HEENAN: Yes, Commissioner, if that's the course you're prepared to take, then simply our submission is that it shouldn't be given appropriate weight.

PN705

THE COMMISSIONER: Okay.

PN706

MR TILEY: Commissioner, on that point it's preposterous for one of the RTBU's star witnesses - for us to virtually be punished by his unavailability due to pre-existing leave. It would do us an injustice were you to diminish the weight you ascribe to his affidavit because of that fact. It is our - - -

PN707

THE COMMISSIONER: Mr Tiley, it's always been the case that the deponent of an affidavit has to be available for cross-examination - - -

PN708

MR TILEY: I understand - - -

PN709

THE COMMISSIONER: - - - reasonably available for cross-examination.

PN710

MR TILEY: And I don't have any problem with that as a concept, Commissioner, but the facts of this matter are that at the time you issued your directions - there's two relevant facts. Number one, I did not know at that time whether or not I was going to be leading an affidavit from Mr Moffitt, Commissioner, for certain. It certainly occurred to me, but more importantly I had no idea - me personally - I couldn't have advised you of his unavailability at that time as late as when he affirmed this affidavit late last week.

PN711

I was of the - certainly my understanding arising out of our discussions the other day, at the mention, was that cross-examination may not be required; indeed, we weren't even talking about affidavits. We attempted to elevate the quality of the material we provided you to affidavit level in an attempt to avoid that need. It is unfortunate that Mr Moffitt is unavailable, but we not brook any aspersions being cast on the weight of his affidavit just because QR can't wait another week.

PN712

If they want to implement this change, they have to go through the process set out in the agreement for resolving a dispute about it. So if they maintain any objection to that evidence, it must be done properly by cross-examination next week. We're more than happy for you to adjourn this evening and then come back for a short period of time and have Mr Moffitt cross-examined, but the matters - - -

PN713

THE COMMISSIONER: Why can't he be available on the telephone in Norfolk Island? Last time I checked, telephone links were available to Norfolk Island. Why can't someone ring him on his mobile telephone and see whether you can make him available?

PN714

MR TILEY: Sure.

PN715

MR MACKIE: Commissioner, it is a policy of the RTBU that the organisers who are being relieved leave their mobile phones behind. It is one was as an employer that I ensure that my organisers take their annual leave. Certainly I could attempt to get Mr Moffitt on the phone in Norfolk Island. The unfortunate part of it is, Commissioner, I have no idea where he's staying. He is on annual leave. I know he's in Norfolk Island, and that's about the best I could do. I urge you to the fact that Mr Moffitt - and my counterparts would know that Mr Moffitt couldn't be in the country, would be only too happy to be available. Mr Moffitt works extraordinary hours; in fact, to the point where I am often asking him to take time off because of my concerns for his health, and I'd be very, very reluctant with the one opportunity I have to get him out of the country, and to be able to take some time off, that he be disturbed. If it pleases the commission, thank you.

PN716

THE COMMISSIONER: All right.

PN717

MR TILEY: Just finally, Commissioner. I should have mentioned this earlier, but if I can take you to Mr Moffitt's affidavit, and just to provide a bit of context on his absence today, paragraphs 1 to 8 are merely Mr Moffitt's CV if you like.

PN718

THE COMMISSIONER: Yes.

PN719

MR TILEY: Paragraphs 9 through 23 - there is nothing in that affidavit I can tell you for a fact that is not replicated in almost the same words in Mr Williams' affidavit. Their evidence is identical to the extent that - because they were both there together at the meetings, and that is all that Mr Moffitt goes to. He doesn't talk about the CTP or anything else because - - -

PN720

THE COMMISSIONER: Well then why is Mr Moffitt so essential, if his evidence is all replicated in the other witness's evidence?

PN721

MR TILEY: Well, Mr Moffitt was the lead negotiator. Mr Moffitt is our official. Mr Moffitt is the more experienced of the two, and he is important to our case, Commissioner. In any event, any challenge which the respondent may wish to make to Mr Moffitt's evidence about lengths of set shifts in Coal North as compared to Coal South would be the subject of vociferous objection on the basis that, if he were to be cross-examined about that, that would be him being cross-examined about a matter that did not arise out of his affidavit. He doesn't say anything in there - - -

PN722

THE COMMISSIONER: They're not limited to what's in his affidavit. Cross-examination is at large.

PN723

MR TILEY: I understand that, Commissioner. But I'm saying it would not be relevant to the dispute because we submit that your determination about how long available shifts can be in Bluff is not - it is not relevant what happens in another depot that is outside the Coal South region and has an entirely different - - -

PN724

THE COMMISSIONER: It is relevant to an - if you're going to argue that in the negotiations for this agreement something was said about the number of variations of shift length that could be included, well, that applied everywhere surely?

PN725

MR TILEY: Certainly. Certainly they should apply everywhere, Commissioner, and it is new to me that there are any depots where other shift lengths are being utilised and it would be disputed if it was.

PN726

THE COMMISSIONER: QR is entitled to cross-examine on that, though, surely?

PN727

MR TILEY: If they want to challenge it, that's the way to challenge it, Commissioner.

PN728

THE COMMISSIONER: All right. An affidavit substitutes for sworn evidence. If a person is reasonably not available, then you can argue that there affidavit is admitted. If the person is reasonably available, then we can wait for the cross-examination. Quite frankly, I'm in a two-day arbitration for the next two days. It's likely to be three working days before we get the transcript and I'm going to be wanting to look at the transcript so I think in the circumstances I can't see why we can't wait till Mr Moffitt is available and if you want to cross-examine him, Mr Heenan, you can do it on Monday. We can resume on Monday morning, say at 8.30, if you want to cross-examine Mr Moffitt and - no, sorry. Monday is Anzac Day.

PN729

MR HEENAN: Commissioner, I'm in a three-day trial from Tuesday to Thursday of next week as well, but I can certainly do after hours or before hours preferably.

PN730

THE COMMISSIONER: Well, Tuesday, 27 April, 8.30, if you want to cross-examine him.

PN731

MR HEENAN: Can we make it 8.00, Commissioner?

PN732

THE COMMISSIONER: Yes, 8 o'clock on Tuesday morning.

PN733

MR HEENAN: Commissioner, QR's position is that we simply can't wait that long.

PN734

THE COMMISSIONER: Well, you're likely to be waiting, Mr Heenan, because I am going to be burning the midnight oil to get any conclusion out of this matter and I can't make the transcript happen any quicker than it's going to happen. I want to look at the transcript and I need to consider the material. I wouldn't have been in a position to have any outcome of these proceedings tonight in any event.

PN735

MR HEENAN: No, I accept that, Commissioner. However, waiting till next Tuesday for the cross-examination and then another delay for the decision, which is perfectly acceptable, is simply too long for QR to wait. We'd submit we're - - -

PN736

THE COMMISSIONER: Unless something earth-shattering is going to come out of the cross-examination of Mr Moffitt, I dare say I can make progress on getting to a final position so that I can, shortly after Mr Moffitt's cross-examination, release a decision, Mr Heenan. But I can't see any other option. He's not available till next Tuesday. I'm not going to - I can't make him have his - he hasn't got his mobile phone with him. I don't propose to make the union contact hotels in Norfolk Island in the vain hope they'll find Mr Moffitt. I just don't see there's anything we can do about it.

PN737

MR TILEY: The only other suggestion I can make, Commissioner, is that if there was a specific issue, a discrete issue, which was to be addressed by Mr Moffitt's evidence, which would not necessarily require him coming in her for the proceedings, I can undertake to the commission and to the parties that I will obtain an affidavit from him which answers that question and I can then submit that to yourself and the parties, which would arrive at the same time, I would have thought, approximately, as you get your transcript.

PN738

THE COMMISSIONER: I don't think it will make any difference if QR wants to - - -

PN739

MR TILEY: Sure; just trying to assist.

PN740

MR HEENAN: Commissioner, if it's the case that we're not going to be able to get a decision before Tuesday anyway, then we'll cross-examine him on Tuesday

PN741

THE COMMISSIONER: All right. We'll resume at 8 o'clock on Tuesday morning. You can cross-examine him and then I'll be in a position pretty quickly thereafter to release a decision. On that basis, we'll adjourn.

PN742

MR HEENAN: Thank you, commissioner.

PN743

MR TILEY: Thank you, commissioner.

<ADJOURNED UNTIL TUESDAY, 26 APRIL 2010

[7.31PM]

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