

Tender documents ad

TSP 5003 0001 0069

Screenshot 2022-02-28 at 3.55.03 PM

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Date: Mon, 28 Feb 2022 15:55:16 +1100

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3:55

4G



Tracey >

Sun, 20 Feb, 10:23 PM

We are still on call. There is a concern to go for termination as the disruption could play out for a few days before we would get a decision. We cannot get interim orders if Commission hears matter within five days which they are saying they can and the unions have agreed they could respond in a few days.

1/6

Can you please expand. I don't understand the play offs you are referencing?

Group is concerned on Ministers view of potentially having a number of days of disruption or full stoppages whilst we are in the hearing on potential termination and/or suspension. So want to consider all options eg

conciliation, delay a deal



Text Message

Screenshot 2022-02-28 at 3.55.24 PM

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3:55

4G



Tracey >

Group is concerned on Ministers view of potentially having a number of days of disruption or full stoppages whilst we are in the hearing on potential termination and/or suspension. So want to consider all options eg conciliation, doing a deal, making application to argue agreement should be upheld, etc.

Thanks

3/6

Can we grab you for a call
with Meg and Matt?

Yes

I understand there is tension
in this decision however I
want to stress we may not get
this opportunity again
especially with support of
Minister of ER.



Text Message

Screenshot 2022-02-28 at 3.56.00 PM

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3:56

4G



Tracey >

I understand there is tension in this decision however I want to stress we may not get this opportunity again especially with support of Minister of ER.

Noted... we would need to message this clearly

Do you want to do phone or can you come onto teams?

Either is fine

5/6

Either is fine

Okay will send an invite for
teams

Sun, 20 Feb, 11:44 PM

Thanks for looping me in
Tracey. Tough weekend for
you ... definitely like herding
cats!

Hi Tracey. What are the next
steps tonight? Ding me any



Text Message

Screenshot 2022-02-28 at 3.56.43 PM

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3:56

4G



Tracey >



You now have media release
and talking points

Onto it now

Have just responded. All
good with A minor change.
Thanks Tracey

Just checking you have seen
internal Comms as well?

page 1 of 2t

...will come shortly and then will get to you for review and sign off. James is working to get application lodged along with new evidence to support the stoppages.

Great. Thanks Tracey

Internal Comms in

Just reviewing now



Text Message



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

DEPUTY PRESIDENT CROSS

B2022/93 B2022/94 B2022/95

s.426 - Application to suspend protected industrial action, significant harm to a third party

**Sydney Trains
and
Australian Rail, Tram and Bus Industry Union
(B2022/93)**

Sydney

8.00 PM, SUNDAY, 20 FEBRUARY 2022

Continued from 19/02/2022

PN84

THE DEPUTY PRESIDENT: Yes, could I take the appearances, please. You're on mute, Mr Baroni.

PN85

MR M. BARONI: Thank you, your Honour. My apologies, Deputy President. My name is Baroni, initial M. I appear for the applicants. Appearing with me is Mr Pararajasingham.

PN86

THE DEPUTY PRESIDENT: Thank you.

PN87

MR BARONI: My apologies to my learned friend if I have mispronounced his surname.

PN88

THE DEPUTY PRESIDENT: Yes. For the respondent? Ms Saunders?

PN89

MS L. SAUNDERS: Indeed, Deputy President. I apologise for the slightly casual attire.

PN90

THE DEPUTY PRESIDENT: And I apologise for having the matter listed shortly before I got your message that you were unavailable until 6 am. All right, Mr Baroni.

PN91

MR BARONI: Your Honour, thank you. No doubt you're aware from yesterday's session we had reached an agreement as to some terms in relation to the applications. But an issue now has arisen in relation to one of the terms of that agreement which relates to the altered working, which would probably be now of no surprise to your Honour because that was an issue which was rather looming large in terms of what the applicant and the respondents intended or understood that phrase to mean. And unfortunately it has passed that we still don't understand what it means and have a different interpretation of what was agreed.

PN92

I'm not sure whether your Honour has the transcribed agreement, if I can refer it to that, that Ms Saunders had read onto the transcript.

PN93

THE DEPUTY PRESIDENT: I have what Ms Saunders read on to the transcript which was from Ms Saunders' email of 6.08 pm. I have also had the ability to review the recording that notes Mr Emmett noting on the basis of what was read out, that the applications were withdrawn.

PN94

MR BARONI: Yes, that's correct.

PN95

THE DEPUTY PRESIDENT: So you wish to revive the applications?

PN96

MR BARONI: Yes, your Honour. My apologies for not dealing with it first. That's the first issue. Those applications now need to be revived, given the position that the parties are in because of this dispute about interpreting what has been agreed.

PN97

THE DEPUTY PRESIDENT: Rather than getting stuck on ceremony, what's the problem?

PN98

MR BARONI: The problem is this. If your Honour has regard to the terms of the agreement, and if I can take your Honour to this particular dot point, it relates to the dot point dealing with operating the master roster, and the issue dealing with altered working.

PN99

THE DEPUTY PRESIDENT: Dot point 1, 2, 3, 4, 5 or 6?

PN100

MR BARONI: Just bear with me, your Honour, I can't find the relevant document I had in my hand a moment ago.

PN101

MS SAUNDERS: It's dot point 2 - sub dot point 2, sub dot point 1.

PN102

THE DEPUTY PRESIDENT: 'The ban does not prevent Sydney Trains from operating the master roster weekend timetable from 21 to 27 February 2022, as is presently scheduled.'

PN103

MR BARONI: Correct. My understanding now is that union's position is that somehow that the words, 'as presently scheduled', should be given no work to do. And the effect of what they're saying is that a ban is lifted or not imposed upon the working of the weekend master roster on weekdays. What is currently happening at the moment, and this was a notice of roster sent out on 10 February and implemented 4 days later so it's currently in operation, is that the weekend roster is operating during the weekday with enhancements. That is, it's operating with additional services.

PN104

The union's position is that the agreement was that the weekend roster could be implemented and would continue to be implemented during the week, but not with the enhanced services which are currently in place. That is not the understanding in terms of the agreement that the applicants had understood it had reached, particularly given the words at the end of that sentence, 'as is presently scheduled.'

PN105

That in our minds, my instructions are, were clear that that the current working pattern which is in place at the moment would continue to be in place for the period of time stipulated in that particular dot point.

PN106

THE DEPUTY PRESIDENT: Why is the current roster with enhanced services implemented from 10 February? Is it because of COVID issues, or is it because it's how the applicants are dealing with the former notices of protected action?

PN107

MR BARONI: I'll need to get some instructions on that. I think it is all COVID related, to be honest, your Honour, and that's my understanding.

PN108

THE DEPUTY PRESIDENT: Don't let me throw you, but if you can get those instructions it's - still, so is the issue this, the question of enhanced services added onto the master roster?

PN109

MR BARONI: Yes. We say that the agreement was, as we understood it, that the current services as are being engaged in would continue to be engaged in. That is, the master roster, the weekend master roster, applying to weekdays with the enhanced services. That's the way it is operating at the moment. If one accepts what the union is saying, the applicants would have started from a position which is less than what they already have. But that's not the way that we understood that the position would be.

PN110

It is simply to maintain what we have now. That is, the weekend master roster operating during the week with the additional services to maintain the system, so that the system runs. The union's position, as I've said, now is that you can run the weekend master roster during the week but with no additional services. That's not what the agreement was, as we understood it.

PN111

THE DEPUTY PRESIDENT: All right.

PN112

MR BARONI: So that's where the impasse is. And I'm not sure what my friend has to say about that. But it was on the basis that because once it was made clear to us that the altered working didn't apply to the weekend roster, then that was the basis that we understood we were going forward, again, as I say, underlining the fact that it would be nonsensical to agree to a position which is less than what we're actually operating at now.

PN113

THE DEPUTY PRESIDENT: Why is it nonsensical?

PN114

MR BARONI: Because we wouldn't agree to it. Our understanding is clearly - - -

PN115

THE DEPUTY PRESIDENT: That doesn't make it nonsensical, it just means you wouldn't agree to it.

PN116

MR BARONI: Well - - -

PN117

THE DEPUTY PRESIDENT: The basic fact is that the entirety of your conduct in dealing with the notices has been to try and make them more manageable so that, in the case of the applicant, that the system did not stop and therefore enlivened 424, 425 and 426.

PN118

MR BARONI: Yes.

PN119

THE DEPUTY PRESIDENT: Does the unions interpret - I'll wait and I'll hear from Ms Saunders first about what the union's interpretation of this particular point is. Is there anything further, Mr Baroni?

PN120

MR BARONI: Not at this stage, your Honour.

PN121

THE DEPUTY PRESIDENT: Ms Saunders?

PN122

MS SAUNDERS: Thank you, Deputy President. We disagree with most of what's been put by the respondent in respect of the agreement reached. Your Honour would recall that there are two concepts here: the master roster weekend timetable; and what is described in Mr Tumber's statement and was being described consistently throughout the conciliation as the 'enhanced weekend timetable.'

PN123

THE DEPUTY PRESIDENT: Yes.

PN124

MS SAUNDERS: The enhanced weekend timetable involves the master roster weekend timetable being altered by the altered working practices set out in the driver and guard rostering work arrangements manual. What the union agreed to was not to lift the ban on altered working, but was a clarification that that that ban did not mean that the weekday roster had to be run on weekdays.

PN125

The position that Sydney Trains has taken is that what we meant by 'as presently scheduled', was it's the weekend roster as affected by altered working, i.e., the altered working ban is lifted, fairly clearly not the position. And to the extent that there's an ambiguity in the words, precisely the kind of thing that I would have expected, at the very least, senior counsel to have clarified at the time if presented

with a deal that appeared to good to be true. It didn't happen. That was found in the various other clarifications that are made.

PN126

The union's position is as it was yesterday, the ban on altered working which is a specific practice about altering schedules and patterns in advance, not individual work rosters as the day moves out of sync, but the three day adjustment. That ban remains but we're content to Sydney Trains to run the, as the agreement says, 'master roster weekend timetable', on weekdays for the five days that it proposes to continue to do so.

PN127

THE DEPUTY PRESIDENT: Yes.

PN128

MS SAUNDERS: That's what the agreement says. That's the position. It does not, in our view, prevent train services being run. I note my friend hasn't said that. My client has been in discussion with Sydney Trains since 9.30 this morning, the first time this matter was raised to try and work out a solution to this.

PN129

As I said on the last occasion, if the RTBU wants to stop the network it can very directly by notifying that. That's not the purpose of this. Those discussions haven't been successful. Every proposal we've put has been rejected. But there are options that remain available to Sydney Trains to continue to operate the metropolitan network. I appreciate there was some discussion about Sydney Trains' New South Wales trains last night. As I apprehended, this is only an issue for the metropolitan network and so it's only Sydney Trains apply. If I've got that wrong it would be helpful if my friend could tell me now.

PN130

One option, it's closer than (indistinct) option but one is that all jobs which are the scheduled running patterns are cancelled, every single worker is put on standby, and the network is run at what is called, running off a clip, c-l-i-p, not 'cliff' with an 'f' - - -

PN131

THE DEPUTY PRESIDENT: Yes.

PN132

MS SAUNDERS: Ad hoc, to adjust as things come up. That's available. The key thing to remember is every single member of the RTBU who is rostered to work tomorrow will be turning up, ready, willing and able to work. Any difficulty with the network is caused by both, a), Sydney Trains taking a very, very difficult view of the phrase, 'master roster weekend timetable' in the settlement agreement; b) not clarifying that; and c) failing to make contingency plans.

PN133

I don't know how far we can advance it tonight. I have one or two RTBU officials on the line, but certainly not the depth of instruction that I had available yesterday. And I note that these applications were, in fact, withdrawn.

PN134

THE DEPUTY PRESIDENT: Yes. Mr Baroni?

PN135

MR BARONI: We don't accept that, your Honour. The words that were inserted there, 'as presently scheduled', have meaning. And the meaning that they've attributed to them was the fact that it was the roster with the enhancements which was currently operating, that would be maintained. That was the basis of the agreement. The union did not say anything about that not being what was agreed to, or raise it. So if my friend wants to be critical of Mr Emmett, in fairness to Mr Emmett the words were there for a reason. Otherwise they would have no work to do. And that's certainly what my client understood, the words to be there and why they inserted them.

PN136

THE DEPUTY PRESIDENT: There seems to be a lot of counsel going to be witnesses in this matter, possibly.

PN137

MR BARONI: Possibly. But again, your Honour, putting it to one side - - -

PN138

THE DEPUTY PRESIDENT: Well, let's put it to one side. Are you telling me that train services will not be running tomorrow?

PN139

MR BARONI: We are undertaking a risk assessment to see what the impact of this is. The affidavit of Mr Tumber doesn't specifically deal with this because what he was dealing with was something different to what arose out of the discussions yesterday. So if you accept the union's position, his affidavit doesn't particularly deal with that particular issue and they are looking at it now to determine what the risk is.

PN140

THE DEPUTY PRESIDENT: And, of course, his affidavit will have to deal with all of the other points favourable to your client's interest that are raised from the agreement that was reached with the RTBU. That'd be the case, wouldn't it?

PN141

MR BARONI: If we have an agreement. Because our - - -

PN142

THE DEPUTY PRESIDENT: You do have an agreement, don't you, because I was told there was an agreement and I was told that the applications were withdrawn. There was some discussion about a notice of discontinuance but the final words from senior counsel were, 'the applicants withdraw the three applications.'

PN143

Now I'm not going to stand on ceremony on that point. I'd rather just deal with the particular applications, because you're going to make another application within an hour, I'm sure, Mr Baroni.

PN144

MR BARONI: Again, the same issue, your Honour. I don't want to be sitting here, or standing here and saying, well, if the matter's closed I'll simply make an application now and re-file them within an hour. You're quite right.

PN145

THE DEPUTY PRESIDENT: Exactly. So we're not going to deal with that. We're not going to waste time on that.

PN146

MR BARONI: Exactly. So for the - - -

PN147

THE DEPUTY PRESIDENT: If the case is that no one can tell me that train services won't be running on the morning, albeit on a reduced timetable, albeit the master weekend roster, or with, as you call, with, you say it must be, that roster as is presently scheduled that includes enhanced services. I mean, that's the difference between the parties.

PN148

MR BARONI: That is the difference between the parties. And I said one of things we're trying to do is understand, not me but the operations people, are trying to understand the impact that that will have. My instructions are, whether it's immediate or a short time thereafter, the flow on effect will cause a stoppage of the network. It might not be immediate, but that's not to say that it won't be immediate. I don't have those instructions.

PN149

But what is clear from the instructions I do have is that flow on effects from stoppages, that is when trains are just left idling around because work patterns can't be altered, that will have a flow on effect. Logically it will have a flow on effect because if trains are stuck in the middle of the rail network and nobody's there to move them, it will cause a bank up. So that's the effect, on a very high level.

PN150

THE DEPUTY PRESIDENT: Are you telling me that when one considers all of the other dot points in the agreement, which I think we can term it as an agreement, that many of those don't attend to some of the hypotheticals you're putting to me now?

PN151

MR BARONI: Some of them will.

PN152

THE DEPUTY PRESIDENT: So why are you putting the hypotheticals in that fashion to me?

PN153

MR BARONI: Because your Honour asked me, and I'm answering your Honour's question. My instructions are that if not immediately, at some point thereafter the backlog will result in the stoppage of the network because there will be trains that just can't be moved, because of the ban on altered working.

PN154

THE DEPUTY PRESIDENT: Have those who have given you these instructions given you a timeline? Because the current timeline is from Mr Walters, 'halt shortly after the Monday peak', and that was at paragraph 8. Obviously the goalposts have moved significantly on this matter.

PN155

MR BARONI: Yes, your Honour.

PN156

THE DEPUTY PRESIDENT: And I am obligated, assuming the applications are on foot, which let's not, as I say, not waste time on that, but I need to determine the matter by midnight on Wednesday, the time frame under the Act. Now is there any reason that you say I should expedite the timetable even more quickly than that?

PN157

MR BARONI: Given the current state, we say yes. That's the preferred outcome. Our preferred outcome is obviously we can reach some sort of understood outcome tonight. If that's not possible then it raises the real issue about what your Honour should do. Can I say this, that the obvious misunderstanding, or lack of understanding between the parties about what is intended by the phrase, 'altered working', raises a significant question about section 414, subsection (6).

PN158

That's squarely now an issue because it is clear that even from the outset, putting aside all the discussions that happened yesterday, there was no clear understanding between the parties about what 'altered working' means. The union is entitled to its view about what it means. It doesn't mean that it's right or wrong. It has a different view and continues to have a different view about what altered working means, vis-à-vis, my clients.

PN159

That then raises the real issue about whether there is sufficient specificity in the phrase, 'altered working', for it to comply with section 414. And I don't say that lightly, your Honour but it does raise a significant question. Because even your Honour yesterday had asked the parties, there seems to be a completely different understanding of what 'altered working' means. And that seems still - - -

PN160

THE DEPUTY PRESIDENT: And that's exactly why I encouraged the parties to speak directly with each other.

PN161

MR BARONI: Yes.

PN162

THE DEPUTY PRESIDENT: From which arose the clear points of agreement.

PN163

MR BARONI: They're clear points of agreement to us, just as they're clear points of agreement to the union. But the problem is, our view of the clear points of agreement are different to theirs. So, again, the question about altered working and its significance in how it comes about and what it means, we're not ad idem on that issue.

PN164

THE DEPUTY PRESIDENT: Yes.

PN165

MR BARONI: So your Honour can be critical of my clients, I understand that, but the fact remains that just because my client has a different understanding of what 'altered working' means in the context of the purported agreement that was reached yesterday, it does not mean that it's simply its fault. Everybody agreed to it. Now the union has one view, my client has another view.

PN166

THE DEPUTY PRESIDENT: All right. So you wish to advance your applications on the basis of the amendments that arise from the agreement, is that the case?

PN167

MR BARONI: There's a number of ways to cut this. We can simply advance the case simply in relation to action no. 1, which is the issue about altered working; or we can simply advance the case on the basis of what the agreement that was purported to be reached, in fact, means. And your Honour can then have regard to section 414, because that is a live issue. There seems to be no clear understanding so that my client can take appropriate steps to mitigate the effect of the stoppages in relation to how altered working is imposed.

PN168

THE DEPUTY PRESIDENT: And the two examples you just put to me, one involves in effect accepting the withdrawal of the applications and enforcing the deal; and the other is more of a re-ventilation of the application - - -

PN169

MR BARONI: Yes.

PN170

THE DEPUTY PRESIDENT: Which course does the applicant wish to take?

PN171

MR BARONI: I need to get some instructions on that. But because - - -

PN172

THE DEPUTY PRESIDENT: While you're getting those instructions, I think what we also need clear instructions to be obtained on is, when one considers what case line(?) one wants to run, the time frame.

PN173

MR BARONI: Yes, your Honour. I'm - - -

PN174

THE DEPUTY PRESIDENT: Because I've made my comments about time frame previously just in relation to applications. There has to be fairness to the respondent in responding and being able to put their own position in relation to an application. You need to get instructions as to how soon you say the issue will impact upon Sydney Trains. You might want to lead evidence on that. But that's where we are, is it not?

PN175

MR BARONI: It is. The other option available to your Honour, obviously, which would be the more appropriate and immediate option, is to confer with the parties, either separately or together, to try and reach some sort of agreement. If that's not possible then we move into that phase which your Honour is talking about. And in the meantime we will get some instructions about the basis upon which we want to advance the application.

PN176

THE DEPUTY PRESIDENT: Ms Saunders?

PN177

MS SAUNDERS: We are not terrifically interested in conciliation at this point. It's a practicality issue. Unlike yesterday I don't have all the right people on the call. That's the major obstacle. The secondary obstacle is, of course, how well reaching agreement has gone last time. It's very unclear to ask what the applicant's present position is. I will say that it was made clear what the union's position on what altered were the names to it, and what the notices named.

PN178

We have to run the base pattern, the master roster, weekend roster. It can be supplemented, additional services added but through standby or overtime, very, very clear in our view. But that's a matter for evidence if this turns into a (indistinct) proceeding. Can I observe, however, that if it's a 414 issue, that actually becomes the applicant raising the jurisdictional objection to its own application. A 424 and the related 425, of course, can only be heard in respect of protected industrial action. You can't have them all.

PN179

It seems to us the best course is for Sydney Trains to take a moment to figure out what it wants to do. Can I say from my client's perspective that will make ourselves available over the next three days to have the matter heard when we can, and well turn around things quickly. We do need time to, of course, read and understand the respondent's evidence but we wouldn't be seeking any kind of (indistinct) timetable.

PN180

THE DEPUTY PRESIDENT: Yes. I can indicate that I have all tomorrow, and Tuesday afternoon currently available, and frankly, a matter at 10 o'clock on Tuesday morning that can be moved. So that's the time frame that can be accommodated. You do need to get instructions, I think, now, Mr Baroni in relation to the course that the applicant would wish to pursue, but I am wondering whether it would be convenient - I understand the respondent's position about instructions. It was quite clear that there was a broad range of instructions required for the respondent to reach what was a fairly detailed agreement yesterday, and I can understand why the respondent wouldn't want to proceed at 8.30 pm in the absence of those instructions.

PN181

So the course I'm looking at is firstly, what course the applicant wishes to take; what is said to be the proposed timetable in relation to that; and is the respondent available at, say, 9 am in the morning for further, if they wish, conciliation?

PN182

MR BARONI: I'll get some instructions in relation to that.

PN183

MS SAUNDERS: I think that was directed to me as the respondent. Mr Baroni is having perhaps the same difficulty I am. I think we can make ourselves available, if not precisely at 9, then certainly tomorrow morning. I'll confirm that as Mr Baroni confirms what his client wants to do.

PN184

THE DEPUTY PRESIDENT: All right. How much time will you need, Mr Baroni?

PN185

MR BARONI: Perhaps 15 minutes.

PN186

THE DEPUTY PRESIDENT: All right. Is it more convenient if everyone phones back right on 8.45, rather than sitting around?

PN187

MR BARONI: Yes.

PN188

THE DEPUTY PRESIDENT: All right, thank you. The matter is adjourned till 8.45 pm tonight. Thank you.

PN189

MR BARONI: Yes, your Honour.

PN190

MS SAUNDERS: Thank you.

SHORT ADJOURNMENT

[8.28 PM]

RESUMED

[8.36 PM]

PN191

THE DEPUTY PRESIDENT: Okay, Mr Baroni.

PN192

MR BARONI: Thank you, your Honour. I think we have come to the view that there's really not going to be much utility in any conciliation tomorrow morning, or at any time, given the position of the union. Our position is this. We can, and depending what Ms Saunders says about this, we can either file new applications or depending on what my friend says, we're happy to file new applications, we'll press for probably in the same terms.

PN193

If Ms Saunders say, well, we'll maintain that we're not going to press action 3 and 7, that's fine, then we'll delete those for any new application. So, to a certain extent depending on what Ms Saunders says about that will dictate the form of the applications. That's our position, your Honour.

PN194

THE DEPUTY PRESIDENT: Okay, and why do you say there's no utility in conciliation tomorrow?

PN195

MR BARONI: I don't think, and I'm happy to be proved wrong, just a brief discussion and I'm not verballing Ms Saunders, at all, there just seemed to be not a lot of prospect. But we're happy to engage in it, your Honour. If that's a view held by your Honour we're happy to engage in it. If it proves fruitful, it proves fruitful. If not, we'll press our applications either by filing new ones or resurrecting the old ones, the current ones.

PN196

THE DEPUTY PRESIDENT: All right.

PN197

MR BARONI: And that is predicated again on the conversation I had with Ms Saunders about her position on the current applications. Because as your Honour has rightly pointed out, there is an issue about that, that they were withdrawn. But for the purposes of tonight we haven't dug in in relation to that issue, or ventilated it.

PN198

THE DEPUTY PRESIDENT: I don't think it's going to do anyone any use if we do. So, am I to take it from that course of action that the idea of enforcing the agreement is not something that the applicant is going to do?

PN199

MR BARONI: I think it is problematic for a number of reasons. One is the discussions that have been had between counsel. It may be an issue. If it's - - -

PN200

THE DEPUTY PRESIDENT: It does bring, as I said, practically sometimes people into witness boxes they certainly shouldn't be anywhere near. All right, Ms Saunders?

PN201

MS SAUNDERS: Look, I mean, notwithstanding Mr Baroni's intention, I do feel fairly verballled by that. What Sydney Trains does is a matter for it. I would say there's some utility in your Honour retaining the matter, whether it's within this matter number or new applications, given the time that's been spent talking through what the various fairly complicated overtime bans are.

PN202

It's not up to me to tell Sydney Trains what to do. We can make ourselves available for hearing. It depends on when they want to put their evidence on. My principal question is, what is actually said is going to happen to the network at 9 am, or whenever it starts, 2 am tomorrow.

PN203

THE DEPUTY PRESIDENT: All right. It's a valid point, Mr Baroni.

PN204

MR BARONI: Other than what I've already put to you what we think is going to happen to the network - - -

PN205

THE DEPUTY PRESIDENT: Well, I could say, at what time? Because obviously when your application was made there was evidence put on that certain things would seem to be likely to occur.

PN206

MR BARONI: Yes.

PN207

THE DEPUTY PRESIDENT: But there's an agreement that but for three disputed words, I don't hear the respondent is going to depart from, and I assume it's because it believes it has an agreement with Sydney Trains.

PN208

MR BARONI: I think that's what I was trying to, you know, to get to the chase. To cut a long story short, if the union are going to maintain the agreement in relation to actions 3 and 7, then really it's the residual one and the other matters that would be pressed.

PN209

THE DEPUTY PRESIDENT: Rather than just 3 and 7, I assume, and Ms Saunders can correct me if I'm wrong, I would assume that all six dot points would be adhered to by the union in accordance with the agreement upon which the applications were withdrawn. And I'm not saying that, again, to try and close off the issue that we can simply keep dealing with the applications by consent. But that's the problem, isn't it? From 2 am tomorrow the respondent, unless Ms

Saunders tells me differently, is going to curtail what it had notified pursuant to an agreement.

PN210

I can understand why there might be some concern that such curtailing would occur pursuant to agreement. And then one would still face applications, possibly in the same form as were filed last Friday.

PN211

MR BARONI: I guess, for the sake of repeating myself, I understand my friend's concern and I understand your Honour's point, but the fact remains that we have two different versions or understandings of what has been agreed to. That is the problem. There's no disagreement about item 3 and 7. The dispute is in relation to action 1, which was in the notifications.

PN212

That is, again, the issue about altered work. We have a completely different understanding, rightly or wrongly and I'm not raising this to point any fingers at anybody, it's just the fact remains that there is a different understanding of what was agreed in relation to that issue. Now Ms Saunders says, well, I can't get instructions, I accept that, because we haven't got the right people here tonight. Well, that was your position. I mean, Ms Saunders is shaking her head. That's what I understand the position to be.

PN213

MS SAUNDERS: I'll respond in due course.

PN214

THE DEPUTY PRESIDENT: Yes. But the basic fact is, from the commencement in the network tomorrow there will be curtailing of the respondent's previously notified actions pursuant to an agreement. Now is there a need to determine what the agreement means? Ms Saunders, what's your position?

PN215

MS SAUNDERS: I think I raised this yesterday in the sort of final exchange before your Honour. Calling in the agreement might not be the most helpful way to understand what's happened here. The union has made certain commitments. And I'm saying, 'commitments' rather than 'undertakings' to avoid the (indistinct) of language there but it's said, this is what we'll do. That's as set out in this document.

PN216

It may be that Mr Baroni's client has misunderstood the extent of the commitments in respect of altered working. I don't think there is much utility in ventilating tonight, or perhaps ever, as to how legitimate that misunderstanding is. It appears to exist. It is very clear. The ban on altered working stands. It does not stop Sydney Trains running the master weekend roster on weekdays, this week as scheduled. It does prohibit supplementing or amending that through altered working. It couldn't be simpler. You can supplement it through other means: overtime; use of standby; a variety of other options. But it can't

supplement the master roster, weekend roster, through altered working practices. That's the undertaking. Whether that's clearly expressed in the document, which does say, 'Master roster, weekend roster', fairly plainly, is immaterial. That's the undertaking.

PN217

I can say those undertakings will persist. What Sydney Trains does in response is a matter for it. And it presses these applications. Perhaps there is some sort of obscure or subtle point. I doubt it in the context of an Administrative Tribunal. The real issue is, this is a reality based exercise. And the question for the Tribunal is what industrial action is actual, threatened, impending or probable. And that has to be assessed in the light of the commitments the union has made and is saying now on record that it will adhere to.

PN218

The thing to do seems to be to adjourn. Sydney Trains can do as it wishes. If it delays, it's a matter for it. But we're here today so we can accommodate a Tuesday hearing if we get the evidence tomorrow, et cetera, et cetera. If Sydney Trains takes some time to put its application together that may jeopardise that position. Much like a train schedule these things roll but that's the reality that the organisations are operating within. In terms of enforcing an agreement, certainly we are not seeking to do that. We're just saying this is what's happening now.

PN219

And if Sydney Trains wants to say, that forces us to shut the network, it will need to put on evidence to prove that. That is necessitated by the reality of the present situation, rather than being an operational or other choice. Which is quite a long-winded way, Deputy President, of saying nothing really can be done tonight unless Sydney Trains has a concrete proposal of how it wants the matter to proceed.

PN220

THE DEPUTY PRESIDENT: Mr Baroni, anything in reply?

PN221

MR BARONI: Not really. I mean, I don't quibble with what my friend said. If the union is saying that they will stick to their end of what they understand to be the bargain, that is they will not focus on actions 3 and 7 - we say that clearly there is no agreement about item 1, irrespective of what the union thinks, then if we file a new application that's what will be reflected.

PN222

THE DEPUTY PRESIDENT: All right. I think there's two options in the progress of the matter. Either the matter is scheduled for some time early tomorrow for further conciliation, or the matter is stood over generally for the respondent to choose their course of action. Am I wrong in those two options, Mr Baroni?

PN223

MR BARONI: No, your Honour. If your Honour is suggesting we should have conciliation tomorrow morning, we're open to it.

PN224

THE DEPUTY PRESIDENT: Yes.

PN225

MR BARONI: And then upon the finalisation of any conciliation if there's no outcome then we'll press our applications in one way or another.

PN226

THE DEPUTY PRESIDENT: I'm not suggesting that course of action. I'm just saying there seems to be two course of action and I'm wondering which is preferable for the applicant. Or if you're getting instructions - - -

PN227

MR BARONI: We're getting - just one second.

PN228

MS SAUNDERS: For what it's worth, while Mr Baroni is waiting, I've just got instructions of my own and we're content to participate in conciliation if Sydney Trains seeks it tomorrow.

PN229

MR BARONI: One moment, your Honour. Yes, we'll participate in conciliation tomorrow morning.

PN230

THE DEPUTY PRESIDENT: Is 9 am acceptable to the parties?

PN231

MR BARONI: Sorry, your Honour?

PN232

THE DEPUTY PRESIDENT: Is 9 am an acceptable time for the parties?

PN233

MR BARONI: Yes. I have a short hearing in the local court in the morning so - but I think everybody else is available, your Honour.

PN234

THE DEPUTY PRESIDENT: If there's any difficulties, just please contact my chambers. Prior to tomorrow would I please be able to be provided with 3.6.4 of the drivers' rostering and work arrangements that's referred to at 4.2, point (indistinct) point 1. And I also - - -

PN235

MS SAUNDERS: My instructor will send that to you shortly, your Honour.

PN236

THE DEPUTY PRESIDENT: Thank you, very much. And I think this is probably more for the applicant. Would I please be able to be provided with the master roster timetable - - -

PN237

MR BARONI: I think so.

PN238

THE DEPUTY PRESIDENT: For the period, 21 to 27 February, so that I can get an understanding of the difference between what the master roster weekend timetable is and what the master roster weekend timetable with enhancements is. Would that be possible?

PN239

MR BARONI: I think so. I don't know how bit this is. Yes. I'm told yes.

PN240

THE DEPUTY PRESIDENT: All right, then on that basis if we adjourn to 9 am tomorrow.

PN241

MR BARONI: Sorry, your Honour, can I just have one minute, literally?

PN242

THE DEPUTY PRESIDENT: Yes.

PN243

MR BARONI: Sorry, your Honour. Thank you. My apologies.

PN244

THE DEPUTY PRESIDENT: I think we're waiting for Ms Saunders to put her position. Is there anything - no? There's not anything arising from your instructions?

PN245

MR BARONI: No, your Honour.

PN246

THE DEPUTY PRESIDENT: All right, we'll adjourn the matter then till 9 am tomorrow.

PN247

MR BARONI: Do we use the same links, your Honour?

PN248

THE DEPUTY PRESIDENT: I'll just check with my Associate.

PN249

THE ASSOCIATE: There'll be fresh links and a fresh (indistinct) listing for tomorrow.

PN250

THE DEPUTY PRESIDENT: I do apologise for the link. It said the matter was on at 10 am tomorrow, but apparently the new Fair Work Commission system can't schedule a matter on a weekend.

PN251

MR BARONI: It's on at 9 am now.

PN252

THE DEPUTY PRESIDENT: All right, I'll adjourn the matter till 9 am tomorrow. I thank the parties for their attendance this evening.

PN253

MR BARONI: Thank you, your Honour.

PN254

THE DEPUTY PRESIDENT: Thank you. The matter is adjourned.

ADJOURNED UNTIL MONDAY, 21 FEBRUARY 2022

[8.54 PM]