



FAIR WORK
AUSTRALIA

DECISION

Workplace Relations Act 1996

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

Australian Federated Union of Locomotive Employees, Queensland Union of Employees and the Australian Rail, Tram and Bus Industry Union

v

QR Limited T/A Queensland Rail

(DR2009/10116)

COMMISSIONER ASBURY

BRISBANE, 20 OCTOBER 2010

Alleged dispute concerning the interpretation of clause 82.4.1 of the QR Limited Traincrew Union Collective Workplace Agreement 2009 - Restriction on hours.

Background

[1] The Australian Federation of Locomotive Employees, Queensland, Union of Employees (AFULE) and the Australian Rail, Tram and Bus Union (RTBU) are in dispute with Queensland Rail Limited (QR) over the correct interpretation of clause 82.4.1 of the *QR Limited Traincrew Union Collective Workplace Agreement 2009* (the Agreement) in relation to Traincrew employees driving motor vehicles. The AFULE and the RTBU lodged applications seeking that Fair Work Australia (FWA) deal with the dispute, through conciliation, and subsequently arbitration.

[2] The Agreement is a transitional instrument as defined in the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (the Transitional Act). The applications are made under s.739 of Division 2 of Part 6-2 of the *Fair Work Act 2009* (the FW Act) and Schedule 19 of the Transitional Act. The effect of those provisions is that the former *Workplace Relations Act 2006* (WR Act) continues to apply after its repeal, for the purposes of dealing with disputes in relation to a matter arising under a transitional instrument. The Agreement contains a dispute procedure which provides for various steps to be taken to resolve disputes pertaining to the application of and interpretation of the Agreement. The disputes procedure provides for arbitration, in the event that conciliation does not result in a resolution to the dispute.

[3] A number of conciliation conferences were conducted by FWA as presently constituted, and when the dispute was not resolved, the matter was arbitrated. The parties agreed to the matter being arbitrated by FWA as presently constituted, and on the questions for arbitration, which are in the following terms:

- “1. As they appear in clause 83.4.1 of the *QR Limited Traincrew Union Collective Workplace Union Agreement 2009* (the Agreement) do the terms:

- (a) “drive a motor vehicle”;
- (b) “car driving”; and
- (c) “total car driving time”

include time spent by a train crew employee as a passenger in a motor vehicle?

- 2. In light of FWA’s determination of Question 1, can QR require train crew employees to travel in a motor vehicle for more than two hours (either as the motor vehicle operator or as a passenger) between the hours of 2200 and 0600?

For example: If there is more than one train crew employee in the motor vehicle between the hours of 2200 and 0600, and one or more of the train crew employees is required to operate the motor vehicle, is the total travelling time for the train crew employees in that vehicle a maximum of:

- (a) *the number of train crew employees in the vehicle multiplied by 2; or*
- (b) *2 hours.”*

The disputed clause of the Agreement

- [4] Clause 82.4.1 of the Agreement is in the following terms:

“82.4 Driving Motor Vehicles

Employees who hold a current drivers 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.

82.4.1 Restriction on hours

Between the hours of 2200 and 0600 employees will not be required to drive a motor vehicle for than two hours. To avoid doubt, the total period of car driving in a shift, whether consecutive or otherwise, can extend beyond two hours. However, no more than two hours of the total car driving time, whether consecutive or otherwise, can fall between the hours of 2200 and 0600.”

- [5] QR contends that the clause allows situations where a number of Traincrew in one motor vehicle can each drive for a period of no more than two hours during the period between the hours of 2200 and 0600. The AFULE and the RTBU contend that during those hours, Traincrew may not be in a motor vehicle either in the capacity of driver or passenger, when the driver is a Traincrew employee, for a period in the aggregate of longer than two hours. Both the RTBU and the AFULE concede that the Agreement does not preclude Traincrew from being driven by Rail Operators or from being transported in taxis between 2200 and 0600, for periods in excess of two hours.

Evidence

- [6] Evidence for the AFULE was given by Warren Neville Hinds, No. 3 Divisional Councillor and QR Limited employee working out of Callemondah Depot. Evidence for the RTBU was given by:

- Michael Freeman, Train Driver, member of the RTBU and Delegate at the Rockhampton Depot;
- Gary Noel Goodman, Train Driver, member of the RTBU and Delegate at the Charleville Depot;
- Keith Darcy Heinemann, Train Driver, member of the RTBU and Delegate at the Jilalan Depot;
- Leslie Moffitt, Northern District Organiser; and
- Malcolm Williams, Train Driver and Bluff Sub-Branch Secretary.

[7] Mr Freeman and Mr Moffitt were required for cross-examination. Essentially the evidence for the RTBU and the AFULE can be summarised as follows. Traincrew are required to drive motor vehicles in a number of circumstances including to pick up trains, to relieve crews who have reached their limitation of hours and driving to depots when they have been relieved. Responsibilities in the *QR Traincrew Observance of and Reaction to Signals Specification* continue to operate with respect to driving motor vehicles although there is no specification on responsibilities when driving a motor vehicle.

[8] Mr Hinds gave evidence about the role of Traincrew members in the respective positions of driver and second driver. Appended to Mr Hind's witness statement was a document setting out policy in relation to Traincrew observance of and reaction to signals, which makes it clear that both drivers of a two driver operation crew are responsible for ensuring the safety of trains, especially when approaching signalled areas and during stopping procedures.

[9] Mr Hind also said that he was not aware of any QR specification which removed this responsibility when he was a member of a two person crew and travelling as a passenger in a motor vehicle. Where both the driver of a motor vehicle and the passenger are Traincrew, the passenger remains on duty to ensure the safety of the driver and assist the driver by communicating about fatigue levels and managing them and ensuring the driver stays alert and focused. There are dangers associated with driving between 2200 and 0600 hours including fatigue, other road users, substantial traffic and animals such as kangaroos and livestock straying in to the path of oncoming traffic. Further, where all persons in the motor vehicle are Traincrew, they have finished a shift and may already be fatigued.

[10] Where the driver of a vehicle is a Rail Operator, Traincrew are passengers and can relax, on the assumption that Rail Operators have their own arrangements to ensure that they are not driving motor vehicles while fatigued.

[11] Under cross-examination, both Mr Freeman and Mr Moffitt agreed that current practice in QR is that Traincrew regularly travel in motor vehicles for more than two hours, if the motor vehicles are driven by Rail Operators. Traincrew also travel regularly in taxis for periods in excess of two hours. Both also agreed that Traincrew may be driving motor vehicles at times other than at the end of a shift. Mr Moffitt maintained that it was the preferred position of the RTBU that Traincrew would not travel in vehicles for more than two hours between 2200 and 0600, regardless of who was driving. The agreed provision which became clause 82.4 of the Agreement was a compromise.

Negotiations for the current Agreement

[12] The AFULE and the RTBU tendered a range of extrinsic material relating to the negotiations for the Agreement, in support of the argument that clause 82.4.1 is ambiguous. A number of witnesses gave evidence about the negotiations for the Agreement. Each witness who gave evidence about the negotiations said that prior to the commencement of the Agreement, there were a variety of practices with respect to Traincrew driving motor vehicles. In QR's coal business Traincrew drove only in a "Local Agreed Area of 30 minutes from the employee's home depot, and driving in that area was not limited by the hour of the day". The driving of motor vehicles by Traincrew in QR's freight business was dealt with differently. For example, in the Rockhampton Depot freight train drivers did not drive motor vehicles at all between 2200 and 0600 hours. According to Mr Freeman, this restriction was agreed to following a safety incident in 2005.

[13] In the course of negotiations for the Agreement in 2009, QR proposed that the driving of motor vehicles by traincrew be significantly increased. The RTBU said that it led the opposition to this proposal, and that clause 82.4 represents a compromise position that was ultimately agreed between the parties. Throughout the negotiations, insofar as they related to driving motor vehicles, RTBU negotiators (Mr Williams, Mr Heinemann, Mr Freeman, Mr Goodman and Mr Moffitt) were of the understanding that the 2 hour limit was to apply to any time spent by Traincrew travelling in a motor vehicle, driven by a traincrew employee, between 2200 and 0600 hours.

[14] Each of the witnesses who were involved in the negotiations said that clause 82.4 as it was drafted, was not intended to allow QR to place multiple Traincrew in a motor vehicle and for each Traincrew employee to drive for two hours between 2200 and 0600 hours so that the group travelled for more than two hours. The RTBU witnesses said that they did not negotiate for and could not countenance a proposal that would see employees travelling for more than two hours between 2200 and 0600 hours, because of significant safety risks.

[15] Each of the RTBU witnesses involved in the negotiations said that QR drafted the Agreement including clause 82.4 and the RTBU did not have any input into the wording of the draft. Mr Freeman said that when the two hour limit first emerged, he had a discussion with Mr Akers about clause 82.3 in response to the concerns of members, and Mr Akers assured him that if there are two drivers in a car between 2200 and 0600, QR would not make each driver drive for two hours. According to Mr Freeman, when he conveyed this information to RTBU members and officials, Mr Akers' assurance was central to the RTBU reaching agreement in principle with QR over car driving.

[16] Under cross-examination, Mr Moffit agreed that prior to the Agreement being finalised, RTBU members had raised concerns about the meaning of the term that became clause 82.4. The RTBU had accepted assurances from QR about how the provision would be applied, and had not sought to amend it before the Agreement was finalised. Mr Moffit also agreed that the RTBU was represented at a three day drafting workshop for the purposes of drafting the Agreement but maintained that the work of drafting had been undertaken by QR. Various drafts of the Agreement including clause 82.4 were tendered by the RTBU. These documents indicate that at the outset of negotiations, QR sought a clause to the effect that Traincrew would drive motor vehicles to the limitation of hours and would drive for the full shift length without limitations, subject to QR's fatigue management principles. On 7 January 2009, the RTBU presented a proposal that Traincrew who are required to drive a motor

vehicle as part of a rostered or local shift between the hours of 2200 and 0600 would be limited to a radius of one hour from their home depot and then return and that outside of these hours Traincrew would be available to drive a motor vehicle to the limitation of hours for the rostered or local shift up to a maximum of nine hours.

[17] On 3 February 2009 QR put the following proposal:

“Traincrew will drive motor vehicles as part of any shift. This could be at the end of or during a shift to return to a depot, at the beginning of a shift to a depot or point to return to home depot by a service. Between the hours of 2200 - 0600 hours the driving of motor vehicles will be limited to 2 hours.”

[18] There were further responses from the Unions with one indicating that between the hours of 2200 and 0600 the driving of motor vehicles will be limited to two hours. There were minutes of a meeting on 20 February 2009 which contain the following notation: “2 hour maximum all driving”.

[19] In relation to the use of extrinsic material, QR contends that FWA should only have recourse to such material if the meaning of the clause is uncertain or ambiguous. The meaning of the clause is clear according to QR, and there is no need to have recourse to extrinsic material. In any event the extrinsic material does not advance the case of either party.

Submissions

AFULE

[20] The AFULE submitted that the question for arbitration arises in relation to a crewing arrangement that requires the crew to self drive and that the driving is to occur only within a shift. The terms “drive a motor vehicle”, “car driving” and “total car driving time” include time spent by Traincrew as passengers in motor vehicles.

[21] Where there is a crewing arrangement with more than one person, it must be recognised that the passenger has joint operational responsibilities along with the driver. Being a passenger in these circumstances, means that the Traincrew member who is not in charge of the wheel of the vehicle is not relieved of his or her responsibility for its operation. The AFULE also submits that two (or more) Traincrew who are self driving between the hours of 2200 and 0600 cannot collectively self drive for more than two hours in total but could be passengers, relieved of their duties, for a longer period.

[22] This is said to be apparent from the fact that the Agreement creates a duty for Traincrew to undertake train operation tasks up to the full shift length, inclusive of time spent in a car. This means that Traincrew members are required to work as a team while working as operating employees, and equitably share all duties including driving time: clause 82.1.2 and clause 55.1. Driving motor vehicles as defined in clause 84.2 is part of “train operations” as governed by clause 82 and Traincrew have a duty to undertake these tasks as part of a team. The AFULE also pointed to the exclusion of self drive from spare travel, and that the former is part of the shift of duty while the latter is not. Further, the AFULE maintained that there is more operational responsibility as a passenger in a motor vehicle, because there are fewer safety checks than there are in a locomotive.

RTBU

[23] The RTBU contends that the operative words in clause 82.4 are “drive” (a motor vehicle) and (car) “driving”. The former is a verb and the latter is an adjective and it is this inconsistency which creates ambiguity, and a “tension” in the clause. The expression “drive a motor vehicle” is said to connote being in charge of the vehicle and to have a different meaning to phrases which appear elsewhere in clause 82.4 being “car driving” and “total car driving time”. “Drive a motor vehicle” in the context of the clause is a descriptor for travelling in a motor vehicle and that this phrase should be read down to the extent necessary to achieve consistency with related phrases that appear elsewhere in clause 82.4 and to achieve the parties’ negotiated outcome.

[24] FWA should strive to give effect to the intention of the parties and consider extrinsic material to assist its determination of the correct interpretation of the clause. Even if the clause is not ambiguous, FWA may still consider extrinsic material to assist it in determining the correct interpretation.¹ It was submitted that the extrinsic material establishes that:

- In the formative stages of the negotiations QR’s position was that it wanted Traincrew to drive motor vehicles up to their limitation of hours without restriction, representing a significant departure from the historical position.
- The RTBU lead opposition to this proposal on the basis of safety concerns.
- During the negotiations a compromise was bargained for and was intended to be reflected in what is now clause 82.4 of the Agreement.
- The final proposal tabled by the RTBU referred only to the “driving of motor vehicles” and did not use the term “drive”.
- The minutes from the parties’ final negotiations do not mention the term “drive” but instead use the term “driving of motor vehicles 2200-0600 2 hour maximum all driving”.
- The use of the term “all driving” is instructive as this expression encompasses time spent as the operator of, or as a passenger in, a motor vehicle.

[25] It was also submitted that safety considerations mandate that Traincrew employees not be required to travel in a motor vehicle for more than two hours between 2200 and 0600 hours and that this had been mutually acknowledged by the RTBU and QR, as evidenced by consideration of material produced by the RACQ, during negotiations for the Agreement. That material was said to establish that this time period was a peak period for fatigue related crashes.

Extrinsic material

[26] The principles relating to the use of extrinsic material as an aid to the construction of industrial instruments were set out by Senior Deputy President Ives in *The Australian Workers’ Union v Visy Board Pty Ltd t/as Visy Specialities*² (*Visy*) as follows:

¹ *The Australian Workers’ Union v Visy Board Pty Ltd t/as Visy Specialities* [PR963418] at paragraph 14(d).

² 4 October 2005 PR963418.

- If the terms of an industrial instrument are clear and unambiguous, then the industrial instrument must be interpreted in accordance with that clear and unambiguous meaning;³
- The words used in an industrial instrument should not be interpreted in a strict technical fashion, because those who framed the industrial instrument are often non-lawyers drafting words in the context of custom and practice in an industry or particular enterprise;⁴
- The words used in an industrial instrument should be interpreted within its context, that is, the meaning of particular words should be read in the context of the industrial instrument as a whole⁵ and in the context of the clause/section in which it falls;⁶
- The court or tribunal should strive to give effect to the intention of the authority which made the award (or presumably, in the case of an agreement, the intent of the parties to the agreement), provided that the words appearing in the instrument can reasonably be interpreted to mean that which the authority/tribunal/parties intended them to mean;⁷
- The court or Tribunal's recourse to extrinsic material in the interpretation of industrial instruments is not dependent on the existence of ambiguity in the industrial instrument.⁸

[27] For the reasons set out in *RTBU and AFULE v QR Limited t/a QR Services*⁹ I am of the view that evidence about the negotiations for an industrial instrument, is relevant to the extent that it establishes relevant background facts that go to the context or subject matter of the negotiations. Evidence about the actual intentions and expectations of negotiating parties is not admissible as an aid to the construction of industrial instruments, on the basis that it reveals the terms of the agreement they hoped to make, and those intentions and expectations are merged into the agreement. As Justice Mason observed in *Codelpha Construction v State Rail Authority (NSW)*:

“It is here that a difficulty arises with prior negotiations. Obviously the prior negotiations will tend to establish objective background facts which were known to both parties and the subject matter of the contract. To the extent to which they have this tendency they are admissible. But in so far as they consist of statements and actions of the parties which are reflective of their actual intentions and expectations they are not receivable. The point is that such statements and actions reveal the terms of the contract which the parties intended or hoped to make. They are superseded by, and merged in, the contract itself. The object of the parol evidence rule is to exclude them, the prior oral agreement of the parties being inadmissible in aid of construction, though admissible in an action for rectification.

Consequently when the issue is which or two or more possible meanings is to be given to a contractual provision we look, not to the actual intentions, aspirations or

³ Ibid [12] citing *Re Clothing Trades Award* (1950) 68 CAR 597.

⁴ Ibid [12] citing *Bond & Co Ltd (in liquidation) v McKenzie* (1929) 28 AR 499.

⁵ Ibid [12] citing *Australian Workers' Union v Abbey* (1939) 40 CAR 494.

⁶ Ibid [12] citing *Avondale Motors (Parts) Pty Ltd v Federal Commissioner of Taxation* (1971) 44 ALJR 280 at 283.

⁷ Ibid [12] citing *Australian Timber Workers' Union v W Angliss and Co Pty Ltd* (1924) 19 CAR 172.

⁸ *Australian Municipal, Administrative, Clerical & Services Union v Commonwealth of Australia* (1998) 82 FCR 175; 80 IR 345.

⁹ [2010] FWA 6066 [PR500354]

expectations of the parties before or at the time of the contract, except in so far as they are expressed in the contract, but to the objective framework of facts within which the contract came into existence, and to the parties' presumed intentions in this setting. We do not take into account the actual intentions of the parties and for the good reason that an investigation of those matters would not only be time consuming but it would also be unrewarding as it would tend to give too much weight to these factors at the expense of the actual language of the written contract.”¹⁰

Conclusions

[28] This is a case where there is nothing unclear or ambiguous about clause 82.4 of the Agreement. The clause must be interpreted in accordance with its clear and unambiguous meaning.¹¹ This is also a case where resort to extrinsic material as an aid to interpretation is neither warranted nor instructive. The evidence about the negotiations for the clause establishes that there were significant restrictions on Traincrew driving motor vehicles. QR sought to lift restrictions on Traincrew driving motor vehicles, so that they would do so up to the limitation of their daily hours. This proposal was opposed by the Unions and a compromise was reached which is reflected in clause 82.4.

[29] In my view, before a term in an industrial instrument that on its face is not ambiguous, could be read down in the manner contended for by the RTBU and the AFULE in this case, some significant anomaly, absurdity or unreasonable outcome would need to be established, so that it could be concluded that the parties could not have intended that the clause be applied in a certain way. On the face of the clause, the terms “drive” and “driving” are verbs and the term “driving” is simply the present participle of the verb “drive”. The preamble to clause 82.4 indicates that “driving” of motor vehicles includes employees driving themselves or driving other employees.

[30] I cannot see any basis for including time spent as a passenger in a vehicle within the meaning of the term “driving”. I do not accept that in the context of the clause the term “driving” is used as an adjective. An adjective describes a noun and the noun “car” does not require the use of the term “driving” as an adjective to describe it. I do not accept that the argument that “car driving” should be read in an “adjectival” sense as submitted by the RTBU, as a descriptor for travelling in a motor vehicle. If the parties had intended that the two hour limit would apply to travelling as well as driving it would have been easy for them to make this clear in the drafting of the clause. They did not. In fact, the preamble to clause 82.4.1, set out in clause 82.4 makes it clear that driving includes employees driving themselves and other employees, but makes no reference to the term “driving” including travelling as a passenger while another Traincrew employee is driving.

[31] There is no basis, on the plain words of clause 82.4.1, to distinguish circumstances where Traincrew employees are passengers in vehicles driven by Rail Operators, or in taxis, from those where Traincrew employees are passengers in vehicles driven by other Traincrew employees. To do so would strain the words of the clause. I do not accept that a Traincrew member who is a passenger while being driven by another Traincrew member has any greater onus or obligation than if he or she is being driven by a Rail Operator. In both cases the Traincrew member is a passenger.

¹⁰ (1982) 149 CLR 337 at 347 – 353 (with which Stephen and Wilson JJ expressed agreement)

¹¹ *The Australian Workers' Union v Visy Board Pty Ltd t/as Visy Specialities* 4 October 2005 PR963418 at [12] per Ives SDP.

[32] There is no anomaly, absurdity or unreasonable outcome imposed on Traincrew employees by applying the interpretation of the Agreement that I have determined is correct. I accept that safety is critical and that employees travelling in vehicles during the period between 2200 and 0600 hours may be fatigued. However, I am also of the view that the Agreement contains significant provisions in relation to fatigue management, and that these apply as they would to any other duties required to be performed by employees on a shift.

[33] The questions are answered as follows:

Question 1:

As they appear in clause 83.4.1 of the *QR Limited Traincrew Union Collective Workplace Union Agreement 2009* (the Agreement) do the terms:

- (a) “drive a motor vehicle”;
- (b) “car driving”; and
- (c) “total car driving time”

include time spent by a train crew employee as a passenger in a motor vehicle.

Answer: No.

Question 2:

In light of FWA’s determination of Question 1, can QR require train crew employees to travel in a motor vehicle for more than two hours (either as the motor vehicle operator or as a passenger) between the hours of 2200 and 0600

For example: If there is more than one train crew employee in the motor vehicle between the hours of 2200 and 0600, and one or more of the train crew employees is required to operate the motor vehicle, is the total travelling time for the train crew employees in that vehicle a maximum of:

- (a) *the number of train crew employees in the vehicle multiplied by 2; or*
- (b) *2 hours.*

Answer: Yes. The total travelling time for train crew employees in a motor vehicle between the hours of 2200 and 0600 hours (as per the example given in Question 2) is the number of Traincrew employees in the vehicle multiplied by two.



Appearances:

Ms M. Brewer and Mr G. Smith on behalf of the AFULE.

Mr L. Tiley on behalf of the RTBU.

Mr M. Heenan and Mr N. Burke on behalf of QR.

Hearing details:

2010.

Brisbane:

June 1, 2.

Printed by authority of the Commonwealth Government Printer

<Price code C, PR502937>