

TRANSCRIPT OF PROCEEDINGS
TRANSCRIPT IN CONFIDENCE
Fair Work Act 2009

26382-1

COMMISSIONER ASBURY

DR2009/10116 C2010/2599 DR2010/38

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

**Australian Federated Union of Locomotive Employees, Queensland Union of Employees
and
QR Limited T/A Queensland Rail
(DR2009/10116)**

Brisbane

10.19AM, TUESDAY, 1 JUNE 2010

Adjourned reserved for decision

PN1

MS M BREWER: Good morning, Commissioner. I appear on behalf of the first applicant, the AFULE, together with MR G SMITH.

PN2

THE COMMISSIONER: Thank you.

PN3

MR L TILEY: Morning Commissioner. I appear on behalf of the RTBU, being the second applicant. As you're aware I'm a legal practitioner within this jurisdiction but I appear as an officer of the organisation, and therefore I do not seek your permission to appear in that capacity.

PN4

THE COMMISSIONER: Thank you.

PN5

MR M HEENAN: Yes, Commissioner, I appear on behalf of QR, the respondents, together with NICK BURKE.

PN6

THE COMMISSIONER: Thanks Mr Heenan. Okay Ms Brewer.

PN7

MS BREWER: Morning Commissioner. We're here asking you again to assist under the Tribunal's powers of dispute settlement. We're submitting today that the terms in question 1 are to be read as inclusive of time spent travelling as a passenger, and that's clear from a consideration of the agreement as a whole. The answer to question 2 is that no crew who self-drive can be required to drive more than a total of two hours between the hours of 2200 and 0600. However, where a crew's duty to perform train operations tasks has been relieved by their employer, then they can be driven for longer than two hours. We're requesting that the Tribunal make a determination in accordance with paragraph 73, page 15A of our submission. Thank you.

PN8

THE COMMISSIONER: All right, and are you calling any witnesses?

PN9

MS BREWER: We're calling Mr Warren Hinds.

PN10

THE COMMISSIONER: So are you ready to do that?

PN11

MS BREWER: Yes, we can do that now.

PN12

THE COMMISSIONER: All right - sorry, just before we start, there was an email yesterday with respect to an amendment to the submission.

PN13

MS BREWER: Yes.

PN14

THE COMMISSIONER: But the attachment didn't have the amendment. Is it in

there?

PN15

MS BREWER: Yes.

PN16

THE COMMISSIONER: Good. Okay, thank you.

PN17

MS BREWER: Sorry, I might state at the outset one further error. It's just an error in the submission.

PN18

THE COMMISSIONER: Yes.

PN19

MS BREWER: Which is at page 12, paragraph 54.

PN20

THE COMMISSIONER: Okay, just bear with me.

PN21

MS BREWER: In that paragraph we've got - clause 82.4.1 should be read.

PN22

THE COMMISSIONER: Yes.

PN23

MS BREWER: Sorry, so it's page 12.

PN24

THE COMMISSIONER: Yes.

PN25

MS BREWER: Paragraph 54, and the clause there should read 82.4.1, not 84.2.1.

PN26

THE COMMISSIONER: 82.4.1?

PN27

MS BREWER: Yes.

PN28

THE COMMISSIONER: Okay, thanks.

PN29

MS BREWER: Thank you.

PN30

THE COMMISSIONER: All right.

PN31

MR HEENAN: Commissioner, if I may?

PN32

THE COMMISSIONER: Yes.

PN33

MR HEENAN: There is a threshold matter about which there was some

correspondence between the respondent and the applicants yesterday.

PN34

THE COMMISSIONER: Yes.

PN35

MR HEENAN: That is that the dispute is limited to the situation of train crew only being in the motor vehicle.

PN36

THE COMMISSIONER: Yes.

PN37

MR HEENAN: And my understanding is that it's conceded by both applicants that the dispute does not relate to a motor vehicle being driven by a rail operator or indeed someone else, a taxi.

PN38

THE COMMISSIONER: Yes.

PN39

MR HEENAN: Mr Tiley and Ms Brewer conceded that point in correspondence, and I believe that before we start perhaps we should hear from the applicants about that issue.

PN40

THE COMMISSIONER: I think there was some reference to that in the submission as well, from memory.

PN41

MR TILEY: Commissioner, the matter I think has probably more clearly been dealt with by the first applicant, and the ambiguity, as it was perceived by the respondent, arose as a result of the RTBU's material.

PN42

THE COMMISSIONER: Yes.

PN43

MR TILEY: In any event what Mr Heenan says is correct. It is an accurate summary of the correspondence which we showed him yesterday, which was copied to your chambers.

PN44

THE COMMISSIONER: Yes.

PN45

MR TILEY: The dispute is about 82.4 as it stands. The questions are directed at the application of that clause in the context of train crew employees only, and certainly we accept that. Whilst we may not necessarily agree with the respondent's interpretation of this other scenario, this other scenario is not a matter which you are arbitrating here today.

PN46

THE COMMISSIONER: Okay.

PN47

MR TILEY: Thank you.

PN48

THE COMMISSIONER: Thanks.

PN49

MS BREWER: We concur. I think what we would like to make clear, and I think what we have made clear all along, is that the dispute is about self-drive and it's about train crew self-driving. Thank you.

PN50

THE COMMISSIONER: Yes all right, I understand thanks. Your first witness - my associate has gone to get him.

<WARREN NEVILLE HINDS, SWORN [10.25AM]

<EXAMINATION-IN-CHIEF BY MS BREWER [10.25AM]

PN51

MS BREWER: Hello Mr Hinds. Could you state your full name and address for the record, please?---My name's Warren Neville Hinds. I live at (address supplied).

PN52

Have you got a copy of your affidavit with you?---Yes I do.

PN53

That's four pages long and 18 paragraphs?---Yes.

PN54

It has an attachment labelled A?---That's correct.

PN55

And that's a further six pages?---That's correct.

PN56

I've got the original of that here. I just have a couple of questions, and the first one is would you explain what's required when you're driving a train?---Yes, it - a very high level of concentration on the matter of driving a train. You must be - as the schedule A there says, you've got to call all signals, concentrate all the time, be aware of what's happening and what your mate's doing, if you're in a TDO situation, that sort of thing. You're concentrating for the whole shift length, up to 12 hours or maybe beyond.

PN57

Would you explain the safety systems on the locomotive?---There's three safety systems. There's a visual control system, a VCS, a signal protection - station protection device, and a third safety system in a TDO configuration is your mate that you're working with. Vigilance, VCS, it's a button. At 87 seconds it'll - you'll get a white flashing light and if you don't acknowledge it, at 90 seconds you'll get an audible alarm with a flashing light, and if you don't acknowledge that at 93 seconds the train brakes will come on in an emergency situation to stop you. Signal protection device, it's a little box that's situated at the approach - near the approach beacons at the end of most stations - of all stations, and when you run over it with the loco it will give you an audible alarm and you have, I think it's five seconds, Commissioner, that if you don't press it you'll get a brake application and the train comes to a stop.

PN58

How long does it take to stop a train travelling at 80 kilometres?---For a loaded coal train at 80 kilometres an hour it takes a fair while, approximately 1400 metres to stop it in an emergency situation.

PN59

After a shift of, say, nine or 10 hours, how are you physically and mentally at the end of a shift?---Pretty well washed out I'd say. Yes, washed out because you're concentrating all the time.

PN60

Could you explain the difference between self-driving and being driven by a rail operator?---Well self-driving is when either you're by yourself or you're driving in a two driver situation, where you're still doing your train operation duties. So you've still got to be aware and alert, and manage fatigue and whatever, between you and your mate how you're going to do it. In the - to be driven by a rail operator, my belief is that they're there to - they're kind of your safety mechanism. When you get off you haven't got that full intense of concentration like you would be driving a car. Though you probably still stay a little bit alert, you know what I mean, if there was - say if there was - you could see something happening, you'd do something about it. But yes, you seem to just - like it - you've taken the weight off your shoulders, kind of thing.

PN61

Thank you Mr Hinds. Nothing further, Commissioner.

PN62

THE COMMISSIONER: Thanks. Did you have any questions for Mr Hinds, Mr Tiley?

PN63

MR TILEY: No thank you, Commissioner.

PN64

THE COMMISSIONER: Mr Heenan, cross-examination?

<CROSS-EXAMINATION BY MR HEENAN

[10.30AM]

PN65

MR HEENAN: Morning Mr Hinds?---Good morning Mr Heenan.

PN66

Mr Hinds, you're a delegate for the AFULE?---That's correct, Mr Heenan.

PN67

And you're a train driver?---That's correct also.

PN68

So you've experienced driving motor vehicles and you've been a passenger in a car when another train crew employee has been driving?---Another train crew employee?

PN69

Yes?---As in - as a train driver?

PN70

A train driver, sorry, yes?---Correct.

PN71

It's the case, isn't it, that passengers in motor vehicles often fall asleep, particularly at night?---Definitely not on my shift. I try to not fall asleep. I may relax a little, but no. My job is to put - keep the other bloke alert because I'm very aware of what can happen if you go over the white line.

PN72

So you'd expect that if someone did fall asleep that they'd be disciplined for it?
---To - as a passenger?

PN73

Yes?---No, I don't. I'd say - - -

PN74

You wouldn't be disciplined for it?---I don't know. I don't know. As far as I know - I don't know if there's any - anything in the agreement or discipline process of falling asleep in a motor vehicle.

PN75

No, because it's a passive activity, isn't it?---No, no, not if you're in a two driver situation. It's not passive.

**** WARREN NEVILLE HINDS

XXN MR HEENAN

PN76

But you just said before that you wouldn't be disciplined for it?---No I didn't. I said as far as I know there's no discipline or what's his name, that I know, about falling asleep in a car.

PN77

So if someone fell asleep and was disciplined would you defend them?---Yes, definitely.

PN78

You would?---Well I would have to go - I'd have to go and defend them. I'm their delegate.

PN79

Yes, well you're the delegate but you - sorry - - - ?---Before I'd defend them, we would have to have an investigation.

PN80

Yes?---Some sort of investigation gathering thing, Mr Heenan.

PN81

Sure but, sorry, I'll just take you back - - - ?---But I don't know what the situation would be - - -

PN82

I'll just take you back. Your affidavit says that there are safety critical tasks that are incumbent upon the passenger?---That's correct.

PN83

So I just suggested to you that if a passenger fell asleep and was disciplined you'd defend them, and you said yes?---Yes, that's what I said.

PN84

All right, that's all thanks, Commissioner.

PN85

THE COMMISSIONER: Thank you. Re-examination, Ms Brewer?

<RE-EXAMINATION BY MS BREWER

[10.32AM]

PN86

MS BREWER: Mr Hinds, as a union delegate it's your job to support any of our members in a situation where they would be disciplined?---That's correct.

**** WARREN NEVILLE HINDS

RXN MS BREWER

PN87

You'd attend any meeting for them?---That's correct.

PN88

Okay, thank you?---That's my job as a union delegate.

PN89

THE COMMISSIONER: Would you like to tender Mr Hinds' affidavit?

PN90

MS BREWER: I have.

PN91

THE COMMISSIONER: Sorry, we need to just mark it as an exhibit.

PN92

MS BREWER: Sorry.

PN93

THE COMMISSIONER: Yes, so we'll mark that as exhibit 1.

EXHIBIT #1 AFFIDAVIT OF WARREN NEVILLE HINDS

PN94

THE COMMISSIONER: Thank you for giving your evidence, Mr Hinds. You're excused. You can go about your business or you can stay in the hearing room, if you'd like to do that?---Thank you Commissioner.

<THE WITNESS WITHDREW

[10.33AM]

PN95

THE COMMISSIONER: Mr Tiley?

PN96

MR TILEY: Good morning again, Commissioner. If I can just perhaps start by giving a very brief opening, if it pleases the Tribunal?

PN97

THE COMMISSIONER: Yes.

PN98

MR TILEY: Before I do so I'll just outline the nature of the evidence upon which we rely in this matter. Firstly, we have filed and served five affidavits of evidence. Two of those deponents are required for cross-examination I'm told, and they are available to give their evidence by telephone today, and we've given those relevant numbers to your associate. The affidavits of the deponents which are not required for cross-examination are the affidavit of Michael Francis Freeman, affirmed 24 May 2010.

PN99

THE COMMISSIONER: Sorry, Michael Francis?

PN100

MR TILEY: Freeman. Perhaps if I read each of those as we go, Commissioner, and have them marked.

PN101

THE COMMISSIONER: Yes.

PN102

MR TILEY: So if that one could please be marked exhibit 2.

PN103

THE COMMISSIONER: Just bear with me for a minute.

PN104

MR TILEY: The second one, the affidavit of Gary Noel Goodman - - -

PN105

THE COMMISSIONER: Okay, we'll mark Mr Freeman's as two.

PN106

MR TILEY: Sorry, getting ahead of myself there, Commissioner.

**EXHIBIT #2 AFFIDAVIT OF MICHAEL FRANCIS FREEMAN,
AFFIRMED 24/05/2010**

PN107

MR TILEY: Mr Goodman, Gary Noel Goodman, affirmed 17 May 2010. If I can please read that affidavit.

**EXHIBIT #3 AFFIDAVIT OF GARY NOEL GOODMAN,
AFFIRMED 17/05/2010**

PN108

MR TILEY: Thank you, Commissioner. Next is the affidavit of Keith Darcy Heinemann, affirmed 24 May 2010. If I could please read that.

**EXHIBIT #4 AFFIDAVIT OF KEITH DARCY HEINEMANN,
AFFIRMED 24/05/2010**

PN109

MR TILEY: The affidavit of Lesley Moffitt, affirmed 17 May 2010, if I can have that read please.

**EXHIBIT #5 AFFIDAVIT OF LESLEY MOFFITT, AFFIRMED
17/05/2010**

PN110

MR TILEY: Last but not least, the affidavit of Malcolm Williams, affirmed 24 May 2010. If I could have that read also please.

**EXHIBIT #6 AFFIDAVIT OF MALCOLM WILLIAMS,
AFFIRMED 24/05/2010**

PN111

MR TILEY: Thank you Commissioner. It is Mr Moffitt who you will recall is our northern district organiser, who I'll call first after I give you an opening.

PN112

THE COMMISSIONER: Yes.

PN113

MR TILEY: Following Mr Moffitt, Mr Freeman.

PN114

THE COMMISSIONER: Yes.

PN115

MR TILEY: Just briefly, Commissioner, we of course have the same position as the AFULE, the first applicant in this matter although you will have seen from the applicant's outlines that we arrive at that conclusion via a slightly different path.

PN116

THE COMMISSIONER: Yes.

PN117

MR TILEY: The focus of the dispute from the RTBU's perspective is very much the words of the clause and you can draw any conclusion that we've taken a more narrow or perhaps more technical interpretation of the dispute. In any event we say, for the purposes of the clause, time spent by train crew travelling in a motor vehicle between those hours as a passenger is included within the expression car driving. We say car driving appears there twice, whereas drive, a verb, only appears once and is anomalous. We lead evidence, Commissioner, about the negotiation of the agreement in two ways. The first is the filed affidavits of evidence about the recollection of the negotiations and what was intended. The second is via some - well it's outlined in our submissions and there are some extras in material which outlines the evolution, if you like, of the clause. That's tracked through the parties - the material which the parties exchanged during the negotiations, which is of course material extrinsic to the agreement. Having elicited that evidence, that background, that context, we will then be putting to you our semantic argument about why the clause operates in the manner which is contended, and how the parties arrived at a clause of that nature; and how, perhaps with the benefit of hindsight, the clause would have read in the eyes of the RTBU and its understanding of what was agreed to.

PN118

THE COMMISSIONER: Okay.

PN119

MR TILEY: Unless I can assist you further, Commissioner, I'll call Mr Moffitt on the phone to give his evidence.

PN120

THE COMMISSIONER: Okay, thank you.

PN121

MR TILEY: Thank you.

<MR LESLEY MOFFITT (via telephone), AFFIRMED [10.39AM]

<EXAMINATION-IN-CHIEF BY MR TILEY [10.40AM]

PN122

MR TILEY: Good morning, Mr Moffitt?---Good day, how are you?

PN123

Good thank you. You can hear me okay?---Yes mate.

PN124

You are the northern district organiser for the Rail Tram and Bus Union Queensland branch; is that correct?---That is correct.

PN125

You've prepared an affidavit for the purposes of this proceeding?---Yes.

PN126

Have you got that affidavit there with you?---Hello?

PN127

Are you there Mr Moffitt?---Yes. Yes, it just dropped out a bit. Yes.

PN128

Can you hear me okay now though?---Yes, it's fine.

PN129

Have you got your affidavit there with you, Mr Moffitt?---Yes I do.

PN130

Is it 29 paragraphs long?---Yes.

PN131

And it's four pages long?---That's correct.

PN132

Are the contents of that affidavit true and correct?---It certainly is.

PN133

The views expressed in that affidavit, are they your own views?---Definitely are.

PN134

Okay, I've got no further questions for you, Mr Moffitt.

PN135

THE COMMISSIONER: Thank you. Mr Moffitt, we'll hand you over now to Mr Heenan for cross-examination. Sorry Ms Brewer, I should have asked you did you have a question you wanted to ask Mr Moffitt?

PN136

MS BREWER: No.

PN137

THE COMMISSIONER: Okay, thank you. (To witness) We'll hand you over to Mr Heenan for cross-examination, if you can just bear with us for a minute.

<CROSS-EXAMINATION BY MR HEENAN

[10.40AM]

PN138

MR HEENAN: Good morning, Mr Moffitt?---Morning.

PN139

You can hear me okay?---Yes, loud and clear.

PN140

Now Mr Moffitt, I'm just reading from your affidavit. You say in paragraph 12 that the RTBU didn't have any input into the drafting of the agreement?---Yes.

PN141

Mr Moffitt, it's the case, is it not, that you were involved in a drafting forum with Ms Siobhan Keating from the AFULE and Mr Lucas from QR, from the 24th to 27 February?---(indistinct) a lot of the discussion and negotiations, I've never really participated in any of the drafting.

PN142

Well that meeting, that three day meeting, was set up as a drafting forum, was it not?---Under the process, yes.

PN143

Sorry, Mr Moffitt, I just didn't catch that?---I said that was part of the process.

PN144

So it's not strictly correct to say that the RTBU did not have input into the words of the draft?---Well we did - certainly didn't put the words together, no.

PN145

Sorry, you're saying that despite your involvement in a drafting forum for three days you didn't have any input into the words of the draft?---Well I was involved in discussion around the issues but the actual wording was put together by Siobhan and Paul Lucas.

PN146

You were happy with that?---Well we all had a chance to review it, and that, from time to time.

PN147

So you did have input into the drafting?---I never actually put the words together, no.

PN148

Mr Moffitt, you were aware, weren't you, that your members had raised concerns about the potential meaning of the words of what became clause 82.4.1?---Yes, well, it's just - after the agreement was introduced there was some issue raised.

PN149

No, before the agreement was introduced. I'm putting to you that you were aware that your members had raised some concerns about the meaning of the words? ---Well the members didn't get to see the draft so I don't see how - where you're coming from.

PN150

Sorry, I'm reading from - perhaps you haven't had the benefit of perusing Mr Freeman's affidavit?---Yes.

PN151

Mr Freeman says that several train crew employees at his depot conveyed to him some concerns about the meaning of the clause?---Okay, I thought you meant for the general population. Mick was one of the negotiators on the committee and no doubt when he was going home on weekends, and that, him and Mal Williams did have their own meetings. Yes, that's right.

PN152

Yes, and you were the - - - ?---I thought you were - - -

PN153

- - - lead negotiator?---Yes, I thought you were saying that the lead negotiators - that I was receiving calls from the membership. Sorry about that. I just mis - sort of - - -

**** MR LESLEY MOFFITT

XXN MR HEENAN

PN154

No, it's probably my mistake. I probably wasn't clear enough as to where that was coming from?---Yes.

PN155

But in any event you were aware that RTBU members had raised concerns about the potential meaning of the words in the agreement?---Yes.

PN156

Yes?---Yes.

PN157

Sorry, thanks Mr Moffitt. I'm just having some difficulty hearing. I'm not sure whether other people in the room are?---No, I'm in the car, so no one else is with me. I've just had to step outside of a (indistinct) and coal meeting, but I'm out in the car by myself.

PN158

Sorry, Mr Moffitt. I will just let you know if I have some difficulty understanding or hearing you from time to time?---Yes.

PN159

So you're aware that there were some concerns raised?---Yes.

PN160

And you've answered yes. So did you make any suggestions about how the clause should be worded?---We had some open discussion in the committee about it, and we had some assurances from the management team, that they allayed a lot of our fears of what the intent was of that clause, yes.

PN161

You didn't make any suggestions as to how the clause should be worded?---No, because as I say - very disappointing because - you learn from your mistakes, but I did raise it with one of the senior negotiators after the - all this blew up and I said, "Listen, we discussed this" and his response was, "Yes, but we didn't put the words into the agreement".

PN162

So ultimately you were happy with the words of the agreement?---Yes, but only because we took - it was good faith bargaining. We had had assurances from the people that sat round that table what the intent was, and we had no problem. It's since then that we've learned a valuable lesson that if the - they're now saying, "Oh yeah, but you've got" - "If the words aren't there" - other people read it and then you've got to be guided by what people that were never involved in it, in their actual interpretation.

**** MR LESLEY MOFFITT

XXN MR HEENAN

PN163

Yes, thanks Mr Moffitt. Now I'll take you towards the end of your affidavit. You talk about travelling for more than two hours. Presumably that should be travelling in a motor vehicle for more than two hours, in paragraph 26 of your affidavit?---Yes.

PN164

You're aware, aren't you, that train crew travel regularly for more than two hours in motor vehicles, in situations where perhaps they're in a taxi or perhaps it's being driven by a rail operator?---Yes, myself coming off the job, been there, done that and that's why I know what the experience is like, and major concerns about that period that we're talking about, because of the stock on the road of a night, the big road trains that we confront in most of the areas we travel, and that. And even back in 2006 is when we tried to renegotiate the train crew agreement. I was very vocal at that point too, with the same stance. I should've come - it's no surprise to QR management that my views hadn't changed from 2006 to when we negotiated in 2009.

PN165

But it's not in issue, is it, that train crew travel in vehicles driven by rail operators for more than two hours?---It certainly is, and we - but that was something we couldn't do much about, so we took the opportunity this time round. That's why we had a industrial instrument that we could try to fix the problem up.

PN166

So Mr Moffitt, you're not disputing, are you, that there's a regular practice and a well accepted practice that train crew will travel in vehicles driven by rail operators for more than two hours, or travel in taxis for more than two hours; that happens?---That happens and - - -

PN167

And we're not disputing - - - ?---Our experience from that has led us to push this issue.

PN168

We're not disputing that that can happen and is allowable under the agreement?--- It certainly is because it was all about compromise, and we could only get so much of what we wanted out of the agreement. And of course management got what they wanted in there, otherwise if we had our way we would have a clause in there restricting that.

**** MR LESLEY MOFFITT

XXN MR HEENAN

PN169

Yes, but you're not disputing that it is allowable under the agreement for that to occur?---And the way we saw it, it was - the way forward was it was going to be very limited issues where we would have these people driving train crews because we've found down the number of staff in all the locations that are capable of doing that, and the idea of this new agreement was breaking new ground and train crew were to be doing the majority of travelling in vehicles by self-driving. So this is what - why we were comfortable with what we put into the agreement.

PN170

Yes, Mr Moffitt, perhaps you could just come back to the question that was asked. You're not disputing that it is allowable for train crew to be driven by rail operators or in taxis for more than two hours, between the hours of 2200 and 0600?---That is allowable and, like I say, we tried to put it into this agreement to fix that problem up because - - -

PN171

It is allowable?---Because it's a major safety issue to us.

PN172

So it is allowable and it's a well accepted practice?---It is and has been and this - we took the opportunity this time round to try to fix that safety issue.

PN173

Yes, I'm just not sure that I follow you. You're trying to fix a safety issue with rail operators driving train crew around?---Trying to fix an issue about anyone driving anyone between those hours of the night, day and night, and restricted to - we thought - and most of the operations of Queensland Rail under normal circumstances, the two hours is suffice to be able to maintain the operation.

PN174

So you're saying that the safety risks for occupants of vehicles are the same, whether it's a rail operator driving or train crew driving?---It certainly is, and like I said, the compromises, at least we got some restriction in there. It is fully known that the majority of travel between those hours will be self-drive.

**** MR LESLEY MOFFITT

XXN MR HEENAN

PN175

Thanks, that's all Commissioner.

PN176

THE COMMISSIONER: Thanks. Re-examination Mr Tiley?

<RE-EXAMINATION BY MR TILEY

[10.51AM]

PN177

MR TILEY: Mr Moffitt, if I can just take you to paragraph 12 of your affidavit. Can you see that paragraph?---I'll turn the page now. Yes.

PN178

Do you recall discussing with Mr Heenan under cross-examination that you had some input into the drafting process after the first draft was provided; is that right?---Yes.

PN179

But in your affidavit in paragraph 12 you're talking about prior to the first draft, correct?---Yes.

PN180

Has anything that you discussed with Mr Heenan under cross-examination changed the view that you set out in paragraph 12 of your affidavit?---No. No.

PN181

Okay, thank you. You recall you discussed the issue with Mr Heenan about concerns that were raised with Mr Freeman; do you remember that?---Yes.

PN182

Mr Williams was also one of the RTBU delegates who was involved in the negotiations?---He was.

PN183

It would be usual that concerns raised by members would not necessarily come to your attention on every occasion; is that correct?---That's correct, yes.

PN184

And just finally, Mr Moffitt, in paragraph 26 of your affidavit?---Yes.

PN185

You're talking there about train crew traveling in a motor vehicle, aren't you? ---Yes.

**** MR LESLEY MOFFITT

RXN MR TILEY

PN186

I've no further questions for Mr Moffitt, Commissioner.

PN187

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

<THE WITNESS WITHDREW

[10.52AM]

PN188

MR TILEY: Okay Commissioner, thank you. Without anything further, I propose that we now call Mr Freeman, please, by telephone.

PN189

THE COMMISSIONER: Okay thanks. I'm not going to bother re-numbering the affidavits. They're out of order that they're called in but we'll just leave it as is.

PN190

MR TILEY: I set out to do it in order too. My apologies.

PN191

THE COMMISSIONER: That's all right.

<MICHAEL FRANCIS FREEMAN (via telephone), AFFIRMED [10.53AM]

<EXAMINATION-IN-CHIEF BY MR TILEY [10.54AM]

PN192

MR TILEY: Good morning Mr Freeman?---Good morning Luke.

PN193

You've prepared an affidavit for the purpose of this proceeding? Can you hear me, Mr Freeman?---Hello?

PN194

Hello, can you hear me now Mr Freeman?---I can hear you now.

PN195

Yes, okay. You've prepared an affidavit for the purpose of this proceeding?---Yes I did.

PN196

Have you got that affidavit there before you?---Yes.

**** MICHAEL FRANCIS FREEMAN

XN MR TILEY

PN197

Your affidavit is four pages long?---Yes.

PN198

It contains 32 paragraphs?---Yes, that's right.

PN199

Are the contents of that affidavit true and correct?---Yes.

PN200

And are the views set out in that affidavit your own views?---Yes.

PN201

I've no further questions, Commissioner.

PN202

THE COMMISSIONER: Thank you. Anything for Mr Freeman, Ms Brewer?

PN203

MS BREWER: No thank you, Commissioner.

PN204

THE COMMISSIONER: Mr Freeman, it's Commissioner Asbury. I'm going to hand over now to Mr Heenan to cross-examine you?---Yes.

<CROSS-EXAMINATION BY MR HEENAN [10.55AM]

PN205

MR HEENAN: Good morning Mr Freeman?---Good morning.

PN206

Mr Freeman, I'll take you to the section of your affidavit that talks about a conversation with Warren Ackers, at the end of your affidavit from paragraphs 27 on. Have you got your affidavit with you?---What was that? There might be - I might have a problem with this phone here, I think. It seems to be dropping in and out.

PN207

Sorry, can you hear me now?---Yes, I can hear you now.

PN208

Okay, you have your affidavit with you?---Yes.

**** MICHAEL FRANCIS FREEMAN

XXN MR HEENAN

PN209

I'm taking you to paragraph 27 and following?---Yes.

PN210

You say in there you had a conversation with Warren Ackers?---Yes, that's right.

PN211

Following that conversation what suggestions did you make to change the wording of the clause?---I can't remember making any suggestions because I took him on what he said, that they wouldn't book us on like that.

PN212

So you didn't make any suggestions?---No, not that I recall.

PN213

You didn't do anything about it?---I can't hear you.

PN214

Sorry. You didn't do anything about it?---No, well I asked him and I took him on his word that he said that they wouldn't book us that way.

PN215

So following that conversation you didn't do anything about it? Mr Freeman, are you there?---Yes, I'm there. Yes. No, well like I said, I took him on his word.

PN216

Okay. Now Mr Freeman, train crew travel in motor vehicles regularly for more than two hours if they are being driven by a rail operator, don't they?---Yes, that's right.

PN217

They travel regularly for more than two hours in taxis?---Yes, that'd be right.

PN218

So are you suggesting that it's more or less unsafe for train crew to be travelling in motor vehicles when they're driven by other train crew, than when they're driven by rail operators?---Well we've done a lot of travelling from Emerald to Rocky via car with rail operators, at all times of the night and day.

PN219

Yes?---And we've found that everyone has to - you have to keep awake. There was no way that you could go to sleep because, like, there was a chance - there

was incidences here where cars nearly run off the road, and that's why we're saying that you need, like, the two people in the car need to both be alert at that hour of the night.

**** MICHAEL FRANCIS FREEMAN

XXN MR HEENAN

PN220

So it's more unsafe or less unsafe when rail operators are driving?---What are you saying? What, a rail operator's less safe than a driver?

PN221

No, I'm just asking your opinion?---Well if a driver that's driving at the end of his shift, I imagine it'd be a lot safer with a rail operator.

PN222

Right, it doesn't have to happen at the end of the shift though, does it? It could be during the shift, at the start of the shift?---Yes, well rail operators they work on - a lot of them work set shifts, where we work at - (indistinct) shifts. We can be rostered all over the place and they can get into a proper sleep pattern, where a lot of the times we can't, when we're rostered from, you know, different start times each day.

PN223

Okay, that's all Commissioner.

PN224

THE COMMISSIONER: Thank you. Re-examination?

PN225

MR TILEY: None from me.

PN226

THE COMMISSIONER: Thank you.

PN227

Thank you very much for giving your evidence, Mr Freeman. You're excused?
---Yes, right, thank you.

<THE WITNESS WITHDREW

[10.59AM]

PN228

MR TILEY: Commissioner, together with the three affidavits that we've already read, that concludes the RTBU's evidentiary case.

PN229

THE COMMISSIONER: Thank you. Mr Heenan?

PN230

MR HEENAN: Yes, Commissioner, our case simply revolves around the interpretation of the clause in the agreement. Commissioner, you will have seen our outline of submissions.

PN231

THE COMMISSIONER: Yes. Are you calling a witness?

PN232

MR HEENAN: No, there are no witnesses being called.

PN233

THE COMMISSIONER: You're not? Okay, so you're not calling any evidence.

PN234

MR HEENAN: No.

PN235

THE COMMISSIONER: So in that case we'll just hear the applicant's submissions.

PN236

MR HEENAN: Yes.

PN237

THE COMMISSIONER: Then you'll make yours in response.

PN238

MR HEENAN: Yes.

PN239

THE COMMISSIONER: Are you ready now Ms Brewer or would you like a bit of a break?

PN240

MS BREWER: I'm ready if it (indistinct).

PN241

THE COMMISSIONER: All right, thanks.

PN242

MS BREWER: If I may I'll just start by addressing some of the - Commissioner, you've had the benefit of our submissions.

PN243

THE COMMISSIONER: Yes.

PN244

MS BREWER: So I suppose what I'll do is go to the heart of what I feel QR is saying at the moment, which is basically that it's a bit ridiculous to think that if two crew can drive with a rail operator for more than two hours, that they can't drive for themselves for more than two hours. I'll start first just with the evidence that has come up, and we'll talk first about Mr Hinds' evidence where he was asked the question about falling asleep and discipline, and Mr Hinds said that he doesn't fall asleep when he has been in a self-drive situation, and that he has got no experience of that scenario. I think the AFULE would be happy to say that if QR wanted to develop and publish guidelines or policies about car driving, and do so in conjunction with the unions, and that as a result of those policies a train crew was to have some discipline for falling asleep while they were a passenger, then the AFULE wouldn't contend that that was within QR's power. The evidence of Mr Moffitt, we don't agree that being driven by a rail operator also brings in a safety issue, so that's potentially in a little bit of disagreement with what the RTBU might say. We don't disagree that it's a regular and well accepted practice to be driven for more than two hours. We're not making any contention there. We're also not saying that it's not a regular practice to drive in a taxi or with a rail operator. So that's just to address the evidence. In returning to our submissions I

can go through them if you like, Commissioner, or if you have a question? What would you prefer?

PN245

THE COMMISSIONER: Whatever you want to do. I've read them.

PN246

MS BREWER: Yes.

PN247

THE COMMISSIONER: So if you want to go through them in detail that's fine. If you just want to take me to particular things you want to highlight, that's fine too.

PN248

MS BREWER: Right.

PN249

THE COMMISSIONER: It's up to you, Ms Brewer.

PN250

MS BREWER: So I suppose the salient factor here this morning that has arisen is about rail operators and who has got responsibility in that situation. So I suppose I'll address that. In looking at clause 82, which is on page 79 of the agreement there.

PN251

THE COMMISSIONER: Yes.

PN252

MS BREWER: It creates a number of things which are probably at the heart of our argument. The first thing that it does is to create a duty, and you see that when you look at the heading of clause 82, so it's Train Crew Duties. The next thing that it does is outline what the tasks are. So it's the duty of the train crew for what tasks they're to perform. Now they're rail operations tasks and what it does, underneath the rail operation tasks, is to point out that they've got a duty to work as a team and that driving a motor vehicle is one of those tasks in rail operations. So they may be required, as a rail operations tasks, to drive a motor vehicle. It doesn't say one of those tasks is being driven. The next thing that we say is that if we have a look at clause 60 of the agreement, which is page - - -

PN253

THE COMMISSIONER: 60.

PN254

MS BREWER: Page 60? You know it better than I do, Commissioner.

PN255

THE COMMISSIONER: No I just happened to open the right page, I think.

PN256

MS BREWER: It gives governance of self-drive to clause 82.4 and in 82.4 it very clearly states that self-drive is not spare travel, so it's in place of spare travel. So in line with clause 82 they still have a duty while they're self-driving. They've not been relieved of all of the requirements for vigilance that Mr Hinds has outlined in his affidavit and in his evidence here today. When you're the second

driver you have a duty to make sure that the driver in charge of the locomotive is maintaining their vigilance. At some points they must only talk about safety. So while you're driving the loco there's that. When they're outside of the locomotive there's nothing that says when they're self-driving, which is also one of their train operations duties, that they are relieved of that necessity to maintain awareness and maintain vigilance. We'd say that if the agreement was found to be stating that one crew member was on shift while the other crew member wasn't on shift, then we'd be creating a bit of a fiasco in terms of rostering, in terms of time off, that one of the train crew would have to have more time off than the other.

PN257

You couldn't continue them both in the same shift; they couldn't jump on a train together. And if they were rostered the next day to travel in the same way, if they were rostered together the same day assuming that one of them wasn't on duty when they were driving, there may also be implications there about whether or not they could start the next shift together on the same day. So we're saying that both the crew are self-driving and that outside of the hours of 2200 and 0600 they're still operating as a team, performing train operations tasks, and they still have that duty, and they could drive for longer outside of those hours. But what we're saying with regard to the rail operator is that although - and also with taxis - our train crew are still within their shift, in accordance with clause 21 of the agreement, which is where QR has said that safety is imperative - where all the parties to the agreement have said that safety is central to the agreement - in accord with that and in consideration of - page 15 is clause 21, Commissioner. Sorry.

PN258

THE COMMISSIONER: Yes.

PN259

MS BREWER: In accord with that the employer has an understanding that we have got two train crew who are about to jump on a train and have to have a lot of concentration. One train driver described driving a locomotive as getting in and having a couple of semi-trailers behind him to drive, so a massive locomotive with another potentially kilometre long train behind them. They've got all the responsibility for the safe operation of that. They're going to have periods of time when the only thing they are allowed to consider or talk about is the safe operation of the train. They've got, as Mr Hinds has said, an extreme period of concentration ahead of them. So in consideration of section 21, where workplace health and safety is so important, QR have supplied them with a rail operator in order to ensure that that period of train driving is going to be safe for them. In the same way, when they're getting off the train, while they're still on shift, QR have given them a rail operator or a taxi as well, in consideration that they've come out of that and they're going to be feeling washed out, and they're going to be feeling a bit flogged by the whole experience, and that they're going to have to drive home for perhaps four hours or three and three-quarters, I think. So that's in the case of a rail operator.

PN260

In the case of a taxi driver, what we're saying is that QR are actually giving the whole responsibility for the safe carriage of those train crew to the taxi operator at that point. So we're basically saying that while they are on shift they are still

expected to perform all the train operations tasks which, when it's in the scenario of self-drive, they are expected as a passenger to be active and not passive, and to obey all of the safety specifications that they have been trained to observe. When they're relieved of that train operations task by a rail operator it is the employer acknowledging that it's a dangerous situation, and providing for that within their responsibilities under clause 21 of the agreement. That concludes that. Would you like me to discuss anything further?

PN261

THE COMMISSIONER: I don't have any questions.

PN262

MS BREWER: Yes.

PN263

THE COMMISSIONER: If you wanted to tell me about anything else I'm happy to hear you.

PN264

MS BREWER: That concludes our submission.

PN265

THE COMMISSIONER: All right, thank you.

PN266

MS BREWER: Thank you.

PN267

THE COMMISSIONER: Mr Tiley?

PN268

MR TILEY: Commissioner, I assume you'd like to hear from us as the second applicant before hearing - - -

PN269

THE COMMISSIONER: Yes.

PN270

MR TILEY: Okay. Commissioner, I don't propose to go into any great detail via oral submissions today, given that very little has emerged in evidence today that necessitates submissions that go beyond what is said in our written outline. However I do appreciate an opportunity to make submissions. If I can just start, Commissioner, by reiterating that the background to this clause, and ultimately this dispute, is that the driving of motor vehicles between these hours was dealt with very differently prior to the operation of this agreement. Now we say that's useful historical background information. In our affidavit material, in the affidavits of Mr Williams, Mr Heinemann and Mr Goodman and Mr Moffitt, they talk about the way that car driving has historically been undertaken in the coal area. Specifically that train crew employees only drove motor vehicles within a local agreed area, and that was for freight and coal, and then in coal depots the local agreed area would be a radius of approximately 30 minutes from the employee's home depot. So we're talking about necessarily shorter journeys because there is this radius.

PN271

However, we recognise or we bring to your attention that that driving was not limited by the hour of the day as it now is in this agreement. So it was tighter in one way and lesser in another. But in any event what that serve to inform you of is that this is very much a new clause and a new way of dealing with the issue. The affidavit of Mr Freeman is slightly different on that score in that he goes into more detail about the arrangements for driving motor vehicles at Rockhampton, which is his home depot, and he's a freight train - he's employed in the freight business. Now Mr Freeman says at Rockhampton, prior to the commencement of the agreement, there was no car driving at all between the hours of 2200 and 0600 because there had been two cars that had run off the road; and a local operating procedure or something of that kind had been struck between the workers and the employer, and no evidence has been led to refute that. What that serves to illustrate, Commissioner, is that certainly there - two points really, we submit.

PN272

Number 1, there are legitimate and ever present safety concerns when driving motor vehicles between these hours. Secondly, at least in the freight business, the need for this driving to occur is not so compelling as to necessitate your interpreting the agreement in the manner contended for by the respondent. So that's the background prior to the commencement of the agreement. What we append to our outline of submissions, and we say by virtue of the decision in *Watson and ors v ACT Department of Disability Housing and Community Services* - sorry, what we append is the extrinsic material, being some proposals. We say because of the *Watson* decision - this is paragraph 30 of my outline - you can get to that extrinsic evidence in this case because there is ambiguity - sorry, to resolve the ambiguity. Or in the alternative to demonstrate the existence of ambiguity. In any event we say you should arrive at that material. Now, Commissioner, it is not the case that that extrinsic material will assist you in understanding the meaning of the words in that clause, on our reading of it.

PN273

However it is the case, we say, that it offers very useful context and background to the progression of the parties' negotiations and where those negotiations were, at the time agreement was reached, prior to the drafting of the agreement, which of course informs, in the case of the ambiguity, the meaning of the agreement. Now I don't seek to make a huge amount of that, Commissioner, other than to say that in the early stages of the parties' negotiations in approximately October 2008, the proposal put by the respondent was that train crew would drive motor vehicles to the limitation of hours. That is to say that the respondent wanted carte blanche. Now our union in particular led the opposition to that proposal and over the course of the parties' negotiations a compromise was struck. What we are arguing about, of course, is what the meaning and effect of that compromise was. Ultimately, Commissioner, the parameters of 2200 and 0600 arose as a result of the intervention of Mr Moffitt, and he says in his affidavit, "I did some research and I came across these RACQ material which talked about the risks and the frequency of accidents during those hours". That is an exhibit to our outline.

PN274

It also talks about the greater risk in rural areas. Now we are of course talking about rural or regional areas in which this driving is occurring in central and north Queensland. The other way in which that extrinsic material is relevant is that the

final proposal that was tabled by the RTBU, which was from February 2009, talked only about the driving of motor vehicles and did not use the term drive, and I'll come to that distinction in a moment. That proposal is RTBU 6. The next and final piece of our extrinsic material is RTBU 7 which is the minutes from what I'm instructed is one of, if not the final, negotiation meetings. Those are off the whiteboard and I believe you've seen those before. Those again use the word driving twice and drive does not appear. Indeed the expression used there - and this is set out in paragraph 36 and 37 of my outline - the respondent uses the expression "all driving" which we say is instructive, and that "All driving counts as time spent as the operator role or as a passenger in a motor vehicle".

PN275

So we've come from a particular set of arrangements, very different to what's now in the agreement. The respondent has said, "Let's have no limit" and the RTBU have said, "No way". We get to, "Here's a cap, here's what we can live with", and the parties agreed to that. Now the question then becomes what does that mean and how is that to be applied? Commissioner, this takes me to our semantic argument which is set out in paragraphs 19 and following of our outline. The operative words in the clause, and these are helpfully set out in the first of your two questions for arbitration, or Fair Work Australia's two questions for arbitration, are "drive a motor vehicle", "car driving" and "total car driving time". Now we say the word drive is a verb and the word driving is an adjective, and the inconsistency between - obviously those are related terms and strictly speaking one's a derivative of the other. But in the context in which they appear they can mean vastly different things.

PN276

Now the word driving outnumbers the word drive. The word drive appears on only one occasion. We say the word driving is a broader term which, in the context in which it appears, should be constructed in a manner that includes time spent in a vehicle as a passenger. I refer there in paragraph 20, to emphasise the point that drive is a verb, to drive as being in charge of the motor vehicle and refer you to the similar interpretation of that term in the context of traffic matters. So we say in the context in which it appears in the agreement, car driving is used in its adjectival sense to describe traveling in a motor vehicle as the operator or as a passenger. The expression "drive a motor vehicle" is anomalous. It is the (indistinct) the company two adjectives and it is inconsistent with the rest of the clause. Quite simply, Commissioner, we say that our understanding during the negotiations was that it was about driving in the broader and in the inclusive sense, and that the fact the parties arrived at a clause that included the word drive and that was missed was not a matter that was a - it was not deliberately worded in that manner, certainly not by the RTBU.

PN277

Commissioner, we say that that conflict has to be resolved one way or the other, because it needs to be consistent throughout for the clause to make sense. So it either is driving throughout or drive. If we are right that driving is a broader term which is synonymous with - in the context of the clause - travelling, as it were, inclusive of time as a passenger. Now Commissioner much will be made of the proposition that drive is the present participle of driving. Commissioner, I don't propose to take you on a frolic through the English language but our interpretation

is the plain one which is - and any dictionary will tell you this - drive is a verb, driving is an adjective. A verb is a doing word. To be the present participle the gerund must be a noun, and in the context in which it appears, the word drive is being given work to do so it can't be a noun. It is sitting there as a verb which, on our understanding and in our submission, negates or removes any suggestion that it is merely there as the present participle of driving.

PN278

The evidence of Mr Moffitt to an extent, and certainly Mr Freeman, is that the matter was raised with the respondent and much will be made of the fact that in response to the concerns which were raised nothing was done about it. It will be said why wasn't the wording of the agreement changed. Well Commissioner, quite simply, it was an act of good faith and those assurances were taken in that light. Certainly the evidence from Mr Freeman is particularly compelling on that point. It obviously is axiomatic that not every issue about which a party is slightly unsatisfied can be agitated in that forum, if you are trying to get an agreement concluded in a timely fashion. We say the respondent has resiled from the negotiated position and is now trying to have its cake and eat it too, so to speak; after giving assurances upon which employees relied, prior to the commencement of the agreement. Mr Freeman says, "The reason I raised it with Mr Ackers is because employees at my depot said 'Are they going to do this to us?' I raised it with Mr Ackers and Mr Ackers said no. I took it back to the depot and the depot said 'Thanks very much'".

PN279

So Commissioner, these employees have been informed by that assurance when they voted on the agreement, on the evidence of Mr Freeman. Certainly there has been no evidence from the respondent to refute that conversation, or by Mr Ackers, to say "No, I did not say that "; Mr Ackers, who remains employed by the respondent. On the issue of the distinction between being driven by a rail operator and being driven by or driving yourself as train crew, the evidence of Mr Moffitt was Mr Moffitt did not commit one way or the other, the transcript will reveal, to form any view about which is safer. Mr Freeman suggested that at the least, at the end of a shift, it's safer to travel with a rail operator and that would seem logical, in our submission, for reasons he outlined in his evidence. Commissioner, much will be made of the comparison between travelling in a vehicle driven by a rail operator and a vehicle driven by train crew, and the respondent will say there's no difference.

PN280

Well Commissioner, that argument is a nonsense because in the agreement itself it caters very specifically for there being a difference. There's no secret of the fact that during the negotiations a difference was made. Mr Moffitt says, "We would love to have confined it across the board, for safety reasons, but that wasn't possible". But just because there might not exist the same cap if the rail operator was driving doesn't mean that this cap doesn't exist, or is to be read down in any way, shape or form. Train crew have bargained for, voted upon, and should obtain the benefit of this particular clause and they should have visited upon them the benefits, in terms of the safety in their workplace. The affidavits that we've filed each depose to the risks inherent in this kind of travel, which we say necessitated the inclusion of this clause in the agreement.

PN281

Just finally, Commissioner, I'm reminded by the evidence of Mr Moffitt - and certainly this was in the opening submission from the first applicant - the intent of the clause was to deal with self-drive. It was not envisaged by either union that these vehicles would regularly have multiple train crew employees. It was not suggested by the respondent that that would occur, and so the eventuality of, if you like, two plus two plus two up to a total of eight, wasn't dealt with because the object of the clause was to regulate self-drive, and the respondent hasn't led any evidence to the contrary. So we say, Commissioner, whilst the wording of the clause might not be perfect, certainly it is a logical and inevitable conclusion to draw, in our submission, that it was directed at a total travel time of two hours, which would include of course time spent in the vehicle as a passenger if there were more than one train crew in the vehicle. So in answer to your questions for arbitration, Commissioner, the first question should be answered in the affirmative, and the second question should be answered in the negative, with the result that the total travelling time of two hours between 2200 and 0600 is effectively to be read as total travelling time. The inclusion of the word drive in 82.4 is to be read down to achieve consistency with its peers, being total car driving time - sorry, peer car driving, which appears more than the word drive does. Unless I can assist you further, Commissioner, those are my submissions.

PN282

THE COMMISSIONER: No, thank you. So all the extrinsic material is attached to your submission?

PN283

MR TILEY: That's correct, Commissioner.

PN284

THE COMMISSIONER: Because I've got this bundle - I might just get my associate to show you - and I'm just not sure what it was attached to.

PN285

MR TILEY: Commissioner, that's not my material.

PN286

THE COMMISSIONER: Okay.

PN287

MR TILEY: I have seen that before and that was exchanged by the parties at the conciliation stage.

PN288

THE COMMISSIONER: All right.

PN289

MR TILEY: It was provided by the first applicant. You might like to hear from the first applicant and the respondent about the - I don't have any comment about the admissibility. That's not my material. I don't know.

PN290

THE COMMISSIONER: Mr Heenan, was it intended - or Ms Brewer, do you

- - -

PN291

MS BREWER: Commissioner, it looks like some documents that I've seen, that we submitted in conciliation, but we didn't submit any extrinsic materials here.

PN292

THE COMMISSIONER: No, all right.

PN293

MS BREWER: I'll just get - I wasn't involved in that conciliation.

PN294

THE COMMISSIONER: It's just that things come in on a stream of emails and they get printed out, and I just want to make sure I've got everything you want me to have.

PN295

MR TILEY: Well Commissioner, one of those at least is in my materials.

PN296

THE COMMISSIONER: Is in your material, yes.

PN297

MR TILEY: I don't require or request that Fair Work Australia consider any of that material.

PN298

THE COMMISSIONER: All right. Mr Heenan, can you just have a look at it and tell me was it intended to be attached to your submissions?

PN299

MR HEENAN: No Commissioner, it wasn't attached to any of my submissions.

PN300

THE COMMISSIONER: Good, okay.

PN301

MR HEENAN: But I do understand that there was a bundle of documents attached to AFULE's material during conciliation.

PN302

THE COMMISSIONER: And that could be it.

PN303

MR HEENAN: That seems to be it.

PN304

THE COMMISSIONER: All right, well I won't worry about that. Thank you. Mr Heenan?

PN305

MR HEENAN: Thank you, Commissioner. Commissioner, the effect of our written submissions is simply that the words of the clause, in our submission, are clear. No recourse to extrinsic material is required, and that the natural and ordinary meaning of the words drive and driving should apply, and should not be broadened in the manner that the applicants contend. Now to turn to particular arguments of the applicants, the AFULE has attempted to construct an argument based on shared duties, that both drivers, if there are two drivers in a vehicle,

maintain obligations or duties during the period of a car journey. Commissioner, we certainly take issue with that although, for reasons which I'll advance later in my submissions, we say that it doesn't matter. Now the terms of clause 82.1.2 are just to this issue of whether duties are shared. Clause 82.1.2 talks about employees on the locomotive. Now in the context of the clause that is headed Train Crew Duties and the sub clauses headed Train Crew Tasks, clearly the task or any tasks that are shared refer to tasks or duties which occur on the locomotive.

PN306

The AFULE ignores that particular clause when constructing their argument. Then if I take you to clause 93.1, the definition of two driver operations, "Two driver operation means the operation of a train by two qualified locomotive drivers". Now the AFULE has said that perhaps if there were guidelines in place which QR drafted to regulate the duties of a passenger in a vehicle, they'd be happy to have input and would be happy to call people to be disciplined if they didn't comply with them. Well, the reality is there aren't any guidelines in place for travel as a passenger in a vehicle, because it's not a task. It is spare travel, and again the AFULE ignores 60.1.2, "Means of spare travel". The second dot point, "Motor vehicle, including those self-driven by train crew". Again, 60.1.8, "Spare travel involving self-drive". I mean, it is spare travel. That said, our submission certainly is that it doesn't really take the AFULE anywhere in any event.

PN307

THE COMMISSIONER: Sorry, what was the second one of those clauses you referred to?

PN308

MR HEENAN: 60.1.8.

PN309

THE COMMISSIONER: Sorry, 60.1.8?

PN310

MR HEENAN: Yes.

PN311

THE COMMISSIONER: Yes, thanks.

PN312

MR HEENAN: Our submission is that it doesn't particularly take the AFULE anywhere because - and you may recall, Commissioner, we've actually had a dispute about this. We had a dispute about whether spare travel occurs within a shift length or within the limitation of hours, and it was conceded by QR that spare travel should be completed within the limitation of hours; and that if it didn't it should be dealt with under clause 56.1, which is the mechanism that the parties agreed, to deal with breaches of limitation of hours. So the reality is that all of this occurs during a shift. In our submission that's an important perspective, when considering the effect of clause 82.4.1. That is that all of this happens during a shift, and if it goes outside the shift clause 56.1 comes into operation as a limitation of hours breach. The RTBU's argument relies on the supposed intent of the negotiators and supposed ambiguity in the clause. Our submission is that the RTBU's case - or should I say if you were to accept the RTBU's argument it would require you to ignore the clear meaning of the words drive and driving.

PN313

The RTBU also places some store in safety concerns. QR doesn't deny that there are safety issues involved in travelling on the road. There are equal safety issues involved in driving a train. QR doesn't quibble with the notion that that RACQ has put out some material specifying what those safety risks might be. Those safety risks are general risks for occupants of a vehicle. There are no more or less issues when train crew are driving than when a rail operator is driving. They are general concerns. In our submission it takes the applicants nowhere, when considering the question of whether train crew should be allowed to share the driving, or there is a maximum cap of two hours, because it has been conceded that occupants in the vehicle are regularly on the road for more than two hours when a rail operator is driving a vehicle or in a taxi. Mr Tiley has taken us back to the history of negotiations and says that QR wanted carte blanche. Well certainly in our submission the clause doesn't give carte blanche. It places a limit on driving of two hours. We say that is a clear effect of the clause.

PN314

Mr Tiley contends that the extrinsic material should be of assistance, Commissioner, when attempting to resolve what is said to be an ambiguity in the clause. Commissioner, we say that the extrinsic material is of no assistance because everywhere within that extrinsic material it refers to the term driving. It doesn't refer to travelling, which is the obvious alternative if the clause is to be construed in the manner that the applicants contend. In any event Commissioner, we certainly take issue with the applicants' contention that driving is used in an adjectival sense. Driving when used in an adjectival sense is, in our submission, used for terms such as a driving force or driving rain. The more appropriate interpretation of driving as it is used in clause 82.4 - sorry, I'll go back a step, Commissioner. The operative sentence in clause 82.4 is the first sentence. The sentences that follow merely seek to explain the effect of the first sentence. So that's the first point I would make.

PN315

Secondly, the preamble to 82.4 clearly uses drive and driving as verbs, "May be required to drive a motor vehicle in accordance with this clause. Employees who hold a current driver's licence may be required to drive a motor vehicle in accordance with this clause. Driving of motor vehicles will include employees driving themselves or other employees". Clearly verbs. Now it is said that in the terms "Total period of car driving" and "The total car driving time", driving is an adjective or at least is used in an adjectival sense. When one considers what those phrases actually represent, they're effectively contractions of what perhaps should be a longer phrase; inelegant contractions you might say. But we say the effect of it is that "Total period of car driving" should perhaps, if it was explained more fully, be a total period of driving a car. Or "Total car driving time" could be the total time spent driving a car. In any event they remain verbs and, as I've said in the submissions, driving is the present participle of the verb to drive.

PN316

Also on that point, if you look at the rest of clause 82.4, drive is used all over the place as a verb. To say that it is anomalous that it appears in the first sentence of 82.4.1 is really to misrepresent the rest of the clause. It's used in 82.4.2, the first dot point, "In place of spare travel employees can be required to drive a motor vehicle". The first dot point of 82.4.3(a) which is titled Driving During A

Rostered Shift. So driving and drive is used throughout that clause as a verb. To say that it is being used in an adjectival sense in one particular section, and further that somehow because it's used in an adjectival sense it somehow magically takes on a broader meaning, is to misrepresent the context in which it sits.

Commissioner, we rely on the decision of President Hall in James Hardie Australia Pty Ltd. Commissioner, you're already well aware of the effect of the decision, but certainly what we say is the salient point that can be drawn from the decision is that it is the words in the agreement that are the best representation of the parties' intentions. We say the words of the agreement are clear. We say, Commissioner, that if you were to accept the applicants' arguments, the Tribunal would simply be ignoring the natural and ordinary meaning of the words drive and driving. Unless I can assist you further, Commissioner, those are my submissions.

PN317

THE COMMISSIONER: Thank you. Anything in reply, Ms Brewer?

PN318

MS BREWER: Thank you Commissioner. We don't dispute that the words in the agreement are the best representations of the intentions of the parties. We are in complete agreement with that. What we're saying is that this particular clause doesn't lend itself very easily to a literal interpretation, and it's actually the agreement as a whole that we need to consider. We have said that if we consider the agreement as a whole it constructs for train crews, crewing arrangements with shared duties; and that when Mr Heenan discusses 82.1.2 here, "Where all employees on the locomotive will work as a team and will equitably share all duties", then that's extended further down, if we look over the page on page 80, still as part of clause 82. We're talking about train operations duties, and they are the provisioning and preparation of locomotives, shunting and driving motor vehicles, so it's extending the duties that train crew are expected to perform as a team outside of the locomotive, or outside of driving the train; and that they are actually trained operations tasks in accord with clause 82.1.1.

PN319

We are also saying that self-driving is not spare travel. It replaces spare travel in circumstances of self-driving, and that's very clear in clause 82.4. We're further saying that a rail operator is provided by QR as part of its safety obligations under clause 21, in order to provide safety to the train crew. We're talking about what we've agreed to as train crew. We're not talking about what rail operators have agreed to, in terms of their own safety. If they've agreed to a single person driving as a rail operator, then that's because they've taken into consideration their own specifications. I suspect the RTBU can explain more fully what a rail operator is subject to in terms of their work, but we're saying here that it's not very relevant to this argument; whether or not a rail operator is safe. We're quite happy to say that if Queensland Rail are proposing that it's not safe to have a rail operator drive crew in that situation, then perhaps there should be two rail operators, and we'd be happy to consider that proposition.

PN320

So we're saying that, in answer to question 1, it's the whole agreement that creates the meaning of driving and drive and to drive. Total car driving time, it can't be interpreted literally. We have to look at everything, and when we do look at

everything we see that crew are together. They're not separate; they work as a team. To answer question 2, we say that the agreement doesn't put QR at liberty to require a train crew, who has been a passenger as part of a crewing arrangement involving more than one crew in a self-driving situation, to drive for a further two hours between the hours of 2200 and 0600. That's because they've had duties. They're not passive. They're not sitting there having a kip. As Mr Hinds has said, he doesn't fall asleep. Neither does it put QR at liberty to require the driver of that motor vehicle to become a passenger for a further two hours, after potentially having driven a train for nine hours, and then driving another two or four hours, which would come outside their limitation of hours. We're saying that they could drive for longer if a rail operator or taxi driver was driving them, and that is because Queensland Rail have provided them with a safety system to ensure their safety in those situations, and that's what the rail operator is there for, in accord with Queensland Rail's duties under clause 21. That's all Commissioner.

PN321

THE COMMISSIONER: Thank you. Mr Tiley?

PN322

MR TILEY: Thank you Commissioner. I just have seven points I'd like to make in reply to Mr Heenan's submissions on behalf of the respondent. The first is that we heard some submissions that talked about what are apparently general risks for the occupant of a vehicle and what are merely general concerns, which are no greater or lesser risks or concerns if a rail operator is in the vehicle. Commissioner, that's not quite correct, in our submission. When answering the question why is it safer for train crew employees to be driven by a rail operator or by a taxi driver, than by themselves or their peers whilst on duty, the question can be answered, in our submission, via recourse to logic. It's not a matter of evidence before the Tribunal that it is safer or unsafer, and indeed that would be quite difficult to quantify. What we say is that the rail operators are - it is a significant part of their role. We heard evidence from Mr Freeman that they have the benefit of shorter shifts and better sleep patterns, and it is only logical therefore to draw a conclusion that being of a specialist driver almost, one might say, in our submission, are better placed to safely carry the train crew employees from point A to point B.

PN323

Certainly the same in respect of the expertise goes for taxi drivers. So we don't concede that there is no safety advantage that comes from someone other than the train crew driving but in any event, Commissioner, that's really quite extraneous to the parties' dispute. The clause is about train crew driving the vehicle. The cap is there for train crew driving the vehicle, and then the only question you really need to answer is what does car driving, as it appears in the clause, mean, or what do each of the terms mean? On the respondent's submission it's all about driving and everything's a verb, and the ones you need to interpret are car driving. We transpose that submission and say that driving is the operative term. Driving is the majority term. Driving is the one which you should interpret, which dovetails nicely, Commissioner, into my second point which is that it was put in my primary submissions on behalf of the RTBU that as they appear in the clause, the term driving appears twice and drive appears once. Mr Heenan helpfully pointed out that in the context of the clause as a whole that's not quite correct. So if I can

just correct for the record I was referring to 82.4.1, and the reason I was referring to that is because, of course, you have asked us to assist you in determining the words as they appear in clause 82.4.1 only. That's question 1.

PN324

So yes, the word drive appears for example in 82.4.2. There's no doubt about that, but where I say it's two against one, if you like, that's in 82.4.1, and the reason I say that is because that's the clause which you're arbitrating the meaning of those words in the context of. The third point, Commissioner, is that Mr Heenan put for the respondent that the effect of the clause is - his words were, "It only places our limit on driving". That's quite true, Commissioner, but what is driving? We're in agreement up to the point of the meaning of driving. We agree there's a limit. We agree that's the purpose of the clause, but what is it limiting? So that's what we ask you to arbitrate. We certainly support that is put in the AFULE's outline that explains why, when you are travelling with a rail operator or in a taxi, it is spare travel and you don't bear responsibility for the duty of vigilance, I think it's described as, in the same manner that you do when you are a passenger in a vehicle being driven by your fellow train crew. I defer to their exposition of those matters which are set out in their outline and I commend that to you, Commissioner.

PN325

As for the extrinsic material, Commissioner, it was said that the extrinsic material is of no assistance because all it refers to is driving and not travelling, and that travelling would have been the obvious alternative. Well, Commissioner, yes with the benefit of hindsight it may have been but that doesn't take us anywhere at this point in time, given that we are in dispute about the matter. Assurances were given which are now being resiled from. Had those assurances not been given perhaps hypothetically the RTBU might have sought to change the words. But it's certainly within the realms of possibility that the parties did act in good faith with an agreed or an understood meaning of those words. It's not the case that certainly our union was lying blithely by and understanding what is now contended for to be the case. The fifth point I wish to make, Commissioner, is if I can take you to clause 82.4 itself, the preamble so described. The final words of it say, "Driving of motor vehicles will include employees driving themselves or other employees". Mr Heenan took you to those words.

PN326

So if driving of motor vehicles includes a train crew employee being driven by another train crew employee then how can the respondent contend that total car driving time and the period of car driving in a shift doesn't include time as a passenger, because "Driving of motor vehicles will include employees driving themselves or other employees"? In our submission that can be read, or is capable of being read, "Driving of motor vehicles will include a driver driving themselves and a passenger", so driving includes the passenger time. Mr Heenan has helpfully pointed that out for us, or drawn that clause to our attention. Last but not least, Commissioner, the issue about the ambiguity and President Hall's comments in the Hardie decision. We certainly don't have any qualm with the reliance on that authority as a matter of principle, however that is only - certainly the words of the agreement are the primary consideration, but what has been cited is an authority for the very starting point of principles of interpretation. It is no

secret of course that there are authorities which say you don't get to extrinsic material unless there's ambiguity, and it's a parol evidence rule scenario. We would take no issue with that whatsoever, but there is ambiguity in the words. It is not clear what they mean, Commissioner, in our submission. So President Hall's words will only take you so far, when trying to examine that issue.

PN327

Just finally, Commissioner, Mr Heenan said - I think his words were that perhaps it would've been helpful for the words "car driving time" to have read "to drive a car". In our submission, yes, that would've borne witness to the respondent's intention that these all be verbs and that everybody could drive, and it didn't include time spent as a passenger. But equally, Commissioner, that is not what the agreement says. If you were so disposed to look at the extrinsic material that is not what is borne out of the extrinsic material either. There is blatant ambiguity in the meaning, Commissioner. It does not say, "To drive a vehicle". It says, "Car driving time". It says, "Total period of car driving". So we certainly aren't persuaded by the respondent's submission that car driving as it appears is as a verb, but rather we maintain our submission, and press our submission, that it sits there as an adjective to describe the act of travelling in a vehicle, driving or being driven by your train crew colleague; because 82.4's preamble says it will include employees driving themselves or other car driving - sorry, driving of motor vehicles will include employees driving themselves or other employees. May it please the Tribunal, those are my submissions, unless I assist you further.

PN328

THE COMMISSIONER: Thanks Mr Tiley.

PN329

MR TILEY: Thank you Commissioner.

PN330

THE COMMISSIONER: I'll reserve my decision. Thank you, we'll adjourn.

<ADJOURNED INDEFINITELY

[12.00PM]

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