

IN THE FAIR WORK COMMISSION

Matter No: AM2019/23 and AM2019/2

Section 158 – Application to vary a Modern Award –
ROAD TRANSPORT (LONG DISTANCE OPERATIONS) AWARD 2010

SUBMISSION OF ROBERTO A. PAJUELO DODDS

1. It has come to my attention that Mr. Trevor Warner ('The Applicant') has submitted an application pursuant to s158 of the Fair Work Act 2009 to vary the Road Transport (Long Distance Operations) Award 2010, specifically to vary the definition of 'Loading and Unloading' as set out in Clause 3; and to omit a part of Clause 14.2 (c)(i).
2. This matter is of great importance to me as a Heavy Vehicle Operator of nearly 13 years here in Australia because I coincide with the applicant in this topic overall. To support this, I will share my personal experience and discuss current legislation and case law.

Background and Personal Experience

3. I currently hold a Multi Combination Heavy Vehicle License since 2009. My first commercial license was issued in 2007.
4. My first job as a truck driver back in 2007 was for an employer carting shipping containers. Common practice was (and still is) that a worker gets paid from the moment they clock on, until the moment they clock off. Any delays in the process during any leg of the work was to be notified and recorded in our Runsheet. I never had issues with pay during my engagement with this employer.
5. As my main goal at the time was to travel interstate, I sought to work for an interstate transport company. My first job as an interstate truck driver started in 2009. It was this employer's policy that, in the event of a Long Distance Driver LD Driver being instructed to pick up or deliver the goods to the customer, to pay the LD Driver 1 hour only if it was a single trailer, or 1.5 hours if it was a B-

Double combination, however long it would take for the task to be completed. Some customers were very efficient, and the task would be done within the time paid or less, but others were usually slow, and the task was done way past the time we were paid. The company had local drivers being paid by the hour to specifically do the pick ups and deliveries, but sometimes a LD Driver was sent to collect his trailer or trailers. It is important to highlight that the company was always mindful to send LD Drivers to customers known to be fast.

6. I moved on to another transport company and one of their runs was Sydney-Perth-Sydney. The way they had it set up, several semis would travel from Sydney to Dubbo (I was assigned to this Sydney to Dubbo and return run), where road train drivers would be waiting for us to take our trailers to Perth. Our return trips (as semi-trailers back to Sydney) were all the trailers the road train drivers brought in from the west. Our issues here arose when the road trains were delayed, because this company would not pay us drivers any demurrage when being stuck in Dubbo waiting. I personally had to wait for 8 hours and I was not paid for none of that time, and such a lengthy wait ruined my work diary to the point where I had to take the next night off due to end up non-compliant for that trip, which only meant more money lost. When I raised the issue, I was told “events like this are very seldom, but this is transport, you better get used to it”
7. I moved on to another interstate transport company, and from the beginning we were told that the pay was only in cents per kilometre (CPK) and that the loading and unloading was a part of life basically and if we were quick enough we would be in and out quickly and the wheels will be turning again quicker... I believed it for a while, until one pickup became two pickups and one delivery became two and even three deliveries. I saw this unfair and economically not viable for me so eventually I moved on.
8. After all these misfortunes I concluded that it wasn't economically smart to be “unpaid” for tasks other drivers would perfectly be paid for, and therefore I formed the idea that LD Drivers and Local drivers were treated unequally. It was only logical then, to be in the group that was treated more fairly.
9. During this time being a local driver, I decided to do some legal studies. In 2014 I successfully completed a Diploma in Legal Services at TAFE, and on my own time studied Industrial Relations and Employment Law because neither one

was part of my course at the time. Then after doing my own research, I discovered where the flaw in the Awards were.

10. After a few years of doing local driving, my employer (a small fleet operator) wanted to pick up an interstate contract for a one of the biggest transport companies in Australia, and I explicitly told him that I would not do it if I was not going to be paid for the loading and unloading duties involved. Ultimately, he agreed. After nearly one year doing this new interstate job, I moved on to what it is now my current, permanent job, carting shipping containers.

The issues of Clause 3:

Statute

11. What the applicant seeks to change is based, in my understanding, on how poorly is the definition of “loading and unloading” is and how disengaged it is from real life. Clause 3 reads as follows: “**loading or unloading** means being physically engaged in the loading or unloading of the vehicle and includes tarping, installing and removing gates and operation of on-board cranes.”
12. Another piece of legislation relevant to my submission is s221 of the Heavy Vehicle National Law (NSW) in relation to “work’ as defined in Chapter 6:
- “**work**, in relation to a fatigue-regulated heavy vehicle, means—
- (a) drive a fatigue-regulated heavy vehicle; or
 - (b) instruct another person to drive, or supervise another person driving, a fatigue-regulated heavy vehicle; or
 - (c) perform another task relating to the use of a fatigue-regulated heavy vehicle, including, for example—
 - (i) load things onto, or unload things from, the heavy vehicle; and
 - (ii) inspect, service or repair the heavy vehicle; and
 - (iii) inspect or attend to a load on the heavy vehicle; and
 - (iv) if the heavy vehicle is a bus, attend to passengers on the bus; and
 - (v) clean or refuel the heavy vehicle; and

- (vi) perform marketing tasks in relation to the use of the vehicle;
and
 - i. Examples for the purposes of subparagraph (vi)—**
 - arranging for the transport of goods or passengers by the heavy vehicle
 - canvassing for orders for the transport of goods or passengers by the heavy vehicle
 - (vii) help another person to perform, or supervise another person performing, a task mentioned in any of subparagraphs (i) to (vi); and
 - (viii) record information or complete a document, as required under this Law, a corresponding fatigue law or otherwise, in relation to the use of the vehicle; or
- (d) occupy the driver’s seat of a fatigue-regulated heavy vehicle while its engine is running.”

Case Law

13. Several truck drivers have been victims of how poorly the definition of “loading and unloading” is under the Award. I will cite 4 legal cases that are currently relevant to and are offer used in some way by all parties in the Transport Industry.

- a. *Bewley v Linfox Interstate Transport* [1998] [SAIRC 37](#) (21 July 1998)
- b. *Graham Jones v Post Transport Pty Limited* [2000] [NSWCIMC 71](#) (15 December 2000)
- c. *Burge v Adelaide Interstate Loading Agency Pty Ltd* [2014] [SAIRC 31](#) (26 September 2014)
- d. *Laycock v J & C Independent Carriers Pty Ltd* [2018] [FCCA 6](#) (12 February 2018)

14. It is important to highlight that:

- a. these cases went through lower level courts and there aren’t any strong cases so far, testing this definition of “loading and unloading”, or any case law for that matter on a high level on neither State or Federal jurisdictions:

- b. Most parties were self-represented. A notable exception to this is *Bewley v Linfox*, Mr. Bewley had the backing of the Transport Workers' Union, and Linfox had legal representation.
 - c. All 4 cases clearly state that they followed the letter of the law when the question about the meaning of "loading and unloading" arose, and therefore the truck drivers lost their cases.
15. Of all 4 cases cited, I will highlight Mr. Laycock's case because the presiding judge elaborated on the wording of the definition and raised valid points on the real-life description of the loading and unloading tasks detailed by Mr. Laycock, and undisputed by the Respondent. Driver J concluded in his judgment that "loading and unloading" is a task that involves far more than simply placing goods on a truck or removing goods off a truck, but he had to follow the letter of the law.

Analysis

16. I bring all this information to give some context, for us all to appreciate how poorly the Award's definition of "loading and unloading" is, when we learn how it all works in the real transport world.
17. As a personal experience I can tell you, every Distribution Centre and warehouse I have visited have the policy that truck drivers are strictly prohibited from using the site's equipment. Warehouses and distribution centres all over Australia have taken their duty of care much more seriously, and to let non-employee truck drivers use their equipment to load and unload is simply not acceptable practice nowadays. I was told this explicitly in every induction I have attended to. I was also told that I was to be available for the forklift driver in the "designated drivers area" in order for my truck to be loaded and/or unloaded and that I must have enough hours on my work diary in order to be onsite. Anything under 4 hours generally would be deemed "not enough working hours" and the site would very well turn a driver away and get them to rearrange another time slot. Nobody told me this story, I saw this happen to a fellow driver in front of me on a queue once.
18. The definition of "loading and unloading" as written now in the Award is simply not realistic. We know of some transport operators that pay only 1.5 hours for

loading or unloading a B-Double combination, but they clearly state that it's only "compensation for the troubles" or a "make up pay", which only sounds like they're being nice or doing the LDD a favour. In real life, why would an Australia-wide interstate transport company have local drivers on 8-10 hour shifts in each Australian state or territory, to sit and wait for 3-4 hours in a Distribution Centre, when they can make the Long Distance Drivers sit and wait and do the unloading and reloading for 1.5 hours no matter how long the sit and wait for? Or even for free, like a lot of companies currently do?

19. It is my personal experience that the ideal turnaround time for 34 to 36 pallets on a B-double is no less than two hours. By "turnaround" I mean from the moment I drive in until the moment I drive out. However in some places the average turnaround time is 3.5 hours. I was picking up beer from a major brewery in Melbourne and that day, the turnaround time was 6 hours. I could only claim two hours pay.
20. Let's see the scenario where a LDD simply drops trailers and leave or picks up trailers ready to go. There evidently isn't any involvement in the physical part of the loading and unloading process. But we must take in consideration all the paperwork and Security checks to be completed and we all know that also takes time. Checking in or out with Security and going through the paperwork could take 10 minutes, or it could take 45 minutes, it will all depend on how busy or how well the day was on that day. I dare ask: if a local driver gets paid for every minute they spend at a customer's facility, why would the Award deny a LD Driver of the pay for their time?
21. Transport operators have this dilemma all the time: a b-double truck is on their way from Sydney to Melbourne and the driver has 5 hours left on his work diary to use. Should Melbourne Depot 1.-send the LD Driver straight into the customer's site to deliver, or 2.-should we get the truck into our depot, send the LD Driver to have rest up and then send a local driver to deliver? The financial incentive is there, to save the money and send the LD Driver, even if said operator decided to pay 1.5 hours (like only a few companies pay), there is still a financial incentive to not send their local drivers and have the LD Drivers doing the job for less money
22. In conclusion, I believe it is of extreme importance to modernise the concept of "loading and unloading" to a more real-life concept, and accept the fact that if

we leave things as they are now, this loophole will leave Long Distance Drivers in a disadvantaged position.

The issues of Clause 14.2 (c)(i):

Statute

23. The Award as it stands today reads the following:

Clause 14.2 (c) Travelling allowance

(i) An employee engaged in ordinary travelling on duty or on work on which the employee is unable to return home and takes their major rest break under the applicable driving hours regulations away from home must be paid \$40.44 per occasion. This will not be payable where an employee is provided with suitable accommodation away from the vehicle.

(ii) In exceptional circumstances, where amounts greater than those specified are claimed, an employee will need to demonstrate why the claim is necessary and gain approval from a representative of the employer. Such approval will not be unreasonably withheld.

24. It is important to have in consideration what the Fair Work Act says about payments. The FWA states in s325:

(1) An employer must not directly or indirectly require an employee to spend, or pay to the employer or another person, an amount of the employee's money or the whole or any part of an amount payable to the employee in relation to the performance of work, if:

- (a) the requirement is unreasonable in the circumstances; and
- (b) for a payment--the payment is directly or indirectly for the benefit of the employer or a party related to the employer.

Note: This subsection is a civil remedy provision (see Part 4-1).

(1A) An employer (the prospective employer) must not directly or indirectly require another person (the prospective employee) to spend, or pay to the prospective employer or any other person, an amount of the prospective employee's money if:

(a) the requirement is in connection with employment or potential employment of the prospective employee by the prospective employer; and

(b) the requirement is unreasonable in the circumstances; and

(c) the payment is directly or indirectly for the benefit of the prospective employer or a party related to the prospective employer.

Note: This subsection is a civil remedy provision (see Part 4-1).

(2) The regulations may prescribe circumstances in which a requirement referred to in subsection (1) or (1A) is or is not reasonable.

Analysis

25. To be away from home and spend on food and accommodation is an inherent part of the job of an interstate driver. My understanding is an employer can now negate all travel allowance IF they provide any kind of roof on their drivers' heads and nothing else. The Award allows this, and leaves the Long-Distance Drivers in a disadvantageous position. They don't get to go back home, they're forced (by the nature of their employment I must stress) to eat and shower and sleep in another city or another state. No wonder why employers struggle to find drivers keen to drive interstate without knowing when they'll be back home.
26. This does not happen in any other industry where traveling allowance applies, such as FIFO Workers or commercial pilots. These workers are clearly covered when they are sent to work out of home.
27. I think that when one reads both the Award and the Fair Work Act, its not too hard to realise that what the Award states (specifically what Mr. Warner seeks to omit) goes against what the Award seeks to protect in s325

Conclusion

28. For all reasons described above, I fully support what Mr. Warner seeks to change, I agree with him that it is in the best interests of all workers in the transport industry. I sincerely hope the Fair Work Commission sees reason in what he asks and approves his application to vary the Road Transport (Long Distance Operations) Award 2010.

25th of February 2020

Roberto Alejandro Pajuelo Dodds