



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

DEPUTY PRESIDENT CROSS

C2023/5443

s.739 - Application to deal with a dispute

**Australian Rail, Tram and Bus Industry Union
and
NSW Trains T/A NSW TrainLink
(C2023/5443)**

Sydney Trains and NSW TrainLink Enterprise Agreement 2022

Sydney

10.00 AM, MONDAY, 13 NOVEMBER 2023

Continued from 15/09/2023

PN1

THE DEPUTY PRESIDENT: (Audio malfunction).

PN2

MR T WARNES: If it pleases, your Honour, my name is Warnes, initial T, appearing for the applicant in the proceedings.

PN3

MR R HUTCHINSON: If it pleases the Commission my name is Hutchinson, initial R, and with me is Mr O'Connell, initial E.

PN4

THE DEPUTY PRESIDENT: Have you had a discussion as to how the matter is going to proceed today?

PN5

MR WARNES: We haven't, your Honour, but I would imagine, just in the usual course of how these proceedings go, we did - my colleague did have a brief discussion with Mr Hutchinson last week and just can't see, unfortunately, any avenue in which this case might be settled one way or the other. I think it's just a fairly straight down the line interpretation question and a pretty clear issue that needs to be resolved by the Commission, in relation to whether NSW Trains can externally recruit these new guards.

PN6

THE DEPUTY PRESIDENT: The actual concern, or the position on the ground, is that there's been how many externally recruited trainees?

PN7

MR WARNES: Well, across the network there's been quite a few, according to the evidence, I think, of Mr Brandse. I think it's something like 80. This particularly cohort, I think, is about eight or nine.

PN8

THE DEPUTY PRESIDENT: Five, I believe.

PN9

MR WARNES: Five.

PN10

THE DEPUTY PRESIDENT: Yes.

PN11

MR WARNES: Single digit.

PN12

THE DEPUTY PRESIDENT: The concern is the recent ones in Newcastle.

PN13

MR WARNES: Yes, that's right.

PN14

THE DEPUTY PRESIDENT: There's been some assertions in a previous dispute before Bull DP - - -

PN15

MR WARNES: Yes, that's right, in Wollongong.

PN16

THE DEPUTY PRESIDENT: - - - and recent applications in Sydney where the GRAWA was not in force but this is specifically in relation to Newcastle.

PN17

MR WARNES: To Newcastle, that's right.

PN18

THE DEPUTY PRESIDENT: So maybe my questions are misguided because I'm only looking at Newcastle and it's best to work out where, in the scheme of things, things were at. Were there people on the seniority list waiting in Newcastle?

PN19

MR WARNES: Look, our evidence today is going to be that there is. On the documentary evidence, at this stage, there's an assertion that there isn't and a counter assertion that there is. There's some dispute about it. I do note that the list actually hasn't been produced by either party but, regardless, our case doesn't actually rise or fall on whether or not the seniority list has been exhausted or not. We say that there's a prerequisite that needs to be met in order for a suburban guard, or an existing guard, to become an intercity guard.

PN20

THE DEPUTY PRESIDENT: Once you get to the end of clause 8.4 of the GRAWA you go to clause 18.

PN21

MR WARNES: Eighteen, yes. And we say that 8.4 only applies to urban guards, so a newly qualified guard has to go into a suburban depot first and then you jump to 18 before you can get into the intercity guard school to then become qualified as an intercity guard to do intercity working.

PN22

THE DEPUTY PRESIDENT: All right. Okay. Sorry, I'm just trying to get my head around it myself.

PN23

MR WARNES: Me too.

PN24

Your Honour, I'm just going to make a brief opening before I call my first witness. This case today, it isn't about the cancellation of services, or the number of guards at a particular depot, or the amount of overtime that some guards receive, this is about a long-running industrial arrangement that was made between the parties that was consolidated in 2008.

PN25

Your Honour will notice that the date and the organisation on the GRAWA is currently significantly outdated, it's got Rail Corp in the top right corner, and it was made in May 2008 but these types of arrangements go back a lot longer than that.

PN26

You'll notice on the front page of the GRAWA it notes that, 'This document was consolidated pursuant to a clause in the 2005, as it was then, collective agreement between the parties'. But it's important to note that even though the GRAWA was made in 2008, by agreement between the union and Rail Corp, at the time. Now it forms an incorporated document within the 2022 enterprise agreement so, just by nature of the scheme that we operate in, it's not only an agreement between the union and NSW Trains and Sydney Trains, it's also with the - for the purpose of NSW Trains, their 3000 plus employees as well.

PN27

At the outset we say NSW Trains' evidence and submissions attempt to paint what we say is a bit of a doomsday picture of the state of their operations at Newcastle. It's worth noting that - while we're going to say that that situation has been significantly exaggerated, we're going to submit that this situation is almost entirely of NSW Trains' own making. Your Honour would be aware, from previous proceedings you've been involved in, the new intercity fleet caused significant disruption and disputation between the union, its employees and NSW Trains.

PN28

We're going to submit that that dispute which centred around NSW Trains' desire to make these new trains driver only operations has wiped out guard interest in going to the Newcastle depot. We'll submit, and your Honour will hear evidence, that in the past this wasn't only not an issue, there was actually significant waiting times to get into the depot in the first place.

PN29

So much of the evidence you're going to hear, your Honour, is going to be useful for analysing what sort of impact a decision of the Commission might have. But, ultimately, we say, and I said it in response to your questions straight up is, ultimately we say the Commission needs to decide whether or not the agreement and the GRAWA provide a prerequisite that must be met before a train guard can take up work in an intercity depot. We're going to urge the Commission to find that, like so many other safety critical industries, for guards there is a level of experience - sorry, I withdraw that. In this instance there's a level of experience that is required of guards in order for them to become qualified and perform intercity guard work and that that prerequisite has been consolidated by the parties into, primarily, the GRAWA, the Guards Rostering and Working Arrangements, but with supportive clauses throughout the enterprise agreement, and we'll take you to those.

PN30

Just, finally, in this case, the Commission will be exposed, for all its sins, to some fairly average industrial drafting, as is envisaged by Madgwick J, in *Kucks v*

CSR. It's apparent that the document was negotiated by guards themselves and local management or management of the organisation at the time, without any or very little input or oversight from IR professionals or other experts in drafting.

PN31

I'll attempt to take the Commission through it as clearly as I can in my closing, but I wanted to open with that fact, because there's lots of terms and - - -

PN32

THE DEPUTY PRESIDENT: Well, in defence of those guards and those managers, you could say that the number of disputes that have arisen about the 2022 agreement is extraordinary in itself.

PN33

MR WARNES: Yes, it is. Is it, your Honour, unfortunately and - - -

PN34

THE DEPUTY PRESIDENT: (Indistinct) document.

PN35

MR WARNES: Yes. The parties are approaching a new bargaining round, so we'll see where that takes us.

PN36

With that, I note that all three witnesses that are required in this matter are in the room. I'm going to call Mr Ferguson first, so I might just ask for the other witnesses to be excused.

PN37

THE DEPUTY PRESIDENT: Yes.

PN38

You don't want to do an opening at this stage, Mr Hutchinson?

PN39

MR HUTCHINSON: Look, I might just take (indistinct) on a couple of point, Deputy President.

PN40

I think I largely agree with Mr Warnes that this case isn't about the operational situation on the ground, primarily, it's about - it's an interpretation case and it's about whether clause 18 of the GRAWA, as was outlined in the F10 application, stops NSW Trains from recruiting guards to intercity depots. Then there's some subsidiary questions, as outlined in the F10, about the status quo and what should happen with the trainees that are already engaged.

PN41

THE DEPUTY PRESIDENT: That is something I could raise some questions about, but I probably shouldn't interrupt you.

PN42

MR HUTCHINSON: I'll come to that at the end, perhaps and happy to take any questions on it.

PN43

THE DEPUTY PRESIDENT: When you get to it I'll raise the questions.

PN44

MR HUTCHINSON: So the primary question is whether the clauses, drafting, whether it maybe somewhat - I don't disagree completely that there is some drafting that may not be how we would prefer to have it, but we say it's reasonably clear, particularly with the broader context of the organisation that we will cover today.

PN45

Our written submissions outline why the clauses do not have the effect that the union says they have. I don't propose to go through those in detail now, but, in principle, the agreement provides for NSW Trains, explicitly, to engage trainee guards. If we weren't allowed to do that the union's submission is that we can't, under any circumstances, recruit a trainee guard directly. The fact that there is a clause that allows for it makes that submission implausible if not nonsensical.

PN46

The text which the union relies on, we'll just leave it at our written submissions, but we say that those clauses are all clearly explained as to why they don't have the effect that the union says.

PN47

Thirdly, the objectives of NSW Trains, under the Transport Administration Act, and the objectives under the agreements that apply to both parties, make clear that ensuring the provision of services is paramount and the clauses need to be read in that context.

PN48

So I think I agree with Mr Warnes that the question before you isn't about what's happening on the ground, it's not whether additional guards are operationally needed, who's on the transfer list, or whether hiring more is a wise operational decision, that's really a matter of managerial prerogative, we would say, but it's about the interpretation of the clause.

PN49

So far as we've put material forward about the operational situation on the ground, that's for relevant context and relevant to our submissions on clause 2 of the agreement, regarding ensuring the provision of services. I'll just also note that the applicant hasn't made any written submissions to those issues, but there is a lot of witness evidence, so we feel that it's appropriate to respond to that.

PN50

Items 3 and 3 of the F10 go to the trainee guards that are already engaged and what should happen to them and also to the status quo. So, primarily, we say it would be unreasonable to have someone who's been engaged and offered a contract of employment to work at Newcastle depot to be directed to move to -

well, it's not specified. I mean our view, you know, it appears to be the suggestion is they should be directed to work at Central instead, which is quite a significant distance to travel, if you've been offered a contract that has you working at Newcastle, presumably close to your home, and probably unreasonable to direct someone to do that.

PN51

On the status quo, we say that the status quo is NSW Trains has been recruiting, training and placing guards in its depots across the network for over three years and there's nothing particular or different or unique about Newcastle that should change that. That is the work procedure or practice that is in effect, prior to this dispute being raised. The industrial instruments don't specify - that have been raised in this matter don't specify any different arrangements for Newcastle.

PN52

THE DEPUTY PRESIDENT: What does that then (indistinct)?

PN53

MR HUTCHINSON: They are trained, or in the midst of being trained. They commenced, I can't think of the exact month, but somewhere around the middle of this year and once they've concluded that training, which takes around six months, we anticipate they start in Newcastle depot.

PN54

THE DEPUTY PRESIDENT: (Indistinct) or how do I know (indistinct)?

PN55

MR HUTCHINSON: Well - - -

PN56

THE DEPUTY PRESIDENT: If they are industrial relations (indistinct) to do with offers and (indistinct).

PN57

MR HUTCHINSON: Yes, there's an acceptance.

PN58

MR WARNES: Your Honour, if NSW Trains has entered into a contractual arrangement in opposition to what its obligations are, under the enterprise agreement, if the Commission were to side with us, our submission would be it would be incumbent on NSW Trains to go and speak to those individuals who they have formed contracts of employment with, attempt to vary those contracts of employment and, in the worst case scenario, terminate those contracts of employment.

PN59

If the contracts of employment were entered into on a basis upon which they could never properly be continued, or properly be followed through with, then that would be a frustrating event, a frustration event, rather, and that would be one of the remedies available to either party, in relation to that particular contract.

PN60

Obviously, in practical terms, I don't think that would happen. The Sydney and NSW Trains is a significantly sized organisation. They are constantly recruiting guards and drivers and station staff and all sorts of different classifications required to run a railway. In practical terms, there might be some difficulties around where some of these individuals are based, although I understand the training is currently happening in Petersham, there might be some difficulties around whether individuals are willing to relocate to allow them to do what we say is the minimum period of service in order to become intercity qualified.

PN61

So, in practical terms, I don't see there being any particular difficulties but in terms of a purely contractual legal sense, then I would imagine that if the Commission were to find that there is a minimum qualifying period that would be a frustration event and the remedies available to the parties would be that.

PN62

THE DEPUTY PRESIDENT: Mr Hutchinson, you don't want to be heard on that?

PN63

MR HUTCHINSON: Look, I guess, from a technical sense, I can see the argument as to why it might be a frustration of contract argument. I think we can just deal with the question of whether that even has effect, as the union purports and we say it doesn't.

PN64

THE DEPUTY PRESIDENT: Okay. Mr Warnes.

PN65

MR WARNES: Thank you, your Honour. I call Mr Peter Ferguson to the witness stand.

PN66

THE ASSOCIATE: Can you please state your full name?

PN67

MR FERGUSON: Yes, Peter William Ferguson.

<PETER WILLIAM FERGUSON, AFFIRMED [10.22 AM]

EXAMINATION-IN-CHIEF BY MR WARNES [10.22 AM]

PN68

MR WARNES: Sir, your name is Peter Ferguson?---Yes.

PN69

Mr Ferguson, you're currently an intercity guard at Newcastle depot?---Yes, that's correct.

*** PETER WILLIAM FERGUSON

XN MR WARNES

PN70

Mr Ferguson, you've prepared two witness statements for the purpose of these proceedings?---I have, yes.

PN71

Do you have those there with you in the witness box?---Yes, I do.

PN72

Can I just take you to the one titled, 'Witness statement of Peter Ferguson'?---Yes.

PN73

Has that got 38 paragraphs, the one in front of you?---Yes, there is 38 paragraphs.

PN74

I note that it hasn't been signed or dated but you finalised that around 16 July?---Yes. 16 October, was it not?

PN75

Yes, that's right. Apologies, Mr Ferguson?---Yes, sorry.

PN76

Good to see you're on your game. Are the contents of that statement true and correct, to the best of your knowledge and belief?---They are, yes.

PN77

I tender that statement, your Honour.

PN78

THE DEPUTY PRESIDENT: Any objections?

PN79

MR HUTCHINSON: No objection.

PN80

MR WARNES: Now, your second statement, titled reply statement for Peter Ferguson, do you have that there with you?---I do, yes.

PN81

This is page 94 of the court book, your Honour, sorry, to direct you to that. This one is dated, 8 November 2023?---Yes, that's correct.

PN82

And it's 12 paragraphs in length?---Yes.

PN83

Is the contents of that statement true and correct to the best of your knowledge and belief?---Yes.

PN84

I tender that statement your Honour.

*** PETER WILLIAM FERGUSON

XN MR WARNES

PN85

MR HUTCHINSON: No objection.

PN86

THE DEPUTY PRESIDENT: Exhibit A2.

**EXHIBIT #A2 REPLY STATEMENT OF PETER FERGUSON
DATED 08/11/2023**

PN87

MR WARNES: That's the examination.

PN88

THE DEPUTY PRESIDENT: You'll now be asked some questions in cross-examination, but Mr Hutchinson.

CROSS-EXAMINATION BY MR HUTCHINSON

[10.24 AM]

PN89

MR HUTCHINSON: Just a few questions. So looking at your primary statement - - -?---Yes.

PN90

- - - the first statement?---Okay, yes.

PN91

At paragraph 10 to 11 you talk about the NIF, the new intercity fleet, is the reason that transfers have declined, that's a fair summary?---Yes, that is. Yes.

PN92

And you're aware the enterprise agreement, the 2022 enterprise agreement was made in March this year, is that familiar to you?---Yes. I thought it was February, around that time, yes.

PN93

I think it was made by the Commission in March, but - - -?---Sure.

PN94

- - - there was a lot of negotiation prior, through the year prior and - - -

PN95

THE DEPUTY PRESIDENT: It was February 2023.

PN96

MR HUTCHINSON: I should say it became effective in, I think, early March and, or somewhere around that point. Let's say February, yes. Thank you for the correction. But you were aware the critical point, being clause 2.21 of that agreement, I have a copy and can hand that up if that's - - -?---That's about the Marayong Arrangements?

PETER WILLIAM FERGUSON

XXN MR HUTCHINSON

PN97

Yes?---I'm aware of the clause, yes.

PN98

So that made very clear that there would be guards, akin to the model that already exists today, on the new inner city fleet, and that - if it wasn't settled before that, it was certainly settled by that time, in February, you would agree?---Yes. That clause exists. I think where the confusion lies is that there's a another letter of commitment of four years, regarding prohibition on driver only operations and there's some conjecture, in the meal room, as to whether that means after that expires would guards then be under threat again. From my understanding, the enterprise agreement prohibits that, because of the Marayong Arrangements but that hasn't stopped the myth from perpetuating in meal rooms.

PN99

Okay?---So, yes.

PN100

So I think, as you said then, you understand that the commitment is there for guards to be maintained, subject to some conjecture, I guess. Is that a fair statement?---Yes. Yes, the new train has to be worked according to a (indistinct) like model, which is the traditional guards role.

PN101

Okay. You talk about the GRAWA and, that's the Guard's Rostering and Working Arrangements, Deputy President, which is generally known as the GRAWA, we'll use that repeatedly today.

PN102

THE DEPUTY PRESIDENT: Yes.

PN103

MR HUTCHINSON: That you understand that the rationale for the pathway to becoming an intercity train guard, this is at paragraph 20 of your first statement, to be akin to an apprenticeship, to learn the ropes of the job before undertaking complex work. So are you familiar with the clauses of the GRAWA that you've referred to in your statement?---Yes.

PN104

So you accept that the enterprise agreement and the GRAWA is what regulates your employment?---Yes.

PN105

Can you tell us, are you aware of any clause in those documents that says anything to the effect of it being an apprenticeship or that you need to learn the ropes of the job before you undertake more complex work? Where does the document say that, I suppose, is really the question?---Yes. So in those explicit words, that's not mentioned in using those phrases. Under clause 18 it talks about 24 months of practical suburban working for intercity training school.

*** PETER WILLIAM FERGUSON

XXN MR HUTCHINSON

PN106

So you have the attachments to your statement there with you?---Yes, I do. Yes.

PN107

So it's annexure 1, so the court book doesn't have a page number there, but it should be around page 90, I think?---Which clause number are we looking at?

PN108

Eighteen, 18, as you said?---Yes, I've got it in front of me, on page 38.

PN109

Thirty-eight, thanks?---That's on my copy of the witness statement.

PN110

Yes, it's annexed twice, I think?---Yes.

PN111

So in the court book, Deputy President, I think it's at - the numbering might quite not align with what Mr Ferguson has.

PN112

THE DEPUTY PRESIDENT: I think we've got a spare copy of the court book, if that assists.

PN113

MR HUTCHINSON: It's at 57 of the court book. I think he's quite familiar with the court book?---I've got it in front of me.

PN114

THE DEPUTY PRESIDENT: No, that's good?---Yes, I've already turned to the correct page, yes.

PN115

MR HUTCHINSON: So where the opening sentence of that clause says, clause 18 that you've referred to says, 'Train crewing will advertise for vacant positions at Sydney intercity depot'?---Yes.

PN116

That can't mean anything other than it applies to Sydney intercity depot, can it?---So my understanding is that that's in regarding to advertising positions and not the actual intercity training school itself.

PN117

Okay. I think that's - I think we can move on from that, if that's your understanding. Also at clause 20 you talk about how these complex duties in the intercity work are simply not performed by Sydney Trains guards, you say?---Yes. There are certain duties that fall into that category.

*** PETER WILLIAM FERGUSON

XXN MR HUTCHINSON

PN118

So when a Sydney Trains guard moves to Newcastle depot, or any other intercity depot, they have no experience of this more complex work is what you're saying, they don't know this complex work?---So, for example, division and amalgamation of trains, Sydney Trains guards are trained to perform that work in training and then should they work at Sydney Trains for 20 years, they would never actually perform that work, apart from during refresher training courses.

PN119

Right. So if they come to Newcastle or to any other intercity depot, as they have been doing, they need to be trained in that work?---Yes, that's correct.

PN120

If TrainLink hires, NSW Trains hires a new guard, externally, as they've been doing, they also need to be trained in that work?---They would be, yes.

PN121

Then your statement talks about the number of guards currently in Newcastle and the lines of roster?---Yes.

PN122

So you say there's an average of 79 to 82 guards in the depot?---That was prior to the signing of the new enterprise agreement, when there was a relief ratio still in force.

PN123

Right. So there's more now?---There is, yes. So for the period I was speaking about, that was when I transferred into Newcastle, in January 2020, up until February of 2023. So for that period there was an average of 79 to 82.

PN124

Okay. You talk about how there's 66 lines of roster, in your first statement?---Yes, that's correct.

PN125

And as an experienced guard you'd be familiar that there is - those 66 lines are the main lines, is that correct?---Yes, that's correct. Yes.

PN126

So, as an experienced guard, you'd be familiar there's also relief lines that form part of the roster?---Yes, that's correct.

PN127

So together that is the roster, the main and the relief lines together, is that correct?---Yes. Yes.

*** PETER WILLIAM FERGUSON

XXN MR HUTCHINSON

PN128

So do you know how many relief lines there are at Newcastle?---Currently I believe there are 29. There's no fixed number that it needs to be. Prior to the signing of the enterprise agreement there could only be one standby or relief line

for every 4.2 permanent actual lines. That's been bargained away. So while there is 29 currently, it's not a fixed number that it has to be that amount.

PN129

Okay. But that's the number that's been determined through the process of setting the roster. The roster gets consulted, would you agree?---The number of relief lines is not consulted. Not with union delegates, if that's what you are suggesting.

PN130

So, one way or another, the number of relief lines is 29. So 66 and 29 is mainline plus relief line is 95 lines of roster is the baseline standard?---Yes.

PN131

So if there's 95 lines of roster and, as you said, there's an average of 79 or 82 guards - - -?---Or there was, prior to February, not currently.

PN132

How many guards do you understand there is now, if you are aware? I understand if you may not be?---Yes. Well, because there's been several that have just been trained and finished their principal assessment in the last few weeks. My understanding is the number is above 90 now.

PN133

Okay. So I believe there's other witnesses that will go to the exact number, so we can deal with that later. But it's somewhere less than 95, would you accept that?---I'm not sure, it could be. I'm reasonably certain it's above 90 but the exact number I - I don't know at present, because there has been, just in the last couple of weeks, you know, three or four guards that have finished their principal assessment and I know that because I've run into them and, yes.

PN134

So I guess the point here is, if I can put to you, if there's somewhere less than 95 people and there's 95 lines of roster, that is a shortage, is it not? Like the roster is not full?---Well, there's no necessity to have 29 relief lines. It's not a fixed number, that's just a number that I think the local management has decided. In terms of consultation thought, at clause 7 there's - - -

PN135

We don't - it's - - -?---They're required to consult on changes to the composition or size of the workforce, it's really a matter of - - -

PN136

That's not answering the question.

PN137

THE DEPUTY PRESIDENT: We've got some transcript issues. We've had a request from transcript that we just take a short break so that they can be addressed.

*** PETER WILLIAM FERGUSON

XXN MR HUTCHINSON

PN138

MR HUTCHINSON: Okay, sure.

PN139

THE DEPUTY PRESIDENT: So we're just going to have a short break?---Yes, sure.

PN140

It should take no longer than five minutes and then we'll be back and resume?---Sure.

<THE WITNESS WITHDREW [10.35 AM]

SHORT ADJOURNMENT [10.35 AM]

RESUMED [10.44 AM]

<PETER WILLIAM FERGUSON, RECALLED [10.44 AM]

CROSS-EXAMINATION BY MR HUTCHINSON, CONTINUING [10.44 AM]

PN141

THE DEPUTY PRESIDENT: Sorry about that. Please continue.

PN142

MR HUTCHINSON: Thank you, your Honour.

PN143

Mr Ferguson, we were talking about the number of guards in the depot and, just to recap, now that we've fixed the technical issues, there's - I think you suggested that the number of guards in the depot is more than the 79 or 82 now?---Yes, marginal.

PN144

Are you familiar with the statement that Mr Haskins made in this matter, or have you seen that?---Not the witness statement, no.

PN145

No need to worry about that?---I do speak to Jason, obviously, but I haven't seen the witness statement.

PN146

So if we put this at a more conceptual level, if there's some conjecture about the exact numbers, if the number of guards is less than the 95 lines on the roster, then that is less staff than management thinks it's necessary or would like to have, to run the depot because they're created 95 lines on the roster - - -?---It would be still substantially above the 66 lines of work which are being covered at present. So a relief line is nominally a standby line, so additional numbers, if there was less than the desired number at the moment, those additional numbers would then be on standby and - - -

*** PETER WILLIAM FERGUSON

XXN MR HUTCHINSON

PN147

So are you saying a depot can run with no relief lines?---Not no relief lines, because there are people on annual leave at all times, so there is a necessity for relief lines, of course.

PN148

Yes, and the number of relief lines that management has determined should be there is 29, is that correct?---At the moment it appears that way.

PN149

Okay?---There's nothing in the enterprise agreement that says it has to be 29.

PN150

Sure?---When there was the relief ratio we had 16 relief lines.

PN151

Okay. So in your first statement, at paragraph 29, you say, 'The number of new guards, including those who have already taken up on the job, in addition to those currently under training, far exceed the resourcing requirements generated' and you say, 'by the advent of the two additional lines of work'?---Yes. So there used to be 64 lines of work. When the meal break was introduced in the recent enterprise agreement - - -

PN152

There's no 66?--- - - - it needed to be increased to compensate for that.

PN153

So 66 main lines plus the 29 relief is, as we said, 95 lines. So if there's 95 lines and somewhere less than 95 staff, your statement that the number of guards far exceeds the resourcing requirements can't be correct, can it?---No, I disagree with that characterisation because when the relief ratio was in place, prior to February, we only had 16 relief lines and that was enough to cover the working in the depot. Now that there's substantially more than 16 relief lines, and only two additional lines of work, that's enough to meet the need, in my view. So that's why I made that statement in that way.

PN154

Okay. Moving on, in your reply statement, paragraph 7, you say - you comment on Mr Brandse's statement and you say, 'The figure of 25 per cent NTA can't be correct'. Now, just for the Commission's benefit, to ensure that we understand what we're talking about, NTA means 'not to alter', correct?---Yes. It means you're not available for overtime.

PN155

Yes, thank you. So if I could show you a document, please?---Yes.

*** PETER WILLIAM FERGUSON

XXN MR HUTCHINSON

PN156

And if I could tender a document, Deputy President So this is a list of the NTA list, so to speak, for that area, Newcastle and Gosford, and the second column is the Newcastle guards. Now, that's been produced last week so there's 24 people

on that list. Do you see that, in the second column?---Yes, I've numbered those as 24, yes. That's for one fortnight.

PN157

Sure. So as at now, this was produced last week, where there's somewhere around 90 guards in the depot, 24 out of 90 is actually more than 26 per cent, isn't it? It's more than a quarter of 90. So - - -?---My understanding of Mr Brandse's statement was that he was referring to 26 per cent of guards don't make themselves available for overtime at all, not just for a single fortnight.

PN158

Okay. So you're suggesting the 24 here isn't consistent over time?---No, because I know these people and they do, several of them work overtime. Neil Westbrook(?) has done a lot of overtime and there are others there that do overtime. Sometimes people have things on, in a particular fortnight. I can use myself as an example. After my father died I didn't do any overtime for nine months. I've recently resumed doing overtime since I returned from annual leave, on 27 June.

PN159

Okay?---So it does fluctuate from fortnight to fortnight, for various reasons.

PN160

So you're suggesting it fluctuates so much though to make a 26 per cent figure inaccurate?---I've seen a document which shows the amount of overtime shifts worked by guards in the last 12 months and significantly more than 80 per cent of guards have worked five or more overtime shifts in the last 12 months.

PN161

So at least once in the last 12 months though, that's - - -?---Five overtime shifts.

PN162

Right. Okay. We can move on from that. Paragraph 27 of your reply statement you say that cancellations in October were due to a range of factors, including the Tarro Bridge and operational incidents - - -?---Sorry, which - - -

PN163

Sorry, sorry, my apologies. Paragraph 8 - - -?---Paragraph 8, yes.

PN164

- - - of your statement which is in reply to paragraph 27 of Mr Brandse's, my apologies?---Yes, I've got you, yes.

PN165

But you do say there that it was often not due to staff shortages. So do you accept that at least some of the cancellations were due to staff shortages?---A minority, yes.

*** PETER WILLIAM FERGUSON

XXN MR HUTCHINSON

PN166

Are you familiar - obviously this goes back some time, but with cancellation of the services to Dungog, in the week of 24 September, and cancellations of all services to Scone, in the week of 30 September?---Yes, I remember that very clearly because the roster bloke approached me on Monday and he said, 'Pete, do you realise that the Dungog service, the 1525, has been cancelled for the whole week?', and I said, 'Why's that, Chris?', and he said, 'Shortages of crew'. I said, 'Are you referring to guards or drivers', I said, 'because I'm rostered to do the Dungog service on Wednesday and', I said, 'I'm not planning on going sick so I'll be there, so why's it been cancelled?'. He said, 'I don't know Pete, I'm not the one that made the decision'.

PN167

Right. And were you given other work instead of that Dungog service?---No. I sat in the meal room with other drivers and we actually joked about it.

PN168

Okay. Then 11 to 12 of your reply statement you say that it's not possible that Newcastle are sending 40 shifts to other depots?---I don't believe - I thought that was - when I saw that, I thought, 'Wow, that's an exaggeration'.

PN169

Okay. That was - well, if I can show you a document, please? So, again, this is a document produced last week, through the rostering team, and it shows - I'll just wait for you to get a copy?---Yes.

PN170

So at the title there, it shows, 'Uncovered shifts' after posting of the roster in that fortnight period 8 October to 21 October this year. I mean if you wish to have a review, but in summary - - -?---Yes, I'll just quickly read the paragraph to understand the context.

PN171

Sure, I'll step through that. So it shows - the (indistinct) snapshot shows there were 42 uncovered diagrams required to cover after all overtime is assigned, without breaching conditions. It does not include the diagrams that were already removed by scheduling and sent to other depots. It does not show any impacts that happened during the period, such as sick leave. It shows what happened at the start of the period. Now, as it says, there were 42 uncovered diagrams there that Newcastle couldn't work in that period?---So that's for a fortnight, is that correct?

PN172

Yes, for the fortnight 8 October to 21 October?---Yes. From my understanding of Ash Brandse's statement, it seemed that he was suggesting it was 40 diagrams a week and that it was an ongoing thing, weekly.

*** PETER WILLIAM FERGUSON

XXN MR HUTCHINSON

PN173

Well, this is one example - - -?---That was my understanding of his statement that every week there were 40 diagrams, at least, that were being sent to Sydney or

Gosford. So this seems to be one fortnight, not 40 every week. That was my understanding of it.

PN174

It is a fortnight, this is one fortnight, and I think Mr Brandse's statement is that in the last fortnight - - -?---I thought it was weekly, from what I remember. I'm happy to review that but that's what I remember, off the top of my head.

PN175

I'll find the page reference here?---I don't know if I have a copy of Mr Brandse's statement.

PN176

I can give you one. So page 198 of the court book, which - - -?---Thank you.

PN177

So at paragraph - - -?---One hundred and ninety-eight was it, or 98?

PN178

One hundred and ninety-eight, it's at the - it's the numbers at the bottom of the page that are sort of laid over the top. It's the way the Commission puts all the material together into one book?---Yes, number 28. So, 'In addition to the cancelled services, on average, in the last month, Newcastle had to send 40 guard shifts per week to Central intercity and Gosford intercity depots'. Yes, so my understanding was that his statement was per week and that's why the number looked a bit large, from my perspective.

PN179

Yes. You're right, it does say 'per week'. What I'm putting to you here is that this document shows the number of services that were cancelled - sorry, that were unable to be covered by Newcastle depot is 42 in that roster period. It goes over the back of the page as well?---That's about 40.

PN180

Okay?---For the fortnight.

PN181

For that fortnight, yes. So would you be familiar when a shift is sent - when a service is unable to be covered by Newcastle and you have to send the work to another depot, you often can't give the whole shift to one person from the other depot because they need to travel, is that familiar to you?---Yes. Yes, that's understandable, yes.

PN182

So sometimes it might take two people to cover - two people from another depot might need to cover one Newcastle shift?---Yes, and sometimes some work has to be retained by Newcastle because Sydney crew are not qualified for Broadmeadow D Camp or Broadmeadow maintenance centre, they're not qualified for the Hunter line.

*** PETER WILLIAM FERGUSON

XXN MR HUTCHINSON

PN183

Yes?---Yes, so - - -

PN184

At 12(a) of your statement you say that actually that Newcastle can't send work to other depots because they are not qualified?---They can't - certain elements of our work.

PN185

Certain elements of the work?---So the Hunter line, Broadmeadow D Camp, Broadmeadow maintenance centre and Hamilton yard, Gosford crew are qualified for Hamilton yard but not Sydney intercity and - there's about 48 diagrams on a weekday and at least half of that is local working.

PN186

Yes. So for the Commission, to simplify, I guess, because obviously you're very immersed in the technical nature of your work, essentially Newcastle is qualified for all of Newcastle's work and Gosford is qualified for Gosford's work and there is some overlap between the two but not complete overlap?---Yes, that's true. Yes, correct.

PN187

So there's this concept of cutting up a diagram, where you can send certain parts of the work to Gosford that they are qualified for?---Yes. Yes. There is a provision in the GRAWA that says, 'Where possible local working should be kept in the depot'.

PN188

Sure. But if it's not possible, because, as NSW Trains says, there's not enough staff, you can send it to other - so the statement you've made at 12(a) that you can't send work to other depots because they are not qualified isn't completely correct?---Let me just review the wording. So there are several hurdles that would prevent that many diagrams being sent away. So:

PN189

Guards at Sydney and Gosford depots are not qualified to operate on the Hunter line, which operate diesel trains, nor are they qualified for Broadmeadow D Camp or Broadmeadow maintenance centre. Sydney intercity crew are also not qualified for Hamilton yard.

PN190

So that was the statement that I made, yes.

PN191

So I guess what I'm putting to you, in summary, then is in this fortnight period, at least, there's 42 cancelled services. You've accepted that?---For that one fortnight and that differs to Ash Brandse's statement of 40 per week.

*** PETER WILLIAM FERGUSON

XXN MR HUTCHINSON

PN192

That's not what I said though, that's not what Mr Brandse says. So - - -?---It was.

PN193

Just let me finish, please. Forty-two services, I think you've accepted that one service can't necessarily be replaced by one staff member from another depot, because they need to travel. There's various arrangements that need to be made to cut up a diagram, to make the working resourced, because not everyone can go everywhere?---Yes, that's absolutely true, yes.

PN194

So is it not then possible that there may be 40 shifts that need to get sent to another - other depots because there's, at least in this period, 42 services cancelled?---So these are 42 diagrams for the fortnight.

PN195

Yes, 42 diagrams - - -?---For the fortnight.

PN196

So - - -?---So I don't agree with the 40 per week, just to clarify.

PN197

Forty shifts per week being required from other depots, you don't agree with?---That I don't agree with, no. That was the response I gave to the Ash Brandse statement, so I maintain that.

PN198

Okay. Nothing further for this witness, thank you, Deputy President.

PN199

THE DEPUTY PRESIDENT: Any re-examination?

RE-EXAMINATION BY MR WARNES

[11.01 AM]

PN200

MR WARNES: Mr Ferguson, early on in the piece you were asked a question about the effect that the new intercity fleet has had on transfers, do you remember that question?---Yes, I do.

PN201

And you were asked a question around the part of the enterprise agreement that contains the working for the Marayong phase?---Yes, Marayong Arrangements, I believe is the title of the clause.

PN202

Are you able to tell the Commission what the situation was with transfers, before the NIF became an issue?---Yes, it was quite difficult, much more difficult to get to Newcastle. It was always around 10 to 15 years. At the time that I entered the depot, which was January of 2020, by that time I'd been a guard for approximately nine and a half years and it was said to me, by a lot of people, 'You're lucky to get there in less than 10. The only reason is because a lot of people have withdrawn because of the uncertainty surrounding the intercity fleet'. So at the time I considered myself lucky to get there in that timeframe.

*** PETER WILLIAM FERGUSON

RXN MR WARNES

PN203

So when you just gave evidence about nine to 10 years, that's on the transfer list?---Yes. I'd had wanted to go to Newcastle since the beginning of my employment. I wasn't happy living in Sydney and I'd lived in my - pretty much my whole life up in Newcastle. So to come back here was an absolute priority for me, as soon as possible.

PN204

Thank you, Mr Ferguson.

PN205

THE DEPUTY PRESIDENT: Thank you very much for giving evidence, you're excused. You can remain in the hearing room?---Thank you, Deputy President.

<THE WITNESS WITHDREW

[11.02 AM]

PN206

MR WARNES: Your Honour, my next witness is Mr Haskins, who is waiting outside. I'll just - - -

PN207

MR FERGUSON: Do you want me to leave those materials for Jason?

PN208

MR WARNES: Just the folder.

PN209

MR FERGUSON: Just the folder.

PN210

THE ASSOCIATE: Please state your full name?

PN211

MR HASKINS: Jason Haskins.

<JASON HASKINS, AFFIRMED

[11.03 AM]

EXAMINATION-IN-CHIEF BY MR WARNES

[11.03 AM]

PN212

MR WARNES: Sir, your name is Jason Haskins?---Yes, that's correct.

PN213

You're a guard a Newcastle interchange depot?---Yes, I am.

PN214

Mr Haskins, you prepared two statements for the purpose of these proceedings?---Yes, I have. Yes.

*** JASON HASKINS

XN MR WARNES

PN215

Do you have those statements in the witness box with you?---Yes, I do. Yes.

PN216

So, your Honour, Mr Haskins has the court book with him. Mr Haskins, I'll take you to - you can see the little red, or the big red numbers at the bottom of the court book there?---Yes.

PN217

I'll take you to page 16 of the court book?---Yes.

PN218

You see it's titled, 'Witness statement of Jason Haskins'?---Yes.

PN219

Is that witness statement at page 19 35 paragraphs long?---Yes, that's correct, yes.

PN220

Mr Haskins, are the contents of that witness statement true and correct to the best of your knowledge and belief?---Yes, it is, yes.

PN221

I seek to tender that, your Honour.

PN222

THE DEPUTY PRESIDENT: Any objections?

PN223

MR HUTCHINSON: No objections.

EXHIBIT #A3 WITNESS STATEMENT OF JASON HASKINS

PN224

MR WARNES: Mr Haskins, I will take you to page 182 of that same book?---Yes.

PN225

That's also titled 'Witness statement of Jason Haskins'?---That's correct, yes.

PN226

If you turn over the page to 183 is that 17 paragraphs in length?---Yes, it is, yes.

PN227

Are the contents of that statement true and correct to the best of your knowledge and belief?---Yes, they are correct.

PN228

I seek to tender that too, your Honour.

PN229

THE DEPUTY PRESIDENT: Any objection?

*** JASON HASKINS

XN MR WARNES

PN230

MR HUTCHINSON: No objection.

EXHIBIT #A4 REPLY WITNESS STATEMENT OF JASON HASKINS

PN231

MR WARNES: That's the examination-in-chief, your Honour.

PN232

THE DEPUTY PRESIDENT: You will be asked some questions now by Mr Hutchinson in cross-examination.

CROSS-EXAMINATION BY MR HUTCHINSON

[11.06 AM]

PN233

MR HUTCHINSON: Thanks, Mr Haskins. So in your statement at paragraph 13 you say that your understanding of the purpose behind the requirements for the Intercity guard training school was to the guards to become proficient in knowledge, skills and procedures during a 24 month period on the suburban network, and that it's akin to a traineeship. That's familiar to you?---Yes.

PN234

So at page 16 if you want to have a look?---Yes. Sorry, yes.

PN235

It's on page 17, paragraph 13?---Yes, that's correct, yes.

PN236

And at paragraph 22 you also say that your understanding is that recruiting guards to Newcastle is inconsistent with the requirements of the GRAWA?---Yes.

PN237

And so those documents regulate your employment and guards' employment generally; that's your understanding?---Yes.

PN238

So can you tell us how you come to that understanding, where in the documents does it say that? So when you say that it's inconsistent with the GRAWA in particular where does the GRAWA say that you need to serve a traineeship, to be a Newcastle guard I should say?---Well, it says that you have to complete 24 months.

PN239

And so if you look at page 57 of that full book, so the numbers at the bottom of each page in large text. That's clause 18 of the GRAWA?---Yes.

PN240

Correct me if I'm wrong, but I believe you're referring to 18(c) says:

*** JASON HASKINS

XXN MR HUTCHINSON

PN241

At least 24 months practical experience in suburban train working.

PN242

That's - that's what it says, yes.

PN243

So the introduction to that clause 18 in the first sentence at the top says:

PN244

Train crewing will advertise for vacant positions at Sydney Intercity Depot.

PN245

It doesn't refer to Newcastle, does it; it just says that's Sydney Intercity?---Well, Newcastle is an inner city depot.

PN246

But it's Not Sydney Intercity; would you agree with that?---Well, I would agree with that, but they haven't - they haven't determined - there's more than one intercity depot. There's quite a number of them.

PN247

We can move on from that. Back on your statement then at paragraph 33, which is page 19, you say there's 66 lines of work or rosters that have been produced, and 95 train guards. And you say:

PN248

In other words there are more employees than work available at the Newcastle interchange depot.

PN249

Your statement there doesn't actually cover the whole roster, does it, because 66 is the main lines of roster; is that correct?---Sixty-six lines of working in the roster, yes.

PN250

In the main roster. But there's also relief lines of work?---Yes, but you've just mentioned the name 'relief', yes.

PN251

So the depot needs relief lines in order to function, because the purpose of relief lines, would you agree, is covering absences, annual leave, sick leave that are known and likely to occur?---To a certain extent, yes.

PN252

And in your reply statement at paragraph 12 you acknowledge there are 66 lines and 29 relief lines. So that's on page 183 of the book if you wanted to check that?---What number was it?

*** JASON HASKINS

XXN MR HUTCHINSON

PN253

183?---No, the - - -

PN254

183 of the numbers at the bottom?---Yes. What are you quoting?

PN255

Paragraph 12?---Yes.

PN256

So in your reply statement you acknowledge the relief lines, and so 66 main lines and 29 relief lines is 95 lines of roster?---Yes, that's what I also stated in 33.

PN257

Thirty-three of the original statement says - I'm happy to read the whole thing out. It says - - -?---Sorry, yes. No, a correction there. Sixty-six lines, sorry, 95 guards I've written there. Sorry, yes.

PN258

So then when you say 66 lines and 95 guards, and you say at 33 of your original statement:

PN259

There are more employees than work available at the Newcastle interchange depot.

PN260

That's ignoring the fact that you need relief lines, isn't it?---I'm not quite sure what you're trying to paint here.

PN261

If you have 66 main lines of work - - -?---Are you saying that 29 lines get used all the time?

PN262

Well, what I'm saying is that 66 lines doesn't represent the whole roster, does it, you need more than 66 lines of work to run a roster?---Well, you do, yes.

PN263

And the current relief lines, number of relief lines is 29?---Yes.

PN264

So that's 95 lines of roster in total?---Right.

PN265

So you accept that's the Newcastle roster today?---Well, that's what is there today. That's what posted today, yes.

PN266

And you acknowledge that in your reply statement, correct?---Yes, that's correct, yes.

*** JASON HASKINS

XXN MR HUTCHINSON

PN267

So for the roster to be full that 95 lines would be 95 guards for the roster to be full?---And I think that's what we have.

PN268

So in your statement you attach the Newcastle roster. That is at JH4, which is page - it starts on page 67. There's probably a couple of ways of going about this. I have counted the names on this roster and there's actually only 87 names there. If you'd like we can step through it and confirm that. That's up to you, if you want to just double check that?---Well, I can't double check it without going through every individual name. If you want to - if you're happy to go through everyone's individual name I'm happy to go through it.

PN269

I think probably the quick way to do it would be, each page has five names, so we've got 13 pages with five names. So that's, what, 65. And then there's a number of pages with sort of inconsistent numbers. Perhaps I will just put the submission to you rather than counting them all out individually. If anyone wishes we can do that separately. The premise here is that - sorry, I withdraw that. One other question is, of the names that are listed there if I take you say to page 84 of the roster, at line 221 there's a K Tomic, and it shows in brackets after that the letters MAT and then L, which I'd suggest stands for maternity leave. So that person holds a position in the depot that is long term leave. Would you agree that's correct?---I would agree with that, yes.

PN270

And then the name below that, so D Ramos, has the letters INJ after their name, so they're injured, they're not actually at work, and that's indicated by the fact that the roster lines after their name have a strike through on the times?---I would agree with that.

PN271

We probably don't need to step through all of them, but there's a number further down that page, and on the next page it also has INJ after them. At line 224 T Jackson?---The 222 that you mentioned is actually back at work, so that's - - -

PN272

Is now. Sure. Okay. So the question I guess to put to you is, the names that have injured or maternity leave after them they might be shown on this roster, but they're not actually working in this roster period; is that correct? I accept as you said that might vary from roster to roster, because people will obviously - - -?---It does vary - - -

PN273

- - - or come back?---It does from roster to roster.

*** JASON HASKINS

XXN MR HUTCHINSON

PN274

But if we take this one as a sample there are people who are - well, their name is there - they're not actually at work in that roster period; is that correct?---It would appear to be correct.

PN275

And so when this roster - we're at page 84 - for instance if we look on the prior page, 83, there's a line 219 which is blank. That means there was no guard to occupy that line in that roster period?---I think that was something that management have actually put in. They've added a number of these lines with no names on them; 230, 229, 228.

PN276

Yes. So there's lines of relief lines here, if I can grab the relief section of the roster, that management has determined they need, but they're not able to fill them at this point in time; is that correct?---That's your interpretation of it. I wouldn't necessarily agree with that.

PN277

There's no guard on that line in this roster period, there's no guard filling that line?---Yes, that's correct, yes.

PN278

That's all right, we can move on from that. In your reply statement then at paragraph 5 you talk about the NIF, the new intercity fleet, being the reason that guards were concerned about transferring?---Yes, that's correct.

PN279

Are you familiar with clause 221 of the enterprise agreement, and I can give you a copy if you prefer?---Well, I don't have it, no.

PN280

I can give you a copy just for completeness. Do you need a copy, Deputy President?

PN281

THE DEPUTY PRESIDENT: (Indistinct).

PN282

MR HUTCHINSON: So I have just taken the extract for the sake of not printing out the several hundred pages of this agreement, but on the last page there is clause 221. So 221.1 says, starting from the fourth line down?

PN283

There is a modified future stake for the Marayong to support the roles of the driver and the guard to work in a final Waratah-like operating model in accordance with the deed of understanding and agreement.

PN284

This was a quite significant matter for guards; would you agree?---I would agree, sir, yes.

*** JASON HASKINS

XXN MR HUTCHINSON

PN285

And so people would be aware that this commitment was made that there will be a guard on Marayong?---Not from - not from management there wouldn't be, no. I don't think you people have sold it very well at all.

PN286

It is in the agreement though - - -?---It may be in the agreement, but the general consensus out there is that - - -

PN287

People aren't aware of that?---Well, certainly not by management, no. You haven't sold it very well.

PN288

The union's communicated it though as quite a win, haven't they?---I would have thought that it would have come from management, but not the union - but, yes.

PN289

Right. So you're aware of it though, whether it came from union or management?---Well, I'm aware that it's in the deed, yes.

PN290

And that was eight months ago at least, in February this year?---I guess so, yes.

PN291

Moving on from that, paragraph 11 of your reply statement you say:

PN292

All guards at Newcastle have had at least 12 months experience in suburban work.

PN293

Sorry, my mistake again. Sorry, paragraph 6 of your statement says that?---Yes.

PN294

So if I can show you a document that's a list of all the transfers that have been made to Newcastle depot in this year, 2023. If I could hand up the document, please?---It says a suburban depot.

PN295

Yes. So you say that everyone at Newcastle has had at least 12 months experience in a suburban depot. Looking at this list there's five highlighted names. The first highlighted name Jason Pistavos - sorry, I take a step back from that. Looking at the layout of this diagram the third column says 'Seniority date'. Would you agree that that date reflects the date that the guard graduated from training and ceased to be a trainee guard?---I wouldn't be aware of that. That's something that you've - I don't know that personally. All I'm doing is going off this.

*** JASON HASKINS

XXN MR HUTCHINSON

PN296

Okay. We will come back to that for the Commission later. But if I put to you that that is what it is, that's what it represents, that's the date they - - -?---I believe some of these highlighted names here too are people that are seconded, so - - -

PN297

Let me just step through it. So Jason Pistavos, he became a guard don 16 December 2022, and so he came to Newcastle, as the fifth column shows, on 23 April 2023. So that would be less than 12 months, wouldn't it?---I would assume so reading this, yes.

PN298

And it also shows in the final column 'NSW Trains guard school.' So that represents that he was trained by NSW Trains and was never a suburban guard. Is that something that you're familiar with?---Are you - are you telling me that this person's come off the street? Is he an external hiree?

PN299

Yes?---Why didn't you say that?

PN300

That's what I'm stepping through in the document. I don't know if you know Mr Pistavos from the depot or not?---I actually know him very well.

PN301

So this document reflects everyone that came to Newcastle this year and where they came from, and so it reflects that he came from NSW Trains central depot and was trained by NSW Trains. So he has no suburban experience.

PN302

The next one highlighted, Patricia Drew. I think as you touched on a second ago has the letters SEC after her name. So that reflects that she's a secondee rather than a permanent placement in the depot. Is that your understanding?---Yes, she's not permanent, no.

PN303

So the date in the third column for her is 28 February 2023, and in the fifth column is 27 August 2023. So that would be less than a year from when she became a guard, according to column 3, and only six months of suburban experience when she came to Newcastle approximately?---By the look of this I assume so.

*** JASON HASKINS

XXN MR HUTCHINSON

PN304

MR WARNES: Your Honour, if I may, Mr Hutchinson seems to be taking Mr Haskins or the witness through a list. We don't know where the list has come from. Mr Haskins has said he's never seen the list before and he has no knowledge about whether the seniority dates are right or not. It's probably incumbent upon the respondent to at least suggest to Mr Haskins that this is an accurate list or not. I think that the general vibe of the answer being that he doesn't know, but it's probably not worth the Commission's time and of very little

utility to go through a list that Mr Haskins says he has absolute no knowledge over, and this document certainly doesn't form - - -

PN305

THE DEPUTY PRESIDENT: I'm getting something out of it.

PN306

MR WARNES: Pardon?

PN307

THE DEPUTY PRESIDENT: I'm getting something out of it.

PN308

MR WARNES: Okay. Thank you.

PN309

MR HUTCHINSON: If it's assists to assuage the concerns Mr Brandse will attest to the veracity of the document, and to help clarify it's a document produced by Newcastle rostering.

PN310

THE DEPUTY PRESIDENT: Where does it say that?

PN311

MR HUTCHINSON: If I could put it this way, that I guess for the purpose of this cross-examination I am putting it to you that Newcastle rostering produced the document, and I'm asking you to answer the questions on that basis, and as I said Mr Brandse will talk to that later.

PN312

THE DEPUTY PRESIDENT: I am sure if the union has got some enquiries to establish certain of the alleged facts in this document you will assist in the production of documents.

*** JASON HASKINS

XXN MR HUTCHINSON

PN313

MR HUTCHINSON: No doubt. Certainly, your Honour. The nature of rostering is that it is a fluid environment and that's why the documents take this sort of form because they do need to be refreshed frequently. So then if we look at the third highlighted row, Mr Chou, first name Quang, also with the letters SEC after his name indicating he's a secondment rather than a permanent placement. The third row shows 29 July 2022, and came to Newcastle 22 October 2023. So that is obviously more than 12 months, but then the final column shows again NSW Trains guard school, reflecting that he was trained by NSW Trains and has never worked in suburban. Then the next row - I guess I'm not asking you to comment on each row individually, but we will come to a point at the end with a question - Joe Kinda, similarly 18 July 2023 to 22 October 2023 is about three months experience in suburban before moving to Newcastle, and Peter Walker, 16 July 2023 and 4 December 2023, is about five months experience in suburban before moving to Newcastle. So the question is given those records it can't be correct that there's no one in Newcastle with less than 12 months suburban experience,

can it?---Well, I think (indistinct) also said that all of these have had suburban experience. It seems to me as though this list is just a list of people that's circumvented the process to get to Newcastle by management by the look of it.

PN314

You're saying it shouldn't have happened perhaps, is that what you're saying, is that it circumvents the GRAWA?---Well, I think that's why we're here today.

PN315

But the fact in your statement you say at 6 of your reply statement:

PN316

All guards who have come to Newcastle have had at least 12 months experience at a suburban depot.

PN317

?---That is correct, but as I said previously I've never seen this list and I don't know where it's come from. You said Newcastle rosters. I can't see anywhere where it says that.

PN318

The question then just to wrap up is, if this list is accurate it would mean that there are five guards at Newcastle currently who have less than 12 months suburban experience?---I really can't comment on that.

PN319

Okay. Well, I'm happy to move on.

PN320

THE DEPUTY PRESIDENT: Do you want to mark that document?

PN321

MR HUTCHINSON: Yes, if we could, please, Deputy President, because I will take Mr Brandse to it.

PN322

THE DEPUTY PRESIDENT: Any objection?

PN323

MR WARNES: If it's just marked for identification.

MFI #1 LIST OF NEWCASTLE GUARDS 2023 TRANSFERS

PN324

MR HUTCHINSON: So paragraph 7 of your reply statement you talk about:

PN325

Amalgamation and division of V sets is not something suburban guards do. Changing points is also not something suburban guards do.

*** JASON HASKINS

XXN MR HUTCHINSON

PN326

Where suburban guards don't do that work when they come to Newcastle they have to get trained in it; is that correct?---They need to get trained inner city working, which will cover that.

PN327

But they don't have experience of that work. They have to get trained afresh when they come to Newcastle effectively?---Well, they have to get trained fresh when they go from a suburban depot into an inner city depot, regardless if it's Newcastle or not.

PN328

Correct, yes. So that would apply at any intercity depot - - -?---That's correct.

PN329

- - - that a (indistinct) guard goes to?---That's correct.

PN330

And so if NSW Trains hires a new person externally that has no suburban experience they also have to get trained in that work, that the suburban guard is getting trained in that work so is the new hire guard that's brought in externally, correct?---Well, I wouldn't have thought that new trainee guards would be brought in to intercity depots. I would have thought they'd be right into suburban depots.

PN331

Yes. As you said that's the contention, but we've covered how NSW Trains - Mr Brandse's statement covers how NSW Trains has recruited 80 something guards externally and provided them training. So they get trained in these tasks just as suburban guards get trained?---I would assume so.

PN332

Paragraph 9 of your reply statement you talk about Mr Brandse's statement that only three guards with less than 12 months - if there's only three guards with less than 12 months experience you question how he can make an assessment of their proficiency?---Yes.

PN333

So if we look at Mr Brandse's statement, which is paragraph 14 of his statement, which is on page 196 of the book, so the large numbers at the bottom. So that statement there he says:

PN334

In both newly recruited guards and guards who transfer to intercity with less than 12 months experience I have not found any problems with their performance relative to more experience guards.

PN335

?---Yes, that's correct, yes.

*** JASON HASKINS

XXN MR HUTCHINSON

PN336

As I understand it you've raised a concern in your statement as to how could he make that judgment if there's only three guards with less than 12 months experience at Newcastle. That's what you're saying?---That's what he was saying, that the guards that had less than 12 months experience and had not had incidents. I believe that's what he was saying. If you read my statement on page 9, the tail end of it - sorry, my - yes, statement 9, page 182, if you read the tail end of it you'll find that Ash Brandse is actually incorrect with that.

PN337

I am going to come to that last sentence of paragraph 9, but firstly Mr Brandse says in his statement that there's been - I will go to the paragraph. So where he says in both newly recruited guards at paragraph 14 he doesn't say at Newcastle depot. He's saying all guards that have been recruited. So he's making that assessment - - -?---That's not what you just said then, was it? It wasn't - that's not correct what you just said.

PN338

Well, paragraph 14 of Mr Brandse's statement says:

PN339

In both newly recruited guards and guards who transfer to intercity with less than 12 months experience I have not found any problems with their performance relative to more experienced guards since this commenced in 2020.

PN340

?---You would assume that him being located at Newcastle that was a depot that he was referring to. That's the way that I've taken it.

PN341

Perhaps maybe you're not aware that Mr Brandse has a responsibility for more than just Newcastle depot. He also has responsibility for - - -?---I understand that.

PN342

Okay, I'm happy to move on from that one. You say in your paragraph 9 as well that a new guard was removed due to a safety breach?---That's correct, yes.

PN343

So you're aware of who that is?---Yes, I am, yes.

PN344

And have you seen the incident investigation of that matter?---I know of it.

PN345

Do you know with certainty what the findings of that incident investigation were?---Yes, I was, yes. Yes, I am aware of that, yes.

PN346

Do you know for a fact what the attribution was, who was found to be responsible for that incident?---Yes. Yes, I do.

*** JASON HASKINS

XXN MR HUTCHINSON

PN347

Could you tell us about that?---Well, it was Jason Pistavos that you mentioned before on that list of transfers.

PN348

You know that because you've seen the report or that's what you have come to understand in some other way?---Well, he was off safe working duty. He wasn't performing as a guard, he was sitting in the meal room, so, yes.

PN349

But you haven't seen the report or the actual formal - - -?---I haven't seen the report, but he was definitely being removed. I was the one that got him back onto the - - -

PN350

So you don't know what was formally found through that investigation?---I know what was found. I haven't seen the document, but I know what was found, yes.

PN351

What do you understand was found?---That the train left the platform with the doors open.

PN352

Okay. What do you understand was the finding of who caused that, whose responsibility - - -?---Well, it was actually two guards that caused it, but, yes. And both of them were removed from safe working duty, and I believe both of them were new too.

PN353

Do you know the name of the other guard?---Douglas McGomery.

PN354

Without the report I think we can probably move on from that one. We won't resolve that. Paragraph 10 of your statement you say that:

PN355

There are still guards on the transfer list awaiting a transfer to Newcastle.

PN356

In making that statement have you seen a list, do you know who they are?---Well, one of the names on this fairy list here that you've produced is Peter Walker. He is actually on the transfer list and has not been yet given a date to start.

PN357

So when you say he's on the transfer list he's already working at Newcastle though?---No, that's not correct, he's not working at Newcastle.

PN358

So the document we were talking about before, MFI#1 - - -?---It says here the 4th of the 12th as the start date.

*** JASON HASKINS

XXN MR HUTCHINSON

PN359

Yes, that's his transfer date to come to Newcastle. The way a transfer works once you're offered a role and you get given a date you have a place at that depot; is that correct?---Yes.

PN360

So this document where it says 4 December 2023 is the transfer date that means he may not have formally commenced working, but he's holding a position at the depot, doesn't it?---No, that's not correct at all.

PN361

If he has been given a date to come there then he must have a position, doesn't he?---Well, he hadn't been given a date. You know, you must remember that this was first lodged in June, wasn't it?

PN362

Okay. So you're saying at the time of making your statement he may not have had that - - -?---Yes.

PN363

I accept that. But based on this document you'd understand that he has a place now. Assuming it's correct - as you said you don't know who produced it, but - - -?---I really can't comment on this document. I don't know where it's come from. It's got nobody's name on it. I don't know anything about it.

PN364

Okay. Are you aware of any other guards on the transfer list other than Mr Walker?---Not - no, not by name I don't, no.

PN365

THE DEPUTY PRESIDENT: Is there a list, is there a transfer list?---There is a transfer list, absolutely.

PN366

Who keeps them?---I don't know who keeps them. I would assume NSW Trains keep them. I would assume personnel would keep them. I don't - they're not kept at Newcastle.

PN367

MR HUTCHINSON: We will go to that with Mr Brandse, Deputy President.

PN368

THE DEPUTY PRESIDENT: Have you (audio malfunction)?

PN369

MR HUTCHINSON: Well, the issue there is that producing a list with no names on it is somewhat difficult.

*** JASON HASKINS

XXN MR HUTCHINSON

PN370

THE DEPUTY PRESIDENT: Would there not be a historical list at one stage with Mr Walker's name on it?

PN371

MR HUTCHINSON: It's really a matter that moves every fortnight or so, but there would at some stage have been a list with Mr Walker's name on it, yes, that's true.

PN372

THE DEPUTY PRESIDENT: So you're saying the list is reconstituted every fortnight?

PN373

MR HUTCHINSON: It's reconstituted, yes. Yes, whenever offers are made names come off and names can move on to the list every other day effectively.

PN374

THE DEPUTY PRESIDENT: Would you be kind enough to give me all the lists in chronological order for the last 12 months?

PN375

MR HUTCHINSON: I would have to make enquiries about that as to how they maintain those records, but, yes, we could do that. Just to clarify, Deputy President, shall I try and obtain that today or provide that after the facts?

PN376

THE DEPUTY PRESIDENT: As soon as possible.

PN377

MR HUTCHINSON: We will make some phone calls at the first opportunity. So paragraph 14 of your reply statement you raise that you disagree - perhaps we will go to Mr Brandse's statement just to make sure we're clear about what we're talking about. So it's in response to paragraph 24 of Mr Brandse's statement?---What page is that?

PN378

It's on page 198. So you say:

PN379

In response to paragraph 24 I disagree that this is accurate and refer to the year to date tally.

PN380

Paragraph 24 has a number of points in there. Could you just clarify for us what do you say is inaccurate about that?---Am I making some assumption on Ash Brandse's - - -

PN381

Yes. Your statement says:

*** JASON HASKINS

XXN MR HUTCHINSON

PN382

In response to paragraph 24 of Mr Brandse's statement I disagree that this is accurate and refer to the year to date tally.

PN383

?---Yes. Well, that was I think the 26 per cent number that has come up on here, and in one of my - on my statement the year to total of people doing overtime was - was it 86, 78 per cent, something like that. That was the number of guards that participated in overtime on a yearly basis that had more than five shifts. So that was - his statement there on 24 I found to be incorrect.

PN384

I don't propose to dwell on it any further. Paragraph 15 of your reply statement you say that cancellations in October 2023 were due mostly to the Tarro Bridge closure and operational issues, not staff shortages?---Yes, that's correct, yes.

PN385

You say mostly due to the Tarro Bridge, but at least some were due to staff shortages?---Well, once again it's coming from management, because I don't actually any staff shortages on any of the shifts that I do. I think it's probably poor rostering.

PN386

Right?---Poor rostering arrangements I think would be the answer to that.

PN387

Okay. That's your view of it, but you don't work in rostering, you're not aware of exactly why a particular service may have been cancelled or whether it was due to staff shortages or some other reason; is that correct?---Well, I don't know. I don't think there's any - is there any operational data on that? I don't think there is a register of cancelled services, is there? Is there a register of cancelled services?

PN388

The question that was asked was you don't work in rostering or have direct involvement with those decisions?---Not a roster, no.

PN389

Okay, thanks. Then finally the last question is paragraph 30 of your reply statement - sorry, paragraph 17, responding to paragraph 30 of Mr Brandse you say:

PN390

I have no idea how Mr Brandse would have come to this figure without asking the nine guards individually when they are planning to retire.

PN391

?---That is correct.

*** JASON HASKINS

XXN MR HUTCHINSON

PN392

So if those nine guards were asked you'd accept that that was a valid way of coming to that figure?---Well, I think his statement suggested that you have to give four weeks notice before you retire. And so are there nine guards that are going to give notice in the last four weeks, is there?

PN393

Couldn't NSW Trains not also ask people - well, you have to give four weeks formal notice. I think Mr Brandse (indistinct), I will say that?---That's what he said.

PN394

Could you not also ask six months out, 'Do you plan to retire', and get some indication that way?---We know the people at Newcastle. That's not the case, so I'm not sure. As I said I'm not sure where he got this figure from without asking the nine guards.

PN395

Nothing further for the witness, Deputy President.

PN396

THE DEPUTY PRESIDENT: Re-examination?

PN397

MR WARNES: Just the one question, your Honour.

RE-EXAMINATION BY MR WARNES

[11.46 AM]

PN398

Mr Haskins, you were asked a question about the effect the new intercity fleet plan had on transfers in Newcastle depot?---Yes, that's correct.

PN399

Do you remember that?---Yes.

PN400

And you were taken to the last clause in the enterprise agreement, the Marayong arrangements clause. Can you tell the Commission what the situation was before the new intercity fleet became an issue with transfers?---Are you referring to the waiting times at depots?

PN401

Yes?---It was very hard to get to Newcastle. There was a 10 year wait and 20 year wait at Gosford. So before they decided that they wanted to have this train with a driver only that was the waiting time. As soon as they mentioned that no suburban guard wanted to go intercity. There was no guarantee of a job. That's management created that, yes.

PN402

And, Mr Haskins, you understand that the new intercity fleet issue is now resolved in terms of staffing?---Yes.

*** JASON HASKINS

RXN MR WARNES

PN403

Thank you, your Honour.

PN404

THE DEPUTY PRESIDENT: Thank you?---Thank you.

PN405

Thank you for giving evidence and you can remain in the body of the hearing room?---Thank you.

<THE WITNESS WITHDREW

[11.48 AM]

PN406

MR WARNES: Your Honour, we have one further witness. I understand he's not required for cross-examination. It's a statement of Mr David Hauser, page 179 of the court book. And that's the applicant's case, your Honour.

PN407

MR HUTCHINSON: Your Honour, noting the time shall we proceed with Mr Brandse?

PN408

THE DEPUTY PRESIDENT: Unless anyone wants a break.

PN409

MR HUTCHINSON: Fine to proceed. So we will call Mr Ashley Brandse.

PN410

THE ASSOCIATE: Please state your full name.

PN411

MR BRANDSE: Ashley David Brandse.

<ASHLEY DAVID BRANDSE, AFFIRMED

[11.50 AM]

EXAMINATION-IN-CHIEF BY MR HUTCHINSON

[11.50 AM]

PN412

THE DEPUTY PRESIDENT: Please take a seat.

PN413

MR HUTCHINSON: Mr Brandse, you've got the folder in front of you, a copy of the court book. Within that you will see there's large numbers at the bottom of each page just putting all the documents together, and there's a statement at page 194 titled 'The statement of Ashley Brandse.' You're familiar with that? It's almost the last document?---Yes, this is my statement.

PN414

So it's a number of pages, 33 paragraphs, and you've signed that one?---Correct.

*** ASHLEY DAVID BRANDSE

XN MR HUTCHINSON

PN415

I seek to tender that, please, your Honour?

PN416

THE DEPUTY PRESIDENT: Any objections?

PN417

MR WARNES: He hasn't asked whether it's true and correct.

PN418

MR HUTCHINSON: Sorry, my apologies. You said it's your statement. You accept it's true and correct?---I do accept it's true and correct.

PN419

MR WARNES: Your Honour, just one objection. It's to paragraph 24 on page 198. The third line from the end of the paragraph that reads - it's in relation to the limit in the GRAWA. It says, 'And many do not want to work up to that limit.' Mr Brandse can't give evidence around what each and every guard in that depot's intention is in relation to the shifts.

PN420

THE DEPUTY PRESIDENT: Mr Hutchinson?

PN421

MR HUTCHINSON: Well, I mean my friend said cannot give evidence as to each and every guard. I'm happy to go to that in the examination, but I'd suggest Mr Brandse has various and multiple interactions with staff in the depot and would have been advised by them of their views.

PN422

THE DEPUTY PRESIDENT: (Audio malfunction). We can flesh it out now.

PN423

MR HUTCHINSON: I don't think it's probably the critical point. We can strike that point if you wish.

PN424

THE DEPUTY PRESIDENT: (Audio malfunction) any objection. It will be marked exhibit R1.

EXHIBIT #R1 WITNESS STATEMENT OF ASHLEY BRANDSE

PN425

MR HUTCHINSON: I do have a few questions for Mr Brandse. If I could hand you up a document - which is MFI#1, your Honour. Are you familiar with that document, Mr Brandse?---Yes.

*** ASHLEY DAVID BRANDSE

XN MR HUTCHINSON

PN426

Could you just talk us through what that document represents?---So what this is is a list of people on the transfer list that have made themselves eligible to transfer to Newcastle depot as per the transfer arrangements in the GRAWA.

PN427

THE DEPUTY PRESIDENT: So this is a transfer - - -?---It is a transfer list, correct.

PN428

- - - (audio malfunction)?---Correct.

PN429

Is there a particular date that it's related to?

PN430

MR HUTCHINSON: Could I perhaps assist. I think you said transfer wait list. Is it the list of people waiting to come to Newcastle or people who have already come to Newcastle?---Well, they've already accepted. The last person on the list is Peter Walker. He is accepted, the last person on the list that was accepted last, and he arrives as it says on the date the 4th of the 12th, 12 December.

PN431

So as we step through the document obviously the first two columns are the names. The third column is the seniority date and would you agree that represents the date they ceased being a trainee and became a guard, and that's their seniority date?---I'd have to confirm that, whether it is the day they actually started. I'm pretty sure it's the day they started, not once they've graduated as a guard.

PN432

It represents their seniority - - -?---Yes.

PN433

- - - from around their training?---That's right.

PN434

And then the fourth column shows which depot they came from?---Correct.

PN435

And the fifth column shows the date they came to Newcastle?---Accepted a transfer, yes.

PN436

And then in the fifth column there's a couple of notes where that represents a person who has come from a NSW Trains guard training program rather than coming from Sydney Trains suburban network?---That's correct.

PN437

If you've got that note in the fourth column you never actually worked in suburban?---No, that's not - that's correct.

*** ASHLEY DAVID BRANDSE

XN MR HUTCHINSON

PN438

And so you're familiar with the statement of Mr Haskins, you've read that?---I have, yes.

PN439

So when he says in his statement that there are no guards at Newcastle with less than 12 months suburban experience this document would show that that's incorrect?---That's right. It shows that there's three guards that currently work in Newcastle with less than 12 months experience, and Peter Walker will be a fourth.

PN440

Right. Thank you. Then if I can show you another document, please, which is the document we covered earlier, your Honour, about not to alter days, crew requesting days not to alter. I don't think we actually marked that, apologies. So that document represents both drivers and guards at Newcastle and Gosford who in the current period or at the current point in time made themselves unavailable for additional overtime shifts; is that correct?---That's correct.

PN441

And so there's 24 Newcastle guards?---Correct. That's right.

PN442

So when you say in your statement at paragraph 24 that 26 per cent of Newcastle guards do not make themselves available for any additional overtime shifts, that statement is based off this document?---As well as any additional in the day of operations.

PN443

So there's somewhere around - without going to the exact percentage amounts I think that's probably enough to make the point of how you reach that figure.

PN444

THE DEPUTY PRESIDENT: (Audio malfunction)?

PN445

MR HUTCHINSON: Yes, correct. A good point, your Honour. It may be worth doing that.

PN446

THE DEPUTY PRESIDENT: I might say (audio malfunction).

PN447

MR HUTCHINSON: It's a procedure that sometimes gets lost in the moment.

PN448

THE DEPUTY PRESIDENT: So MFI#1 - any objection?

*** ASHLEY DAVID BRANDSE

XN MR HUTCHINSON

PN449

MR WARNES: Your Honour, yes. I was going to ask the witness some questions about it. We still don't know anything about the document, when it was

created, how it was created, where it comes from. It's still just a list of names that we're being invited to accept the validity of. I think we need to know some more information about the document before it could be tendered as an exhibit.

PN450

THE DEPUTY PRESIDENT: Yes. It's not a business record. It seems to be a summary of a business record.

PN451

MR WARNES: Yes.

PN452

MR HUTCHINSON: This is MFI#1 we're talking about?

PN453

THE DEPUTY PRESIDENT: Yes. Not to throw you off did you want to tender the other document being the crew requesting - - -

PN454

MR HUTCHINSON: Yes, please, your Honour.

PN455

THE DEPUTY PRESIDENT: That's the exhibit R1.

PN456

MR WARNES: It's the same objection, your Honour. I know absolutely nothing about it. It's just a list of names. I don't know where it came from, I don't know who created it. I don't know when it was created. I don't know what period it's for.

PN457

MR HUTCHINSON: Perhaps Mr Brandse may wish to talk about it, and I'm happy to ask some questions to give effect to why we say this is a relevant record.

PN458

THE DEPUTY PRESIDENT: (Audio malfunction) this is relevant, summary of records.

*** ASHLEY DAVID BRANDSE

XN MR HUTCHINSON

PN459

MR HUTCHINSON: Looking at the NTA document to start with can you tell us how that list is maintained, what is the process used in the depot to produce this list?---Yes. So how it is formed is that an employee will send a request to the rostering manager or rostering officer and state that they do not want to be accepted for overtime, because the way the process works at the moment is if someone doesn't leave themselves available then they will be given overtime on their available date. If they do not wish to have overtime made available to them then they have to, what we call, NTA their day. So make them not to alter the roster. So what they do is send an email to the rostering officer and state the timeframes that they want to be excluded for overtime, and some of them are up to 12 months, some of them are, you know, six months. And this is a snapshot in

time that we have been looking through and, you know, sometimes it could be higher and sometimes it could be less, but most of the time it's higher. And these people have wrote that email to the rostering officer stating that they do not wish to be included in overtime, and they're on this list.

PN460

So once the rostering officer gets that email what do they do with that, where do they record that?---They record it in OCRU. It's the rostering system, and it will be booked out to say that they will not be part of the roster for overtime.

PN461

And is this document an extract of OCRU?---It's an extract of the list that's created by the rostering officers.

PN462

Right. The list as it exists by the rostering officers this is the list, isn't it?---That's the list, that's right. From the 21st to - the same period that we went through as part of my statement. What was the dates, the 21st to - it was a snapshot in time for two weeks of that period that I put in the statement - 21 October till the end of the month.

PN463

THE DEPUTY PRESIDENT: Is there an accumulation four list?---Sorry, what was that, your Honour?

PN464

There seems to be an accumulation four list; Newcastle drivers, Newcastle guards, Gosford - - -?---Yes, that's right.

PN465

So there would be a separate document and there would be the list in relation to Newcastle guards?---Yes, that's correct.

PN466

MR HUTCHINSON: So when you say it's for the roster period the period is generally a fortnight?---Correct, yes.

PN467

So you said from 21 October, it would be for 14 days?---That's right.

PN468

A roster clerk may have a request from time to time to come off that list or move on to the list and that can happen in an ad hoc kind of way?---That's right. So the example, Rob, is that people will NTA their days for annual leave - sorry, around school holiday periods and stuff like that. So you do see a pretty big increase, and we understand that. That's people's work/life balance, and that's quite normal. But these people are generally permanently NTA-ing their days.

*** ASHLEY DAVID BRANDSE

XN MR HUTCHINSON

PN469

So it's somewhat of a fluid document though, the roster clerks need to move up and down - - -?---Yes.

PN470

- - - and it doesn't have necessarily a fixed point in time?---That's correct.

PN471

And then there was the prior document we went to, which is - - -

PN472

THE DEPUTY PRESIDENT: (Audio malfunction). Is there still an objection?

PN473

MR WARNES: There is. Am I able to get instructions on the names on all this, your Honour. This isn't a business record, it's just a list of names.

PN474

THE DEPUTY PRESIDENT: Bearing in mind the Commission (audio malfunction). We can resolve this by way of production of the actual Newcastle guards list.

PN475

MR WARNES: What I'm saying that might not be necessary. I need to get instructions off my members. It may be that this is - - -

PN476

THE DEPUTY PRESIDENT: (Audio malfunction).

PN477

MR WARNES: That will be fantastic. Thank you, your Honour.

PN478

THE DEPUTY PRESIDENT: Let's just deal with (audio malfunction). You might need to get other instructions.

PN479

MR WARNES: Yes, we might need some more questions asked of the MFI.

PN480

MR HUTCHINSON: If it assists there's no other new documents I'm seeking to tender. So if it's worth getting instructions on (indistinct) that may be worthwhile.

PN481

THE DEPUTY PRESIDENT: You've got a bit of work to do on MFI#1.

*** ASHLEY DAVID BRANDSE

XN MR HUTCHINSON

PN482

MR HUTCHINSON: Sorry, I thought that was a proposal to take a break now. We will probably deal with the uncovered shifts document as well for completeness at the one time. So there's a document titled 'List of Newcastle guards 2023 transfers', and the Commission has marked that document

MFI#1. You sort of just talked us through before around what that document means. There's been some concerns raised around the nature of the document and it being a business record. Is it your evidence that this reflects the transfers that have occurred throughout the year?---That is, that's correct.

PN483

Can you talk us through who maintains that list and how those records are kept?---Yes, for sure: so it is part of the workforce planning team person that manages all transfer lists within New South Wales TrainLink. For guards, the way that they are able to transfer is there is a list that's generated at the beginning of the year. They're based on seniority and then from that top of the list to the bottom, people are offered and accept roles when they become available. At any time during the year though guards are able to put their name down on the transfer list and it excludes seniority though. So they would form the bottom of the list, the list has already been formed, and then they can still accept transfers throughout the year. Once that list has expired, where we're currently at, we then tender a waiver, which means that we can – by agreement with the union, we go and ask for – seek their endorsement for us to produce a waiver. We did that on 3/11 this month and that was accepted by Andrew Sloan, who's the organiser for the guards at New South Wales TrainLink with the RTBU.

PN484

With that waiver being accepted he's obviously made sure that the conditions were right, that we don't have anyone left on the transfer list, we still have three positions to fill. So we're put out a waiver that was produced last week. That goes out for people that haven't got – you know, if there are any restrictions for them transferring. Say they've transferred previously in the last 12 months, they would be classed as ineligible but because we've put a waiver out, they are now eligible to transfer. So that's where there are changes.

PN485

In terms of this document, MFI1, it shows people who have transferred this year. Is there a single business record of people who have transferred this year that normally needs to be kept or is that a process that TrainLink would usually do? You spoke earlier about how OCRU is used around NTAs. Is there a similar system for recording transfers that have happened in a single list?---I'm sure there would be. I can't confirm if there is but I'm sure – this is an excerpt from what the team in workforce planning use.

PN486

So you've got the workforce planning team to compile this?---That's correct.

PN487

I mean, we say that's a valid record.

PN488

THE DEPUTY PRESIDENT: You seek to tender it?

*** ASHLEY DAVID BRANDSE

XN MR HUTCHINSON

PN489

MR HUTCHINSON: I think MF11 has already been tendered, hasn't it?

PN490

THE DEPUTY PRESIDENT: No, it's marked for identification.

PN491

MR HUTCHINSON: Okay, yes, we seek to tender that, please.

PN492

THE DEPUTY PRESIDENT: Any objection?

PN493

MR WARNES: Same objection, but can I just get instructions? I don't want to be obstructive.

PN494

THE DEPUTY PRESIDENT: (Indistinct) get instructions if you need the actual documents to test.

PN495

MR WARNES: Yes.

PN496

THE DEPUTY PRESIDENT: (Indistinct).

PN497

MR WARNES: Yes.

PN498

THE DEPUTY PRESIDENT: Any prejudice that might arise fairly, we can deal with.

PN499

MR WARNES: Yes, I agree. I'm hoping not to be obstructive. I just don't know off the top of my head.

PN500

THE DEPUTY PRESIDENT: We'll mark these subject to the conditional - - -

PN501

MR WARNES: Yes.

PN502

THE DEPUTY PRESIDENT: Yes, what was MF11 will be exhibit R2, I think.

EXHIBIT #R2 FORMERLY MF11

PN503

And the crew request document, R3.

*** ASHLEY DAVID BRANDSE

XN MR HUTCHINSON

EXHIBIT #R3 CREW REQUEST DOCUMENT

PN504

And uncovered shifts after posting of roster.

PN505

MR HUTCHINSON: Uncovered shifts – yes, so - - -

PN506

THE DEPUTY PRESIDENT: Well, is it - - -

PN507

MR WARNES: No, it looks like a printout of a business record. No objection though.

PN508

THE DEPUTY PRESIDENT: That's exhibit R4.

EXHIBIT #R4 RECORD OF UNCOVERED SHIFTS AFTER ROSTERING

PN509

MR HUTCHINSON: I think for clarity, Your Honour, the nature of the records are essentially Excel spreadsheets and that's perhaps why they take this appearance when we produce them here. Yes, well, exhibit R4 - - -

PN510

THE DEPUTY PRESIDENT: It is a summary of evidence, that's the problem.

PN511

MR HUTCHINSON: I understand.

PN512

THE DEPUTY PRESIDENT: It takes the form of a submission that can be prejudicial to the other side in terms of – it's important to make sure that prejudice isn't arising (indistinct) to the extent - - -

PN513

MR HUTCHINSON: No, I understand that. Okay, then so exhibit R4 which you wouldn't have seen yet, Mr Brandse, so I'll just hand you a copy of that one. So could you just explain to us what this document shows?---Yes, so what this is is a record from our OCRU system, the rostering system, and that would show that within this period, from 8/10 to 21/10, these are the shifts that were not covered once the roster was posted. It is going through that posting period so it shows that there is that many shortages in the Newcastle depot that on those days we weren't able to put relief staff on to those schedules.

*** ASHLEY DAVID BRANDSE

XN MR HUTCHINSON

PN514

And is that something that's acceptable from an operational sense? Is that easy to manage or is that – what would you say about that?---Well, if you look on the flip side of the page, this would have been – this is now the shifts that were then covered once overtime was given, out to all of the employees that accepted

overtime. And then from that point these shifts still remain that are classed as uncovered diagrams. They then have to be submitted to TCAC or the scheduling team, where they would allocate that work to another depot, either Gosford or Newcastle, because they are qualified to do Sydney work from Newcastle – the Sydney side of Newcastle.

PN515

Okay. And so this is work you have to get other depots to cover for you?---Yes, that's correct – as well as we do it in the beginning of the schedule set as well so we've had to allocate work from the schedule set where we've had to increase head count in other depots that had people available.

PN516

Right, so this is only part of the work that you need to cover that's not able to be resourced in Newcastle?---That's correct.

PN517

And Mr Haskins and Mr Ferguson in their statements say that – where you say at paragraph 28 of your statement:

PN518

In addition to the cancelled services on average in the last month Newcastle had to send 40 guards shifts per week to the central inner-city and Gosford inner-city depots to cover.

PN519

?---Yes.

PN520

Mr Haskins and Mr Ferguson say that there just can't be that many. I mean - - - ?---This is a record. It's written at the top there's 42 uncovered diagrams.

PN521

So where in your statement you said at 28 it's 40 guard shifts per week, should that be per fortnight or - - -?---It would be per fortnight.

PN522

Per fortnight, okay?---The difference is though is that we also cancel trains as a result. So we've cancelled two weeks in a row, one of the Dungog services was cancelled every - - -

PN523

I'll come back to that point?---Sorry.

PN524

So this is just the ones you were able to get covered by another depot?---That's right.

PN525

And there's 40 per fortnight?---Yes.

*** ASHLEY DAVID BRANDSE

XN MR HUTCHINSON

PN526

So 20 per week that you get other depots to cover for you and then in your statement at 27 you say that there's 20 passenger services in the month to 27 October that you cancelled. Mr Haskins and Ferguson also contest whether that can be accurate. Can you explain the 20 services that were cancelled?---As I state in the statement is that we cancelled 10 services, one up, one back, so 10 services that were associated with the Dungog service. Then the following week, so that we lessened the customer impact, we then cancelled the Scone service for each day, five days.

PN527

And that was because there weren't sufficient guards to resource that?---Correct.

PN528

And Mr Ferguson gave some evidence that he was rostered for one of those services and was in the meal room and wasn't given other work after the service was cancelled. Obviously this is sort of something of a question without notice but does that sound correct to you?---No, I'm sure he would have been utilised if there was work available for him. And I'm sure that the reason that job wasn't uncovered was because there was no guard available.

PN529

So moving on, Mr Haskins in his statement says – and we can go to the statement if we need to but you may be familiar with it – paragraph 9 of his statement he says there's a guard with limited experience was removed in August this year due to a safety breach. Is that your understanding?---That's correct, yes.

PN530

And so he was taken off work for a period. Can you tell us about the investigation and why he was taken off work and what the investigation found in the end?---Yes, I can do that – so the incident in question was a set type that we've got because – called an endeavour service. Something that was introduced during COVID is that the guards created a workstation inside in the vestibule to limit exposure during COVID, obviously to stop transmission and to do that they isolate the doors on these sets so that they work as crew doors and there's a panel that they operate inside the vestibule to make sure that it works as a crew door and doesn't interlock with the passenger doors. When they've changed ends, that door hasn't been secured properly and the control panel door, I would say, wasn't secured properly and there's a proximity, a limit switch in there, that was malfunctioning. When that door was closed, it hasn't activated the proximity switch and when that train has departed, that door is still thinking that it's a crew cab door and remained open in transit.

*** ASHLEY DAVID BRANDSE

XN MR HUTCHINSON

PN531

There is a second level of defence though, where a vestibule door will close, the vestibule door closes inside to stop customers or passengers being able to access that vestibule from the inside but obviously it's still a train working in service with a door open. That's an extremely serious incident so that was identified at the next station by the station CSA and the train was secured and the door was closed. But

because this person was involved in this incident, because they hadn't secured that panel properly, there was an investigation that was undertaken and all parties were removed while that investigation was undertaken. It was then, as I said, identified as a faulty proximity switch inside the door; inside that control panel, and people were reinstated.

PN532

So while the investigation happens, is it standard practice to just remove anyone who is associated with the incident?---That's correct.

PN533

Just until the findings are confirmed?---Correct.

PN534

And when the findings were confirmed you mentioned about this proximity sensor?---Yes.

PN535

Is that something that's found to be a failing by the new guard – I believe it was Mr Pistavos – to do the task as directed or was that a failing of the equipment?---It was the equipment and the design of the way that those trains were designed is a flaw and we have had probably about five occasions this year where that has occurred.

PN536

Right?---Regardless of, you know, guards' length of service.

PN537

And then the next stage of that incident is the door isn't closing properly but the train still left the platform. Whose responsibility is that?---At the interchange where this event started is the CSA. So we have CSAs that provide ride away for the guard and it's the CSA's role to make sure that people aren't, you know, in between the platform train interface and to make sure all the doors are closed before they, you know, raise the flag and blow the whistle to the guard.

PN538

So when Mr Haskins says it was due to some failing of one of the newly-trained guards, this incident was due to their failing, that's not correct, in your view?---Not correct – as I said, I've had five incidents at least this year and as have been reflected on the user service.

PN539

At paragraph 10 Mr Haskins says there's still guards on the transfer list. Is that your understanding?---And as I've said there's still – Peter Walker is still on the list and has accepted a role to start on 4 December.

PN540

So he's committed to a position at Newcastle?---Correct.

*** ASHLEY DAVID BRANDSE

XN MR HUTCHINSON

PN541

He's not sort of on the list waiting to transfer still?---No. So the people's names that are still – have now taken up have got roles that they've accepted.

PN542

Right, and so there's no one new to move to Newcastle. I think your evidence earlier, you already stated was there's three positions that you can't fill at the moment?---That's correct.

PN543

So you've put a waiver out?---And we've put out a waiver.

PN544

Okay?---We also had to put out a waiver in March this year.

PN545

Right. So twice this year you've attempted to advertise for additional guards and you still don't have enough?---That's right.

PN546

Mr Haskins says at 15 of – again – his reply statement that cancellations in October 2023 were mostly due to the Tarro Bridge closure and other operational issues. You were aware of cancellations due to Tarro Bridge?---We had to have some emergency possessions during the night so there would be – I would claim that there were cancellations as a result but for during the peak periods, we actually added additional services.

PN547

Right?---So an additional one service in the a.m. and another one in the p.m. but to cover that was additional schedules we had to send to Sydney and Gosford to release, to get the Newcastle guards to cover those jobs.

PN548

So when you say you had to cancel 20 services in your statement, you've separated out ones that were due to guard shortages versus other incidents?---Most definitely, yes – definitely to crew shortages.

PN549

And Mr Haskins, at the end of his reply statement, paragraph 17, says how could you possibly know the retirement intentions of staff without asking. So could you tell us how you do know the retirement intentions of staff?---Yes, so we obviously use the last five years' data to create what the future, you know – fairly predictable future and what it looks like. So based on historical evidence we know that we're going to see a number of people retire through this year and then we also add to that the shift manager's talk with the employees through a career conversation program that we have, where every employee has a conversation around their intentions; whether it's to transfer to another depot, whether it's to retire moving forward. So that's all captured in the system and we use that to define programs and what we need moving forward.

*** ASHLEY DAVID BRANDSE

XN MR HUTCHINSON

PN550

Thank you. Just some questions about Mr Hauser's statement, at paragraph 6 of his statement, which is – I'll just find it if you want to refer to it – it's 179. So he lists some things that are features of inter-city working that requires prior experience as a guard, in his view. The first one is train fault rectification. Is this something that when you have been engaging new guards you train them in?---Most definitely – so we have faults and failures training program, we call it. Obviously our guard program that we've already used in intensively over the last three or four years has been over five months. Because Newcastle includes the Hunter line we want to add an extra month to that training so it's a six-month program and that is all done by people within the Newcastle depot: trainers and principal guards and that's about uniquely tailoring that training to those individuals.

PN551

He also talks about – his second point is performing lookout work while a driver performs fault rectification. Perhaps it's worth just explaining what lookout work is because I don't think the statement of Mr Hauser goes to that. So for the Commission's benefit, just briefly, what is lookout work?---Lookout working is obviously making – standing train protection. So when there's a fault on a train if the person has to access the corridor to isolate or find what the problem is with the train, they set up safe working environment using safe working rules and as part of that process the guard will be the lookout to ensure that those safe working methods are being maintained. So if there's another train enters the section that they've had isolated they can obviously notify the driver to say that there's a train entering the section and then obviously there'd be a safe working breach and all those sorts of things would happen.

PN552

So if you hire a new guard you need to train them in that?---Correct.

PN553

Is there anyone else who performs lookout work?---Yes, station staff, drivers – everyone that's, you know, most people that work in the rail corridor are trained in lookout work.

PN554

So you said station staff can do that work?---That's right.

PN555

You train them to do that?---We do.

PN556

And they are not experienced as a guard?---No, that's right.

PN557

The station staff – so they're able to be trained and competently perform that work?---Correct, yes.

*** ASHLEY DAVID BRANDSE

XN MR HUTCHINSON

PN558

At 6C, Mr Hauser refers to dealing with natural disasters, in the Hunter Valley in particular he refers to. So when a Sydney Trains guard transfers to Newcastle, regardless of their length of experience, do they have any experience in the Hunter Valley?---No, they don't.

PN559

Do you provide them training on the Hunter Valley and the environment there?---We do, that's correct.

PN560

And you also train new hire guards on that environment in what they need to do?---Correct – as I said it's an additional four weeks at least. As I said, it's competency-based training but there is a target timeframe but if they take six, seven weeks they will be deemed competent at the end of it.

PN561

(Indistinct)?---Yes, that's right.

PN562

At 6D of Mr Hauser's statement he talks about big crowd events. Could you just explain for us what are your practices for managing big crowds, both - - -

PN563

THE DEPUTY PRESIDENT: What's the relevance of this? The witness is agreeing with another witness who is not in court (indistinct).

PN564

MR HUTCHINSON: Well, the relevance is that Mr Hauser puts forward that these statements are reasons why the - - -

PN565

THE DEPUTY PRESIDENT: Prior experience.

PN566

MR HUTCHINSON: - - - prior experience is so critical and Mr Brandse – what we're seeking to illustrate is that prior experience often isn't relevant because the Sydney Trains guard has no experience, for instance, in the Hunter Valley and needs to be trained on that. Sorry?

PN567

THE DEPUTY PRESIDENT: I'm just wondering why this is being explored.

PN568

MR HUTCHINSON: Well, because - - -

PN569

THE DEPUTY PRESIDENT: You can run your case as you wish. It's just - - -

*** ASHLEY DAVID BRANDSE

XN MR HUTCHINSON

PN570

MR HUTCHINSON: I am nearly finished, Deputy President. As I said in the opening, it's really a concern around how much evidence has been put on about these issues without submissions from the applicant in writing and we're unclear what they're going to seek to make of that today. So we're wanting to make sure that the - - -

PN571

THE DEPUTY PRESIDENT: Maybe there's a lot of what people put in relation to experience and the like is irrelevant because each party says there's certain steps that must occur. Surely those steps might have been informed in the formulation by safety and (indistinct) but that's not the point. What's put by both parties is there's steps and I'll be exploring that with the parties. They'll be stepping me through not hypotheticals but actuals, the actuals in relation to the five people: what date did this occur, how does each party say it should have been dealt with pursuant to the agreement and the GRAWA?

PN572

MR HUTCHINSON: Okay. I'll move through this very briefly - - -

PN573

THE DEPUTY PRESIDENT: (Indistinct).

PN574

MR HUTCHINSON: So the big crowd events – is it correct a guard needs to manage and operate to manage where there are large crowds?---They obviously have to manage the train, the passengers on the train during the operation. As I've said, though, it's all part of the training that a guard undertakes, whether it's Sydney Trains or New South Wales TrainLink. It's all part of that program.

PN575

So a guard in Sydney Trains needs to be trained to manage big events as well?---Correct.

PN576

And in your experience, you've worked for a number of years in the rail network: how did the Newcastle events compare to Sydney-based events?---They're very few and far between. Probably the difference is that they – we use the two-car smaller harness sets compared to the large eight-car OSCARs and V sets. So they do take some additional management with crowd numbers but I suppose the people that have to stand up and manage those crowd events are actually on the stations so it's the CSAs, the station staff, additional support from other areas that really manage the corralling of crowds and count them into making sure that there's safe numbers on the train set and then obviously the train crew manage it from there through the stopping and interface of the train.

PN577

So where Sydney Trains a new guard off the street to manage Sydney-sized events, you'd agree with that?---Yes.

*** ASHLEY DAVID BRANDSE

XN MR HUTCHINSON

PN578

And they do that competently and - - -?---That's right.

PN579

You do the same when you hire a new guard for the events that they may be exposed to in Newcastle, is that correct?---That's correct.

PN580

Nothing further for this witness, Deputy President.

PN581

THE DEPUTY PRESIDENT: Did you need a break before you (indistinct)?

PN582

MR WARNES: Yes, a short break just for those – two-and-a-half, three - - -

PN583

THE DEPUTY PRESIDENT: How long do you think you'll be?

PN584

MR WARNES: Probably only – I was going to say five. Let's say 10 minutes.

PN585

THE DEPUTY PRESIDENT: Okay, we'll resume at – do you want to take an early lunch and resume at 1.30?

PN586

MR WARNES: That might be - - -

PN587

THE DEPUTY PRESIDENT: It'll give you time to get instructions.

PN588

MR WARNES: That might be sensible, Your Honour.

PN589

THE DEPUTY PRESIDENT: And then your witness won't be in cross-examination so you can (indistinct). Is that okay?

PN590

MR WARNES: Yes, that's fine, Your Honour.

PN591

THE DEPUTY PRESIDENT: On that basis we'll adjourn till 1.30.

<THE WITNESS WITHDREW [12.31 PM]

LUNCHEON ADJOURNMENT [12.31 PM]

RESUMED [1.32 PM]

*** ASHLEY DAVID BRANDSE

XN MR HUTCHINSON

PN592

MR WARNES: Your Honour, thank you for the opportunity to gain instructions. R3, just dealing with it firstly, there's been identified a number of names on the list of employees who were actually on leave during the period that this document is purported to cover, which leads us to question whether or not they are actually on the NTA list. I'm actually not sure how much falls on how many employees are NTA but I'm also reluctant to admit the document as a sort of – as an accurate representation of the actual NTA list if there is an NTA list available to the respondent to provide.

PN593

THE DEPUTY PRESIDENT: (Indistinct)?

PN594

MR WARNES: We had a brief discussion about the names.

PN595

MR HUTCHINSON: In short, Your Honour, the list is formed by – as Mr Brandse's evidence put earlier – an employee asking to be on the list and they don't come off until they ask to be off. Now, if they – and I think Mr Ferguson even gave evidence to the effect of putting himself on the list for a number of months. If an employee says, 'I want to be on the list permanently', they fall sick for a period, they're still on the list pending their return to work.

PN596

THE DEPUTY PRESIDENT: There's the list.

PN597

MR HUTCHINSON: That is the list, yes.

PN598

THE DEPUTY PRESIDENT: No, that's not a list – it's a surrogate list. There will be a list, you say, then for crew request not available in the fortnight commencing 21 October.

PN599

MR HUTCHINSON: Yes, the rostering team keep a list. That is a - - -

PN600

THE DEPUTY PRESIDENT: There will be an incarnation of that list for that period of time.

PN601

MR HUTCHINSON: Yes.

PN602

THE DEPUTY PRESIDENT: It will relate solely to Newcastle guards.

PN603

MR HUTCHINSON: Yes, the rostering team keep the list. It's essentially a Word document or an Excel document compiling all of the requests they've had and names come on and off the list.

PN604

THE DEPUTY PRESIDENT: That document we have – Mr Warnes is kind enough to say he doesn't know how much turns on it but it's a difficulty in the sense that if there is a list, why not just have the list?

PN605

MR HUTCHINSON: Well, to my knowledge, unless the rostering officer has misguided me, that's what the list will look like, as a printout of what they hold.

PN606

THE DEPUTY PRESIDENT: Yes, that's what it'll look like. So why can't we see what it'll look like, because we'll have the actual list in front of us?

PN607

MR HUTCHINSON: I think that is it.

PN608

THE DEPUTY PRESIDENT: It's not. It's a summary before this.

PN609

MR HUTCHINSON: I don't want to – perhaps I haven't explained this very well, sorry. It's a rostering officer in a room with a computer with a shared document and they type names on the list and they remove names from the list and it looks like this.

PN610

THE DEPUTY PRESIDENT: Okay, well, where is that list? It's kept on a computer in an Excel spreadsheet form?

PN611

MR HUTCHINSON: I can't say for certain. Perhaps you can ask Mr Brandse if we need to but it's a very localised, ad hoc process.

PN612

THE DEPUTY PRESIDENT: That at 21 October 2023 will look like X, a document. It's just we don't have that.

PN613

MR HUTCHINSON: Well - - -

PN614

THE DEPUTY PRESIDENT: Mr Warnes has said there's not that much that turns on it.

PN615

MR HUTCHINSON: Yes.

PN616

THE DEPUTY PRESIDENT: It can be put on the basis that this is a submission by the respondent as to what the Newcastle guards list would have looked like on 21 October.

PN617

MR HUTCHINSON: Yes, I'm happy with that, Your Honour. The only reason we raised it is because the reply statements questioned the validity of Mr Brandse's statement about how many people NTA make themselves unavailable for overtime. That's the only reason we raise it.

PN618

THE DEPUTY PRESIDENT: (Indistinct).

PN619

MR WARNES: I'm more than happy to do that. I mean, I hate to stretch the Commission's patience with this but there's a similar issue with R2 as well, the other one I sought instructions on. This one probably is a little bit more important. Just a couple of names that – namely the last two but also there have been questions raised around a couple of other names on the list too but the last two – Belinda Lawrence and Barbie Vanislac Habach, on the transfer date of Feb '23 we raised issues around this. Now, the Commission in comments made when we were talking about this in the first place I think asked the respondent to produce the last 12 months' worth of transfer lists. I think that would probably resolve this issue. So if that direction or request still stands, I think that will probably resolve the concerns around the R2 document.

PN620

THE DEPUTY PRESIDENT: We'll deal with Mr Brandse's evidence and then submissions.

PN621

MR WARNES: Thank you.

<ASHLEY DAVID BRANDSE, RECALLED [1.37 PM]

CROSS-EXAMINATION BY MR WARNES [1.37 PM]

PN622

Mr Brandse, I'm just going to take you quickly to something that Mr Hutchinson asked you about in relation to the cancellation of a Dungog service for an entire week. I think it was, from memory, the 3.05 sign-on or something like that. Do you recall that question?---I do, yes.

PN623

And Mr Hutchinson told you that Mr Ferguson gave evidence that he was rostered on to work the Wednesday of that week. Do you remember that?---Yes.

PN624

And the evidence was, from Mr Ferguson, that he, instead of working the job, sat in the meal room on standby. Do you remember Mr Hutchinson asking about that?---I do, yes.

*** ASHLEY DAVID BRANDSE

XXN MR WARNES

PN625

So do you have any reason to question what Mr Ferguson told the Commission when he was in the witness box?---All I can say is the reason that potentially happened was that we have to also free up relief to make sure that we've got people available when an incident or something can occur. So that could have been the case. For me, my team instructed me that there was no one available but if they wanted to have people there available, if something happened, then that could have been the case.

PN626

Okay, so there's every chance that Mr Ferguson was sitting in the meal room when he was scheduled to do that Dungog service on the Wednesday?---Potentially, yes.

PN627

Now, I just want to take you just to R4. Do you have that document in front of you?---Yes.

PN628

Doesn't have my writing on it. The printout of an Excel spreadsheet, that's the one?---Yes.

PN629

Now, this document, it says it's 32 uncovered diagrams required to cover. Is that the list of jobs that you say were sent away from Newcastle depot to Gosford and Sydney in your statement?---So in the first summary of those – of this example, this was the number of jobs that were still available after the lines – the people have been put on lines of work and then the back summary is once overtime has been applied after offering everyone in the depot the opportunity to work those are the remaining jobs that would have been sent away. But we don't include in this those 10 cancelled trains per week.

PN630

Okay, so these are all jobs – so first of all, take you back to part of your answer. So isn't this just a continuation – so you've got the first statement on the first page is 8 October?---Yes.

PN631

Then it goes on to 15 October and goes for another week. Isn't it just a continuation? You said there was some difference between what's on the front and the back?---Yes, sorry, my mistake. The one that we did produce has the summary of what has been produced at the bottom. So that's why I thought it was the one that was at the bottom but you're right, it is a continuation, sorry.

*** ASHLEY DAVID BRANDSE

XXN MR WARNES

PN632

So these are all jobs that – what did you say the jobs are, (indistinct)?---So what it is, is from the roster that's created for that period in the fortnight, these are the jobs that are uncovered when the roster's been created. So that means we haven't got the relief staff. Normally in the way you create a roster is that these jobs

become available. You move those 27 or 30 relief up on to those jobs and fill the roster and then everyone keeps moving forward but - - -

PN633

You said these jobs weren't cancelled?---These jobs weren't covered by any relief staff so that shows the - - -

PN634

So what did you do with the jobs?---So those jobs then get offered out to overtime or moved to another depot.

PN635

Okay. So for example, so we're looking at some of the jobs and I'm reliably instructed that if the last two numbers in the column that says, 'Number', so for example 9260, 9252 - - -?---Yes.

PN636

Anything above a five in that third number in the four-digit piece, that's local working?---I think – yes, correct.

PN637

And if it's less than five it's - - -?---Schedule - - -

PN638

So Sydney working or Gosford working?---That's right.

PN639

Yes, okay, so if we just go through all of the columns, you can see at least on the Sunday and the Monday that's all local work. Same again on the Tuesday and the Wednesday and if you look on the Thursday at the 11.01 start, 9709 – that would be a Sydney service or a Gosford service. Assuming they all go to Sydney?---Yes.

PN640

And then there's another local working and then on the Friday there's a few Sydney services?---Yes.

PN641

The same – so it goes over the page. If we just look at the Tuesday 17 October, it says: '0600 training'?---Yes.

PN642

So how would you have to cover a training shift?---Depending on what was happening with the trainer – so the trainer was probably on a scheduled job with the trainee, potentially. That's why I would have training, potentially, next to it.

PN643

So that was a trainer on a train but no trainee?---Well, even then that's why I said there's 40 because I didn't count those two training shifts.

*** ASHLEY DAVID BRANDSE

XXN MR WARNES

PN644

There's three there?---Or three, sorry – but, you know, they would be covered by a trainer, potentially; a trainer and trainee.

PN645

Okay?---Because I know we were doing that for the Tarro Bridge example: to get additional services we were using a trainer and trainee to work those services.

PN646

Okay. All right, so are we saying – I'll just take you to the opening paragraph of this thing, 'Uncovered shifts', that one?---Yes.

PN647

'(Indistinct) uncovered diagrams required to cover after all overtime is assigned without breaching conditions' – so how did you cover these jobs?---So as I said, first of all we cover it with overtime where possible and that's up to the fatigue limits of 12 and 14 and in some cases 13 across two periods in the roster.

PN648

Yes, but it says all overtime is already assigned before this list is generated?---This was probably the remaining list – as I said, the other half of this that I had had even more jobs, up to 14 jobs to cover on one day.

PN649

So how did you cover these jobs though?---They would have had to be moved to another depot, as it says in the paragraph (indistinct).

PN650

That brings me back to the question: it's true, is it not, that all the local workings – so the diesel working in the Hunger region – that can only be done by Newcastle depot?---That's correct.

PN651

So how could you move what is about 80 per cent of these jobs to other depots?---That we have to cut up the diagrams via our rostering teams and give all of the Sydney working to the depots that can cover the working and assign more Newcastle working to – Hunter line working to the Newcastle depot.

PN652

Okay, so what you're saying is you actually took the jobs off Newcastle guards?---Correct.

PN653

So these jobs here didn't got to another depot. These jobs stayed within Newcastle depot?---Potentially, yes, and they would have had to move other jobs.

PN654

Okay. So what this exhibit is meant to be is jobs that were allocated to another depot. It's not, is it?---Well, it's jobs uncovered, that's right.

*** ASHLEY DAVID BRANDSE

XXN MR WARNES

PN655

But they were covered?---In a roundabout way, yes.

PN656

Okay?---Yes.

PN657

So this doesn't really assist the Commission much at all because this just sort of is a halfway story of what the problem was and then you went on to fix it in a different way but this doesn't show what was actually - - -?---I utilised another depot.

PN658

- - - sent to other depots?---Yes, that's right, to fix the - - -

PN659

Okay, so there was some other document that exists somewhere contains that information. This just - - -?---It would potentially, yes, because we've had to move that work.

PN660

Okay?---It's just to represent how short we are in that depot.

PN661

I want to take you now to the provisions of the colloquially put GRAWA. Do you have a copy of the court book with you? It's a folder in the witness box there. Like this thing?---Yes.

PN662

So the GRAWA appears a few times but I'll take you to page 24, which is an attachment to Mr Haskins' first statement. Now, is it right to say that in order to be an intercity guard or perform intercity guard duties you have to be intercity qualified?---Which paragraph are you referring to?

PN663

Just as a general statement – I can take you to a paragraph if you need me to. But you have to be qualified to do intercity work to be an intercity guard? If you need to look at something, on page 59, the final dot point on that page talks about being qualified for intercity work to do intercity trains – on page 59 in the big numbers down the bottom?---It does state that, yes.

PN664

And does that accord with your knowledge, that you have to be qualified in intercity work to do – to be an intercity guard?---That's right, yes.

PN665

In order to get qualified to be an intercity guard, you have to go through intercity training school. Is that right?---That would be right, yes.

*** ASHLEY DAVID BRANDSE

XXN MR WARNES

PN666

And in order to enter intercity training school, do you know if there's any pre-requisites that you have to meet in order to get in?---Only through this process, that if I was a Sydney intercity guard that I would have to go through a minimum of two years as a suburban guard. Never been raised with me previously.

PN667

Okay, I notice you said that in your statement. We'll come back to that but your knowledge as a – what is your position again?---Director, North and Central.

PN668

So you've never been advised since you came to New South Wales Trains that that was a requirement?---No.

PN669

And have you familiarised yourself with the GRAWA since you've been in your position, I'd imagine?---I have, yes.

PN670

When you enrol someone into an intercity training school position, I assume you read what the GRAWA has to say about intercity training schools?---Yes.

PN671

And when you read, say, clause 18, which is on page 57, what weight or what gravity did you give to the provisions it sets out under the heading, 'Intercity training school'? What meaning did you attribute to that?---What we obviously did was then consulted with the RTBU around – this was four years ago when we actually started to look at other options to be able to train our own employees because we had no other option at the time. We were more than 100 guards short through the whole business so we engaged a consultation process on how we could move forward to be able to retain and train our own employees.

PN672

And I'm interested in what you just said then. So you said you engaged in a process that would allow you to do that. Before you did that, did you not do that at all? Did you get all your employees from Sydney Trains?---We did, yes.

PN673

And that brings me to the next question, which is prior to – you started in 2017, didn't you?---Correct, yes.

PN674

That was around - - -?---No, '14.

PN675

Two thousand and fourteen – so you've been around the entire time, throughout when the new intercity fleet was ordered and the process that went on with staffing arrangements and things like that?---Yes.

*** ASHLEY DAVID BRANDSE

XXN MR WARNES

PN676

Did you notice that there was a marked drop-off in people on the transfer list once the staffing around the new intercity fleet was put forward by New South Wales Trains?---Yes, I would agree that we did see a decline in transfers in the guards' ranks.

PN677

Yes, and prior to the new intercity fleet issue, the transfer list was actually really quite long, wasn't it, to get to these Gosford and Newcastle depots?---Gosford, definitely – Newcastle, we had started to see some decline from where we did go through a fairly large transition.

PN678

When we moved from the Newcastle – old Newcastle depot back to Hamilton the work did change a lot and we did have a lot of people resign and retire.

PN679

Yes?---So we went through using the transfer list, probably around a 25 per cent turnover of crew.

PN680

Yes?---And then we never seen it recover.

PN681

So, Mr Ferguson gave evidence when he was in the witness box around having to wait almost 10 years to get into Newcastle depot. Does that sound right? He came in in 2020?---I would say probably a little less than that, probably around eight years was about the average.

PN682

Sure, so the transfer list was fairly long?---The job turnover, except for that period of time, we went through a fairly stable period.

PN683

All right, so just to recap on that, prior to around 2020, New South Wales Trains didn't hire any of its own guards. You got all of its guard resources from Sydney Trains?---Yes, that's right.

PN684

And prior to that the waiting list was quite long?---Except for Sydney terminal, for an example, yes.

PN685

Now, I'm going to – do you have a copy of the enterprise agreement in the witness box?---Is it in the folder?

*** ASHLEY DAVID BRANDSE

XXN MR WARNES

PN686

No, I've got it here. I know Mr Hutchinson gave up an abbreviated version. I'll give you the book. Apparently I don't care as much about the environment. I just want to take you to – there's sort of scatterings of references to specific intercity

work throughout the agreement. I want to take you to – I should give one to you too, Your Honour.

PN687

THE DEPUTY PRESIDENT: Well, I've got one that I used (indistinct).

PN688

MR WARNES: Okay. They normally print out a pretty copy but we didn't get one this time.

PN689

THE DEPUTY PRESIDENT: Not yet.

PN690

MR WARNES: If I can just take you to 215.2B, which is on page 211 - - -

PN691

MR HUTCHINSON: See if I have a spare copy – you can look at the clauses now.

PN692

MR WARNES: (Indistinct) that one, (indistinct)?---What clause was it, sorry?

PN693

It's 214.2B – I'm just getting to it myself.

PN694

THE DEPUTY PRESIDENT: (Indistinct).

PN695

MR WARNES: So it just reads: 'Intercity standbys cannot be used for suburban services or empty trains after seven hours, 36 minutes on duty except by mutual agreement'. Now, just keeping that in mind - - -?---Which clause, sorry?

PN696

Sorry – it's on the top of page 212. I think I misguided you before?---(Indistinct reply)

PN697

Right up the top?---Yes.

PN698

Just keeping that in mind, the new guards that you are hiring – let's just colloquially call it directly off the street - - -?---Yes.

PN699

- - - they have no experience in suburban working at all, do they?---No.

PN700

And there are new guards at Central, at Sydney Terminal, sorry?---Correct.

*** ASHLEY DAVID BRANDSE

XXN MR WARNES

PN701

Are there new guards at Gosford?---No.

PN702

No, just at Central?---And Wollongong and the other (indistinct).

PN703

So do you have any coverage of Sydney Terminal?---I look after Sydney Terminal.

PN704

In your role – so are you able to, with these new intercity guards, are they able to act as – be used for suburban services, given that they haven't ever worked on suburban trains before?---They don't work suburban trains, no.

PN705

Are you only able to use them as intercity guards?---We don't have a requirement to work suburban services.

PN706

Yes, okay, but if there was a requirement, you couldn't do it because they're not trained to do it?---Well, they work under different conditions so potentially not. I don't think any intercity guard can work on suburban working.

PN707

Well, if you just have a look at 215.2B, the one I just took you to - - -?---Yes.

PN708

- - - that envisages, does it not, that intercity standby guards can do suburban work?---Potentially but we never do.

PN709

Yes, and is that because the new guards don't have any experience in suburban work?---No, because they've got about 300 standbys and we're not required. They've got lots of people.

PN710

But you'd agree with me, would you not, that our interpretation is that you should get your guards from Sydney Trains, who have experience in suburban work. If that were the case, they would be able to satisfy that clause because they have suburban experience so they could be intercity standbys and do suburban work, couldn't they?---As I said, I would love to be able to get suburban intercity guards but that's not an option for us. We don't have any.

PN711

No, I understand that. I'm not criticising in that respect. I'm just putting to you that under the old system you could put an intercity standby on a suburban service?---Yes, the option is there, yes, that's right.

*** ASHLEY DAVID BRANDSE

XXN MR WARNES

PN712

And I might just take you, just in the same of thought - - -?---Sorry, they've got to be qualified in the route and still have that route knowledge continuous.

PN713

Of course, yes – assuming proper qualifications?---If they've been an intercity guard for five years, they wouldn't have that continuation of that route so potentially don't use them anyway.

PN714

Yes, assuming qualifications. I'll just take you to page 56 of the court book. This is in the same vein as my last question. It's clause 17, page 56, practice drives?---Yes.

PN715

Now, it's just important to note that this provision isn't actually operative anymore. It was one of the alterations from the last enterprise bargaining agreement. But prior to 17 February, when this was still operative, did you send these new guards that you've hired trained in intercity work, did they perform suburban practice drives, each calendar year?---From 2020, when they were engaged, that would have been part of their schedule as well, yes.

PN716

Okay, so these new intercity guards that have never done suburban work did suburban practice drives?---They start off as part of doing V set traction skill, that's the whole – V set and Tangara are the only train sets that still require a practice drive.

PN717

Yes?---And we would have had them as part of that schedule.

PN718

Okay. Now, we've spoken about the NIF. Are you are of the operation of clause 12 in the enterprise agreement, the facilitation of change clause?---Yes.

PN719

Have you ever been involved in one of those processes?---No, I haven't.

PN720

Are you aware that New South Wales trains sought to engage that process at the end of 2020 in relation to the new city fleet?---Well, as I say I wasn't directly involved but I was aware that there was engagement happening around operating models and things like that.

PN721

Yes. So it's safe to say that New South Wales Trains is aware of clause 12 and what it does?---Yes, yes.

*** ASHLEY DAVID BRANDSE

XXN MR WARNES

PN722

I just want to take you through a couple of phrases because as you probably are acutely aware, the Commission may not fully appreciate what some of the phrases in the GRAWA means?---Yes.

PN723

I certainly had to take instructions on some of them. When we talk about obtaining a line in the roster, is that just talking about, so the Commission's heard some evidence from the other witnesses in this case that there's in Newcastle for example, there's 66 main lines?---Correct.

PN724

And then there's 29, currently 29 relief lines?---That's right.

PN725

Firstly, is that 29, number 29 relief lines? That's a fluid concept, isn't it. Like, it's not something that's set in stone?---Well, how it works is that from the beginning we get a timetable that says this is the amount of services we will run. Those services create schedules, schedules are then, you know, made by the scheduling team. They're then put to, you know, the respective depots to say these are the services that each depot will run with a schedule number, like that 900 number as we spoke of. From that point, a master roster gets created so a rostering committee made up of you know, potentially delegates or people that you know are part of – have skills in making rosters in conjunction with a rostering officer create a master roster, it allocates how many lines that we need to be able to build and work that roster in Newcastle's case, it's 66. And then there's a balance of how many relief you need for how many main lines you have on the roster.

PN726

Yes?---We used to have a ratio that made sure that it was you know, not too high, not too low, and obviously the ratio no longer exists since the new EA.

PN727

Yes?---But obviously it still makes business sense for us to make sure that that number's fairly accurate.

PN728

And so you have said at 29 now for example, the next master roster, it might be 26 of it might be 34?---And that's based on that workforce plan. The master line's might change as well.

PN729

Yes?---We could end up moving more work to Gosford for an example, and we could change it to 55 lines in the roster, and that's just how things balance.

*** ASHLEY DAVID BRANDSE

XXN MR WARNES

PN730

And so currently at Newcastle, you have got 66 plus 29 which equals 95, which is one of the sort of key issues in this case, so you give evidence that Newcastle depots three short, so you have got 92 guards for 95 lines of work?---We have, yes, we're in the process of building up to that number, yes. So currently, we have got 88.5 due to an FDE.

PN731

Okay. Yes?---With flexible work and things like that. But, yes, with people that have accepted those positions, we're currently up to, you know, 92 and we want to get to 95.

PN732

And so feasibly, next master roster change, that could come down and you could be surplus guards. You could have surplus guards?---That's right. Yes.

PN733

Okay. Yes. So it's a bit of a moving flex?---It's a moving flex, that's right.

PN734

Yes?---But what I have done in the past so that we have had that supply, over supply, we have introduced training lines and things like that, to make sure people aren't disadvantaged or sent away from the depot, because potentially that's another option, is I could say righto, four guards are now going back to central. But instead of upheaval of their life, we obviously look at other options on how we can utilise those people in the depot.

PN735

Yes. And so when one refers to obtaining a line in the roster, is that – that's referring to the 66 main lines?---That's right.

PN736

And you essentially, when you get appointed to a line, you own that line, is that – that's - - -?---Unless you find a better one and want to move. You can move further up the lines, too, yes.

PN737

Yes. And then that line becomes vacant and somebody else gets on it?---That's right.

PN738

Yes. Okay. But that's not the same with relief lines?---No. Well, what we try and do too, is in the relief structure is have lines that are more preferable for the following of the diagrams.

PN739

Yes. And then when you're a relief guard in the depot, there's a seniority system?---Yes.

PN740

And the most senior relief guard gets offered the permanent line to own the line?---Correct. That's right.

PN741

Okay?---Probably just something else to point out in why that head count number has increased, one of the clauses in the new EA has been introduction of guards (indistinct) and that increased the head count by six people.

PN742

Yes, we had some evidence about that earlier. Now, just trying to find it because there's a few concepts here. There's obtaining lines which is the main lines, and assumedly that gives you a permanent spot in the depot?---Yes.

PN743

You have got the security there, but if I just take you to page 36 of the GRAWA which is clause 6?---So page 36?

PN744

Page 36 of the book, yes?---Yes.

PN745

And then unhelpfully not numbered, a lot of paragraphs, there's a single line paragraph three paragraphs from the bottom. Appointments to the roster were made solely on the basis of lines of succession?---Yes.

PN746

First of all, appointment to the roster, does that just mean being put in a depot? So assumedly, you'd have to be on the roster?---Yes.

PN747

To be working in a depot?---Yes, that's right. Yes.

PN748

Okay. And when it says on the basis of lines of succession, is that reading between the lines, is that seniority?---Yes.

PN749

That's what a line of succession is?---Yes.

PN750

So when it says appointments to the roster will be made solely on the basis of lines of succession?---Yes.

PN751

Would we read that as you essentially get to go to a depot and if I look at – if we look at 6.1 which is the heading to this long paragraph, long clause?---Yes.

PN752

All depots other than Sydney and Central depots, which includes Newcastle depot?---Yes.

PN753

Where it says appointments to the roster will be made solely on the basis of lines of succession, do we read that as you get to go to that depot when you're at the top of the seniority list?---Unless like twice this year, we have put out a waiver, that sort of you know, waives those conditions and you move straight into that depot.

*** ASHLEY DAVID BRANDSE

XXN MR WARNES

PN754

I am glad you raised waiver, because you spoke to Mr Hutchinson about that?---Yes.

PN755

When you say waiver, just let the Commission know?---Yes.

PN756

Are you talking about if I go to page 40 of the court book, that transfer – clause 8 transfer policy, are you talking about the conditions, the transfer in this clause that constitute a waiver? You essentially waive the condition that you're disqualified from applying for a transfer because you have turned one down for example in 8.2?---That's right.

PN757

Okay. So when you say - - -?---Or accepted one in another depot.

PN758

Yes?---Yes.

PN759

And you can't transfer in X amount of time?---Yes.

PN760

So when you say you're issuing a waiver you're saying you don't have to comply or you can fall within one of these disqualifications and still apply for the transfer?---That's right.

PN761

And that's because there's no one on the transfer list who meets these conditions?---Yes.

PN762

Yes?---And as I have said before, it's by agreement with the RTVU.

PN763

Yes, no, I understand that?---So all conditions have to be met.

PN764

In the waiver piece?---Yes.

PN765

Yes?---Now, can we just go back to clause 18 which is on page 57. It's obviously quite an important clause in the context of this case. So this talks about the intercity training schools we spoke about earlier?---Mm-hm.

PN766

And it speaks about conditions that apply for the acceptance of applications for vacant positions at Sydney Intercity depot?---Mm-hm.

*** ASHLEY DAVID BRANDSE

XXN MR WARNES

PN767

Now, do you understand that as meaning positions in the intercity training school at intercity depot? Is that your understanding of that?---I think it squarely sits in the Sydney Intercity depot.

PN768

Yes, so that's where the intercity training school is?---Well, I just think it refers to the appointment of guards in the Sydney Intercity depot.

PN769

So we then go down the list of all the things that you have to tick off in order to get to become intercity trained. So you have to have your own station in a Sydney depot or apply for a transfer to intercity depot?---Yes.

PN770

And people whose home station is Sydney depot, they're suburban guards, aren't they?---No, we have Sydney intercity depots.

PN771

Yes, but they're two different concepts right, within the same sentence?---Yes.

PN772

So home station or Sydney depot or have applied for transfer to Sydney intercity depot? So Sydney depot is referring to the suburban depot that runs from central. Is that your understanding?---No, I think it clearly says that it's a related to Sydney intercity depot.

PN773

So is your understanding that Sydney depot and Sydney intercity depot in this clause refers to the same thing?---They're two different things, sorry. Yes.

PN774

Yes. So what I am saying to you is Sydney depot, is that where they run suburban services from at Central?---They do, yes.

PN775

Yes. So you either have to be a suburban guard at Sydney depot or have applied for a transfer to Sydney intercity depot, assumedly from somewhere else in order to make the application of this clause. Is that your understanding?---As I said, I am not really familiar with the clause until this latest case, so it's still fairly new to me. But for me, I think that clearly reflects Sydney intercity depots application to become an intercity driver.

PN776

Guard?---Sorry, guard.

PN777

You're right. Yes. And then you have got sort of straight on nominations accepted based on agreed lines of succession which is the seniority thing again, that we spoke about?---Yes.

*** ASHLEY DAVID BRANDSE

XXN MR WARNES

PN778

At least 24 months practical experience in suburban train working, a satisfactory work history, so all of these things are being looked at when people apply to become an intercity guard through the intercity training school. Is that right? Is that your understanding?---Well, potentially, means that for Sydney intercity, yes.

PN779

For Sydney intercity?---Yes.

PN780

So are you saying that, is your evidence or the way that you understand this, that this only applies to the physical depot that exists at central station?---Yes.

PN781

So for intercity?---That's right.

PN782

And therefore if you want to go to central station intercity, you have to have all these things?---When we first read – you know, when I first read this, that's the way I – it applied to me, yes.

PN783

Okay. And in your evidence you said that you have directly hired into Sydney terminal?---That's right.

PN784

So was there a decision made to ignore this or was that based on the consultations - - -?---Through full consultation with the union back then in 2020.

PN785

Okay. All right. And so your understanding when you first read it was that all these things apply at least to Sydney terminal?---Yes. Since this case has been brought to our attention. That's right.

PN786

Yes. And you talk about there not being any issues raised with this practice, but you're aware aren't you, and I know you don't cover Wollongong but there was a dispute around the direct hiring in Wollongong?---Yes, that's right.

*** ASHLEY DAVID BRANDSE

XXN MR WARNES

PN787

So it was raised with New South Wales trains at least that there was an objection to this process?---The issue that existed back then was that there was people that came out of the training school, at the same time there was still vacant positions in the depot. The problem that existed was that the trainees wanted to go onto those lines of work and the people on the transfer list then had changed their mind, you know, post issues with the Marayong as we spoke about before with the NIF, they, you know, made their decision to then transfer to train link. So then the issue we faced back then was ratio issues that would have put the relief lines higher than the lines of roster. So what they came to an agreement that they would go over the ratio until they got back through attrition back to the normal

ratio number. But they accepted both. It wasn't the fact that the people on the transfer list missed out and we put the trainees in there, where they got both of them in the depot which is exactly what I have stated through this process, is we will never not have people on the transfer list that want to be applied to Newcastle will be accepted.

PN788

Yes. So now that you are familiar with this clause 18?---Yes.

PN789

We spoke before about the situation before, say 2020 when this sort of practice first started?---Yes.

PN790

Is your understanding that the provisions of clause 18 were applied to guards that went to Newcastle depot or Wollongong depot or Lithgow for example before that sort of 2020 period where it started to get a bit hard to get transfers?---No, it was never applied.

PN791

Never applied?---So even as I said, when we add that huge attrition that happened in Newcastle, we were getting guards straight out of Sydney Trains Guards School.

PN792

When was that?---About 2015.

PN793

Yes, right?---2016. Because we depleted the list that quickly, most of our guards from Sydney intercity would have went to Newcastle on the transfer and then we had to backfill those positions at Sydney intercity.

PN794

So how does that correlate? Mr Ferguson gave evidence that he was on the waiting list for about eight years to go to Newcastle.

PN795

Until 2020?---Yes.

PN796

So why didn't he get a guernsey in 2015?---If he wanted to go to central in the city which he actually did, he could have been there in six months.

PN797

So you're saying he had to go through Sydney?---No, that's - - -

PN798

Sydney Terminal?--- - - - would have been what he selected at the time instead of staying as a suburban guard.

*** ASHLEY DAVID BRANDSE

XXN MR WARNES

PN799

All right. The evidence is that Mr Ferguson had his name on the Newcastle waiting list for eight years?---Yes, that's right.

PN800

So why didn't he get to go in 2015, when you said you were getting people from Sydney Trains Guards?---Well, they come from Sydney intercity.

PN801

Yes. So already within Train Link, Sydney intercity to the Newcastle depot.

PN802

Okay. So they potentially had been on, you know, at Sydney intercity for eight to 10 years. Mr Ferguson would have backfilled their role at Sydney intercity.

PN803

Sorry, we might be at cross-purposes. I thought you said you have got people directly from Sydney Trains Guard School?---To Sydney intercity. Not Newcastle.

PN804

Not Newcastle?---Yes, yes.

PN805

All right?---You know what I am saying?

PN806

It makes sense now?---Yes, it's the cyclone, it follows the - - -

PN807

Yes, I get you?---And that's what this clause is about. We were getting people straight out of the Guard School into Sydney intercity.

PN808

Into Sydney intercity?---And that's what that refers to.

PN809

Yes, gotcha?---Never got raised with me once.

PN810

Yes. All right. So now you have given evidence of, I should take you to the actual part. At paragraph 29 of your statement page 199 of the court book, where you talk about the impacts on the services and cancellations, et cetera. At 29, you have given sort of a very broad range in your statement, you have been 'prevented from recruiting more staff. I expect train cancellations to continue or increase'. Now that's contingent is it not on people not entering the transfer list?---As I said, it's based on the last five years' worth of evidence on how we have had depleting numbers, aging workforce, career conversations, all those things that make up the picture of what that resource looks like.

*** ASHLEY DAVID BRANDSE

XXN MR WARNES

PN811

Yes, but so if we're talking about the last five years?---Yes.

PN812

Am I right the new intercity fleet has been a burning issue for the past five years?---Well, there has been some carry over but the actual decision to retain guards on an intercity service was that, you know, accepted in 2019.

PN813

Well, not really. And I don't want to get into a debate with you about that, but it was customer service guards. So a new iteration of a guard, right?---Yes.

PN814

Yes. Without the same duties?---Well, extra duties, you could say.

PN815

Well, different duties?---Yes, yes.

PN816

You re-pass the role?---Yes.

PN817

Yes. So it's different to what a suburban guard does?---Correct.

PN818

Yes. So now, you'd acknowledge that that dispute is over?---Yes.

PN819

Yes, there's the current guards' role is continuing onto the new train?---Mm-hm.

PN820

Would you not expect in time, a return to the old days of a lengthier transfer list to come back to Gosford and Newcastle for example?---I would, yes. I would hope to see improvement. That's right.

PN821

Yes. So when you say if you're prevented from recruiting staff, you expect train cancellations to continue or increase, is that based on the past rather than what you have just given evidence will likely happen in the future?---Well, it's to the knowns. It's the knowns that I have – as I said, we do our shrinkage rates, we do what we actually forecast is based on past information.

PN822

Yes, okay?---But I would hopefully, you know, the ultimate wish is that we do see those transfer lists increase and I can guarantee if we had both streams working, that we'd probably still run short.

*** ASHLEY DAVID BRANDSE

XXN MR WARNES

PN823

Have you, not you personally, has New South Wales Trains made any sort of concerted effort to go out to suburban depots for example and say, 'Hey guards, do

you want to come to Newcastle'?---Most definitely. And been supported by the union in the same conversations.

PN824

So when did you do that and what sort of incentives did you put on the table to move to Newcastle?---Just obviously going and spending time in the crew rooms, in meal rooms at Sydney, mainly Sydney suburban depots, Hornsby, those locations.

PN825

Yes, okay?---To try and attract people.

PN826

Yes, okay. Now, you have read the statements of Mr Hauser, Mr Haskins and Mr Ferguson?---I have, yes.

PN827

They have all given evidence broadly around the differences between being an intercity guard and suburban guard in terms of what they class as complexity of the work or difference of the work?---Yes.

PN828

Yes. Do you acknowledge that being an intercity guard has different features to being a suburban guard around sort of the role and duty that you're expected to play out in the network?---I haven't led terms of suburban guards but I can assume that there'd be differences.

PN829

Yes, things like being in remote areas for example?---Yes.

PN830

If you're on the way to Scone or Dungog?---Yes.

PN831

Dealing, driving Diesel trains and the different duties that entails?---Yes.

PN832

Yes. Now, are you involved at all in disciplinary matters at Newcastle depot?---Yes, I can be, yes.

PN833

So when you discipline a guard or you're – let's go with guard – when you discipline a guard it's open to you isn't it to regress the guard to a lower grade or something like that, isn't it?---It's open to us, yes.

PN834

Do you ever do it?---Through discipline. I am not - I couldn't say either way.

*** ASHLEY DAVID BRANDSE

XXN MR WARNES

PN835

Yes, okay. Would it be open to you and I just want to take you to – have you still got the enterprise agreement there?---Yes.

PN836

On 216, it's a classification – page 216, schedule 7A. About a halfway down the page, it's got guard – sorry, no, sorry?---Yes.

PN837

So you can see Guard One Year Trainee?---Yes.

PN838

Sorry, page 216 of the enterprise agreement, schedule 7A. Guard One Year Trainee? It would be possible would it not if for example, you were disciplining a second year guard?---Mm-hm.

PN839

To regress them to a lower rate of pay, either guard year one completion or guard one year trainee?---Yes.

PN840

That would be an option open to you, to regress them to a lower level so they could still be a guard but you know, you get to inflict some punishment and teach them a lesson?---Yes.

PN841

Yes. And now just finally, resulting from the rail review that occurred, I suppose after the election of the new government in March?---Yes.

PN842

There's been a decision made to transfer Newcastle depot back to Sydney trains is that right?---It's under, yes, recommendation 12, yes.

PN843

Recommendation 12?---Yes.

PN844

And do you know that that's supposed to happen in July next year, is that right? As far as you know?---As far as I know. Yes.

PN845

Yes, okay. But yes, I withdraw that. That's me. Thank you.

PN846

THE DEPUTY PRESIDENT: Do you have any re-examination?

PN847

MR HUTCHINSON: Yes. Thank you, Deputy President.

RE-EXAMINATION BY MR HUTCHINSON

[2.21 PM]

*** ASHLEY DAVID BRANDSE

RXN MR HUTCHINSON

PN848

Perhaps if we just start at the end because you probably have the page open?---I just let it go.

PN849

Well, Mr Warnes just asked you a question about trainee guards and would it be possible to regress a guard to the trainee rate. He referred you to the schedule 7A on page 2016 of the agreement. Now, that's the classifications. I'd rather instead take you to page 213 at clause 216.4, page 213. Have you got that page? So 216.4(a) in particular says,

PN850

Trainee guards shall be paid the trainee rate of pay until qualified as a guard upon qualification as a guard. The employee shall complete the remainder of their first year on the completion rate of pay.

PN851

So in Mr Warnes' question, you could regress a guard from being paid the guard rate to being paid the trainee rate. But they'd still be a guard, wouldn't they?---Still be qualified, that's right.

PN852

So then they wouldn't actually be a trainee guard, though?---No.

PN853

If you regress them, they'd still be a qualified guard?---That's right. Correct.

PN854

So they'd still be working a train as a guard does?---And the only regressions I have seen is to a different role type altogether. So back to a CSA rather than a lower level guard.

PN855

Right. So reading that clause 216.4(a), I mean, do you think it's even possible to regress someone to a trainee guard?---No, I wouldn't think so.

PN856

Okay. Perhaps going back now, there was an exhibit - -Exhibit R4, Mr Warnes took you to is the one title uncovered shifts. Have you still got that there?---Yes.

PN857

So look, the title of that document is uncovered shifts after posting of roster?---Mm-hm.

PN858

And then the dates 8/10 to 21/10/23. And then there was a question asked around exactly what that document meant and there was a bit of discussion about it and the nature of the shifts included there?---Yes.

*** ASHLEY DAVID BRANDSE

RXN MR HUTCHINSON

PN859

But essentially, is the title of the document, does that summarise what it represents?---That's exactly what it represents, it's just showing that there is these schedules, were uncovered after the posting of the roster, showing that there's a deficiency of 42 schedules in that depot.

PN860

And then after that is it correct to say that you then between those uncovered shifts and the other work, you, I think the colloquial term that's being used today is 'cut up the diagrams'?---That's right.

PN861

So to figure out who can work which segments of the work in order to make sure everything's covered so far as possible including using other depots?---That's right. And as pointed out in Mr Ferguson and Mr Haskin's statement, the other depots aren't qualified in all of the working, so there are things that still have to be assigned to that depot, but everything else like a round trip to Sydney would be covered by another guard.

PN862

But the key aspect of this document is that it shows Newcastle currently can't cover its work between its staff including you getting its staff to do overtime. It can't cover all of its work?

PN863

THE DEPUTY PRESIDENT: The evidence there is acceptable to cost (indistinct) to lead the witness.1

PN864

MR HUTCHINSON: Sure. Thank you, Deputy President. We will leave it at that.

PN865

THE DEPUTY PRESIDENT: Okay.

PN866

MR HUTCHINSON: So there was a lot of discussion about clause 18 of the GRAWA which, let's find the page, so page 57 of the book. I might just close the door if that's okay? People walking past.

PN867

Now, I think it – there was a lot of discussion or reference made to the fact – to intercity training schools. You know, is there a single intercity training school?---Not anymore.

PN868

Right?---So as you know, Train Link has their own intercity training school through our training and competence division and we also have the Sydney trains – no, that is suburban skills. That's right. So it's ours.

*** ASHLEY DAVID BRANDSE

RXN MR HUTCHINSON

PN869

And so when you need to recruit guards at a particular depot, you just – how do you decide what training to give them?---It's generated around what workload they have in that depot. So as I said earlier in the statement that the Newcastle, the program for Newcastle, versus the program for Sydney is because of the uniqueness of the (indistinct) line. There's at least an extra month's training compared to a suburban – Sydney intercity guard school.

PN870

Okay?---And as I said, as a minimum, because it's still a competency based training program that could take a lot longer than that.

PN871

So you train them for the depot they're going to would be a fair summary?---With the trainers from that depot.

PN872

Right. And then there was quite a bit of discussion about the introduction to clause 18?---Mm-hm.

PN873

And your statement was that it applies to Sydney intercity?---Yes.

PN874

And so far as you understand that clause, does it say anything about what you have to – I am sorry, I withdraw that. It talks about a 24 month requirement?---Mm-hm.

PN875

You understand that? And it talks about at sub-clause N at the bottom of p57 that,

PN876

If insufficient numbers are available to meet the conditions of clause (b) then applications will be invited from all guards with less than 24 months suburban training experience.

PN877

?---That's what it says, yes. That's correct.

PN878

And so as I think your evidence was that you consulted with the RTBU about that but isn't that what you did?---Correct.

PN879

At central, when you didn't have that recruited guards with less than 24 months experience?---That's exactly right. We have consulted at every engagement.

*** ASHLEY DAVID BRANDSE

RXN MR HUTCHINSON

PN880

Yes. Thank you. Now, there was some discussion about clause 215.2(b) of the agreement. You (indistinct) at page 212. And also at, I guess my question is I guess generally about the clauses, that clause in the agreement and also about

clause 18 of the GRAWA?---Sorry, just getting to 212. Which clause was it, sorry, Rob?

PN881

MR HUTCHINSON: 215.2(b)?---Yes.

PN882

So regarding 215.2(b), you, I think there was again, a bit of an extended discussion there, I just want to be clear about the point. Are you saying that there's no requirement for intercity guards to work suburban trains?---There's not. As I said, there's – even some examples where we have a very long time ago, used people that have recently come across to move Millennium Trains around and because it's obviously the traction qualification for those services, have to remain the route knowledge, you know, they – it's still around adjacent line running and things like that, would probably just count in some cases, but there's too many differences.

PN883

Right?---So even – we even do what we call a hybrid service where we bring the train down the north shore and our crew even get off at Sydney terminal and a Sydney trains crew get on and take it to Blacktown. And lock the doors off and turn it into a suburban train and then our crew get off.

PN884

Right. Because Blacktown is suburban, right?---That's right.

PN885

Right. Okay. Moving on. I think you made a statement that the roster or you agreed, I think with Mr Warnes statement that the roster is a moving feast and work can move to another depot. I think your other evidence though is that the current state of play is that there is 95 lines of roster at the depot?---That's right.

PN886

And so it's feasible at some future point that work could move out of the depot?---Well, conditions could change in the new EA that's about to be you know, consulted. There could be anything that could change, but at this stage, it's stayed fairly stagnant with the only exception being the introduction of the guards group rates.

PN887

Right. And the current state is that there are around 95 lines?---That's right.

PN888

And that's what you're resourcing to?---Mm-hm.

PN889

There's – sorry, there was also a question about clause 6.1 of the GRAWA which is page 36 and the third paragraph from the bottom that,

*** ASHLEY DAVID BRANDSE

RXN MR HUTCHINSON

PN890

Appointments to the roster will be made solely on the basis of lines of succession,

PN891

is the statement, so I'd just like to get your understanding of how that process works. That clause 6.1 is headed, 'Filling of Roster'?---Yes.

PN892

And so Mr Warnes asked you some questions that I took them down, around whether this was about appointing someone to the depot. Do you recall that?---Yes, that's right. Whereas lines is – sorry.

PN893

So is the process of filling a roster and appointing to the depot, is it the same process or is it a different process?---It's different.

PN894

But they're both done by seniority lines of succession?---Yes. So to probably explore a bit more on that, say someone - - -

PN895

Well, I think that's – it's probably - - -?---Okay. All right.

PN896

That's fine. Just checking through my notes?---Yes, yes.

PN897

And making sure we respond to the various points that were made. Right. So I think this is probably the final point is just paragraph 29 of your statement if we can go there, I will find the page reference. 199?---Thank you.

PN898

And you said that you were asked, 'Would you expect there'd be a lengthier list in the future and you said yes, you hoped there would be. Does that sound familiar to you? You agree with that?---Yes. Yes.

PN899

I guess I am interested in the work that you hoped there would be. In your duties, as the Associate Director, what do you take it as your responsibilities around ensuring these services at Newcastle depot?---As I said, it's – yes. Hope is a very dangerous word because based on what we have experienced over the last, you know, since I have been in this role in 2017, all we have seen is a steep decline in those transfers across all of the depots. And so there is a – there will be a 2024 transfer list.

PN900

Yes?---Yes.

*** ASHLEY DAVID BRANDSE

RXN MR HUTCHINSON

PN901

And it's possible there may be many people on that transfer list to meet Newcastle's resourcing requirements? That's possible?---That's possible.

PN902

Is it certain?---No.

PN903

And is it something that you would think was appropriate to rely on? That possibility?---No.

PN904

No further questions, thank you, Deputy President.

PN905

THE DEPUTY PRESIDENT: I have got a few questions. You gave some evidence earlier on that you sought a waiver in relation to three positions on the 3 November?---Yes, Your Honour.

PN906

And you mentioned Andrew Swayne?---Sloan.

PN907

Sloan?---Yes.

PN908

And how many were on the transfer list at that time?---None.

PN909

Is that why you approached the RTBU, (indistinct)?---Correct. And it's through their endorsement and evidence that that transfer list has expired. That they will endorse a waiver being put out. I can't do that in isolation.

PN910

It also happened in March, 2023?---Correct, Your Honour.

PN911

So what happened then was, you said there was no (indistinct) transfer this thing?---That's right.

PN912

And did you only look at Newcastle transfer list, not a broader?---That's all we're able to use, is that people that expressed an interest for Newcastle depot only, Your Honour.

PN913

And what you have compared with this (indistinct). Well, there are five people that have been trained?---Yes. As I said, Your Honour, we have been through this process in another five of our depots. In total, we have ended up with - - -

*** ASHLEY DAVID BRANDSE

RXN MR HUTCHINSON

PN914

I have seen that evidence?---Yes.

PN915

I just want to know what happened in Newcastle to bring this dispute to a head?---I am unclear why this has been disputed. From the beginning we went to the union and engaged to tell them that we would be going through this process in Newcastle.

PN916

When was this?---Well, we have got an email and consultation evidence in the submission.

PN917

What was the transfer list looking like at that stage?---It was quite low. That would have been around that March timeframe, when we put the waiver out as when we engaged that conversation.

PN918

So it would have been quite low, did it have names on it or not?---No. Well, it would have been in March when we had no one left on the transfer list again.

PN919

Any questions arising from my questions?

PN920

MR HUTCHINSON: There's just one because I just want to make really clear what the waiver is. And I think I asked Mr Brandse about it in one of his questions, but I just want to clarify it. So a waiver is to waive the conditions in clause 8 of the GRAWA right? On page 40? Which is certain disqualifications from transferring in certain periods of time?---Once the transfer list is depleted, non-existent.

PN921

Yes, so a way that isn't waiving clause 18 for example, it's waiving the requirements in clause 8, a transfer policy?---The conditions, that's right.

PN922

That's all, Your Honour. Thank you.

PN923

THE DEPUTY PRESIDENT: Yes, you delay with the question previously. So I will just see if anything arises from my questions?

PN924

MR WARNES: I don't think so, Your Honour. No.

PN925

THE DEPUTY PRESIDENT: Yes. Thank you, Mr Brandse. You're free to go now. You can remain in the court if you please. (Indistinct).

*** ASHLEY DAVID BRANDSE

RXN MR HUTCHINSON

PN926

THE DEPUTY PRESIDENT: All right. Are we ready to begin the submissions?

PN927

MR WARNES: Yes, thank you, Your Honour. I am going to start with some submissions around managerial prerogative because this is a case that one would imagine hiring, firing, things like that, would traditionally come within the ambit of managerial prerogative and it's important that we address this because the temptation in this case would be, it's managerial prerogative, who you hire, who you fire, you need to operate your business, et cetera, et cetera. So two concepts of managerial prerogative I want to speak about. Obviously, the XPT case in 1984, AFULE v XPT, talked about the exercise of managerial prerogative being fettered if it's unfair and unreasonable. It doesn't really apply here. We're not arguing that it would be unfair or unreasonable to do what New South Wales Trains is doing.

PN928

The fetter on the managerial prerogative in this case comes from a line of cases before it, but I am going to refer you to CFMEU v HWE Mining, a decision by Vice President Lawler. The citation is [2011] FWA 8, 288. And I am only going to - - -

PN929

THE DEPUTY PRESIDENT: That was - - -

PN930

MR WARNES: 2011.

PN931

THE DEPUTY PRESIDENT: Yes.

PN932

MR WARNES: FWA, 8, 288. And that case just stands for the proposition that if the parties agree in an industrial instrument or contract or anything like that, that something will be done in a particular way, that can also fetter the exercise and managerial discretion. And the enterprise agreement, in and of itself, also does that, where in clause 13, it acknowledges managerial prerogative. That says, that's qualified by the terms of the enterprise agreement that's agreed between the parties and just of the Commission's reference, I am not going to take you to it. But clause 13 is the no extra claims clause in the enterprise agreement.

*** ASHLEY DAVID BRANDSE

RXN MR HUTCHINSON

PN933

So we say that the managerial prerogative in this case is fettered by the latter, the HWE Mining proposition and really, the question that the Commission has to determine is whether or not New South Wales Trains' rights in respect of the hiring question are restricted by the operation of the industrial enterprise, the industrial instrument that it has agreed to. So in this particular circumstance, it's the Sydney Trains and New South Wales Train Link Enterprise Agreement 2022,

an instrument that Your Honour is quite familiar with and an incorporated document into that agreement being the Guards Rostering and Working Arrangements which is incorporated through that same clause that I just spoke to you about, clause 13.

PN934

By way of background and I said this in opening, but I will repeat it, just for fun. This agreement was written when all passenger rail services in New South Wales were operated by a single entity and that's RailCorp. And that was the case until 2013. Mr Haskins gives uncontroversial evidence about that. And that's important context when it comes to interpreting the provisions of the GRAWA because it makes the construction that we're advancing to the Commission make a lot more sense.

PN935

So as I said, as I – as I started my closing, it will be very easy to look at this case and see it as imposing a restriction or a burden on New South Wales Trains in terms of who it can employ, who it can employ in order to keep its – keep the doors open, keep the wheels turning, if we must. But it can't really be viewed in that way, because originally, the GRAWA was drafted with one organisation in mind. So the one organisation ran every passenger rail service in New South Wales, apart from some of the tourist ones, but, it had guards all the way from a junior guard, a trainee guard at central station all the way to a 40 year service guard at Newcastle Interchange.

PN936

And it provided for varying levels of skill that the guards performed in any particular depot. And it is important to note at this stage, and it probably won't come into it so much but we are about to go back to the future, so as you heard at the end of Mr Brandse's cross-examination, the Rail recommendation 12 in the most recent rail review, that the new government commission when it came into office in March, was to reinclude amongst other depots, Newcastle – in Newcastle interchange depot and all of its workings. So all of the rail lines up to the Hunter and then back down to Sydney as Sydney Trains again.

PN937

So this distinction between Sydney trains and New South Wales trains being different employers, employing different people et cetera, et cetera, from July next – from what it's likely to be July next year, if everything stays on track, will disappear again. So it appeared in 2013, it will likely disappear in mid-2024.

PN938

So what we're asking the Commission to find in this matter is what we say is what we say is the most common sense interpretation of the industrial instrument, if there can be one. And that's – there is a pre-requisite, that you need to meet in order to be an intercity guard. It's not a role that someone can simply apply for and obtain off the street, which is how we have been referring to it throughout this case. So I just want to make a couple of points on pre-requisites. They're not rare in employment, they're not a foreign concept particularly in safety critical roles and industries. So there's a few simple examples and comparisons that we can make, so obviously trades all require X amount of experience before you can go

and perform your trade yourself. Air pilots, they're not going to let you come out of air pilot school and operate an A380.

PN939

All of these sorts of jobs require periods of experience before you can progress to another stage of what your career entails. So for planes, a type of plane, for trains, a type of supervision that's required. Even lawyers have to perform a set amount of work supervised before you're allowed to shed your baby lawyer costume and go out there on your own.

PN940

And we say that it's the same for guards. So the parties have agreed through their industrial instrument and through sort of many, many years of industrial relations, I suppose, to pre-requisites that apply to become an intercity guard to become qualified to do intercity work. And we say that they're committed to clause 18 of the GRAWA. And they're supportive clauses throughout the enterprise agreement and through the GRAWA that supports that interpretation, which I will come to.

PN941

We say it's clear that there's a difference between being an intercity guard and a suburban guard. Each witness for the union today was a suburban guard before they became an intercity guard, so they were in a perfect place to give evidence about what the difference between the two roles are, and Mr Hauser in particular wasn't required for cross-examination. He probably gave the most detailed difference between what are the two roles. He's a health and safety representative as well which gives him a unique perspective on what the sort of unique safety issues are with performing at least the role of intercity guard at Newcastle depot.

PN942

Things like operational tasks, supervision, assistance from other staff, that was an important point raised by Mr Hauser. When you are a suburban guard, you are assisted by all types of different Sydney trained staff. Numerous CSA's on particular platforms, transport officers who roamed the network, police, people like that. Different when you come to Newcastle Intercity Depot and you're on a two-car diesel set on the way to Scone. You don't have those support services available. You are pretty much on your own. You're with the driver. You're just with the two of you. And they all contribute to what we say the Commission can comfortably find as fact that the intercity guard role is different and more complex than the suburban guard role.

PN943

Just to turn quickly to the reason for the lack of interest in Newcastle depot at the moment, and I think all of the witnesses gave very consistent evidence on this point, and why that lack of interest isn't going to last too far into the future in our submission. So you have heard plenty of evidence today from all three witnesses that gave evidence that traditionally depots like Gosford and Newcastle had significant waiting periods before guards could transfer to them from an intercity depot from Sydney. Things like cost of living housing, better lifestyle, all rate as sort of factors that attribute to the popularity of those depots. You heard that sometimes it can be between 10 and 20 years to get into either Gosford or Newcastle.

PN944

As is evident from Mr Brandse's evidence, that's all but dried up and a trend almost exactly lines up with the disputation around the new intercity fleet. So the new intercity fleet was announced as a driver only operation, and then after an announcement in 2019, as Mr Brandse gave evidence too, New South Wales Trains agreed to put a role back on these trains. It was significantly different to the current guard's role and that has led to a situation whereby people didn't want to risk their jobs. There is no threat that the suburban trains were going to go the same way as the intercity trains and people didn't want to risk their jobs by transferring into a depot where the guard's role might not exist in a few years' time.

PN945

Now, that's changed now, as you heard throughout the witness evidence today, Your Honour. The dispute has been resolved, the guards role is continuing as it has prior to the NIF dispute, colloquially put. There is a clause in the enterprise agreement which restricts the operation of that train to that particular operating model. And the security of it being in the enterprise agreement as everybody in this room can appreciate is that it can be quite hard to remove once it's in there. So there's no reason to anticipate that that will not reopen the flood gates. I think Mr Ferguson gave some evidence about some rumours going around the run at work and it probably the same in a lot of industries but the railway seems to be a – and you can take this from the Bar table, and I am sure Mr Hutchinson would agree with me, a vicious rumour mill there where, rumours run rampant, mainly because the amount of time is spent in meal rooms and things like that. But that rumour will surely abate, particularly when the new intercity fleet does enter service. There's no evidence of when that will be, but all of the trains are here, so it can't be a terribly long amount of time. I would imagine when they start operating and people start seeing the guards doing the same things on those trains, we envisage that the transfer list will get very much repopulated.

PN946

THE DEPUTY PRESIDENT: Then it will all be used by trains, won't it?

PN947

MR WARNES: No, it will be Sydney Trains then.

PN948

THE DEPUTY PRESIDENT: It will be Sydney Trains but if they're (indistinct) longer the transfer list, then they're the first cab off the rank, aren't they?

PN949

MR WARNES: To go in a Newcastle depot, yes.

PN950

THE DEPUTY PRESIDENT: Yes.

PN951

MR WARNES: Yes. And that's based on, as Mr Brandse said in his evidence on lines of succession which is that seniority concept. So you put yourself on the transfer list if you have been in a depot for 30 years. You will get it above

someone who's been there 5, for example. Which is the 10 year, 20 year concept that we're talking about.

PN952

THE DEPUTY PRESIDENT: (Indistinct) my question which I sort of foreshadowed previously was tell me how it should have been done. Sorry, I don't want to throw you off, if you want to continue your submission.

PN953

MR WARNES: No, you're right. Yes.

PN954

THE DEPUTY PRESIDENT: But the one thing I am not following is everyone seems to be agreeing that you have got your seniority and you have got your transfer wait list. And I see the everyone's agreeing that in the relevant period which was around March, there was no one on the list. So what should have happened?

PN955

MR WARNES: So, and I have given this quite some thought because it is very tempting to fall into that – well, what was I meant to do, all right? And there are a number of things they could have done and I have had some discussions around this. I know in - - -

PN956

THE DEPUTY PRESIDENT: There's a number of things you could have done. And there's a number of things that you should have done. Now, what were the obligations arising from the GRAWA in the agreement?

PN957

MR WARNES: Okay, all right. So what we say the obligation is, transfer list exhausted, essential New South Wales Trains needs to go out into suburban depots, as I put to Mr Brandse and go and find people who are eligible to go on the transfer list. And tell them, the first person who goes on the transfer list goes straight there.

PN958

THE DEPUTY PRESIDENT: So go to other suburban locations?

PN959

MR WARNES: Go to any suburban location where you can find someone who qualifies under the provisions of clause 18. So – and - - -

PN960

THE DEPUTY PRESIDENT: What about – where does that require (indistinct) - -

PN961

MR WARNES: Okay. Yes, all right.

PN962

THE DEPUTY PRESIDENT: You're dealing with would – or what, not ideal, but I am not asking what the obligations you say there are.

PN963

MR WARNES: Yes, okay. So I was about to get that, to that, so no, it's perfect timing.

PN964

THE DEPUTY PRESIDENT: Well, I will stop (indistinct).

PN965

MR WARNES: No, you're right. So Clause 18 is where we say the – if you want to call it and it's been variously called a traineeship, an apprenticeship, I am calling it a pre-requisite to perform the role.

PN966

And Mr Brandse agreed with me, although, unfortunately re-examination got a little bit more confused, but the – if you want to become an intercity guard, you have to be qualified to be – to do intercity work and you can find that at page 59 of the court book, clause 19, last dot point which reads,

PN967

Guards must be qualified in intercity working when working on – working any intercity train,

PN968

And it's got 'other than empty cars or (indistinct) those. So you have to be qualified to do intercity work. To be an intercity guard. I think that's uncontroversial. And what we say is, in order to become qualified to do intercity work, you have to go through it's not a building, but an intercity training school. All right. And I asked Mr Brandse questions about that, too. What we say is in order to get into the intercity training school, you have to meet the pre-requisites that are essentially contained (a) through (g) and then there's a couple of I suppose you could call them 'get outs' in (n) and (o) and clause 18 actually envisages a situation where there aren't enough people on the transfer list. So if you look at sub-clause (n) if I can call it that at the bottom of page 57. It says,

PN969

If insufficient numbers are available to meet conditions of clause (b) then applications will be invited from guards with less than 24 months suburban training experience.

PN970

So there's the question, there's nobody on the transfer list or nobody eligible on the transfer list. You can then broaden your net, so to speak, you can go to people with less than 24 months. And then we have got, over the page on page 58,

PN971

In exception to clause (b) if insufficient applications were received from guards, all depots with 24 months experience, then consideration will be given to the training of guards with 12 months or more experience as a suburban

guard. And an intercity depot, should a guard be successful in gaining employment to an intercity line of work,

PN972

And I asked Mr Brandse about the -0 what the term 'obtaining a line of work means' which just means essentially you get a line on the roster that you own, then they will be trained in intercity working which is through the intercity training school.

PN973

So we say that in order to be an intercity guard, you have to be intercity qualified which is clause 19, and to become intercity qualified, you have to satisfy the requirements in clause 18.

PN974

Now, the respondent's going to argue that clause 18 only applies to one intercity depot. I think we heard a suggestion from Mr Brandse that that was the case.

PN975

THE DEPUTY PRESIDENT: Well, he said that there's now more than one intercity training school, didn't he?

PN976

MR WARNES: He may have said that in re-examination. I didn't – it wasn't terribly clear to me, but I think his evidence was Sydney Trains trains guards and New South Wales Trains trains guards. So this was part of the cross-examination of Mr Brandse. He essentially said that prior to 2020 they got all their guards from Sydney Trains. So there was no requirement for New South Wales trains to provide any sort of, I suppose, formalised training the way that Sydney Trains does it at the moment. But since 2020 they have had to essentially start their own training program because of the shortages that occurred there. Just back at the Sydney Intercity Depot piece. Where it says,

PN977

Train crew will advertise for vacant positions at Sydney Intercity Depot, conditions that apply to the acceptance of the applications are - - -

PN978

We're asking the Commission to read into that, that the training school was located at Sydney Intercity depot when it was established. What the respondent is asking you to do is essentially say that the requirements (a) through (o) only apply to people who go through intercity depot. Which essentially means that, okay, so to get into Sydney Intercity depot, you have to have 24 months' experience, a satisfactory work history, obtaining qualified road knowledge between Sydney and Newcastle, Lithgow, Goulburn and Kiama as necessary. A commitment to complete intercity guards training school and indicate in writing you're willing to give up your appointed line in the suburban depot. We say that would lead - that would be an absolutely absurd outcome that you could place such onerous conditions on people who want to become an Intercity guard at one depot and not apply it to the rest of the depots.

PN979

The preferred reading, on our submission, is that Intercity training school is located at the Sydney Intercity depot or the position that you need to obtain to go through an Intercity training school is at the Intercity - Sydney Intercity depot rather than it being confined, for whatever reason, to a small - well, it's not a small depot, but a single depot when you've got depots at Gosford, Newcastle, Lithgow, Mount Victoria, Wollongong and Moss Vale.

PN980

THE DEPUTY PRESIDENT: What about 18A?

PN981

MR WARNES: Yes. So that's what you have to have. Right. So if you want to get into the Sydney - Intercity training school, you either need to be at the Sydney depot which, as Mr Brandse sort of said after a few questions is the suburban depot at central, the ones that run suburban trains from there, or have applied to transfer to the Sydney Intercity depot. So you need to have put your name on a transfer list in order to get into the Intercity depot. Now - - -

PN982

THE DEPUTY PRESIDENT: But that's fairly specific.

PN983

MR WARNES: Yes, it is. Absolutely.

PN984

THE DEPUTY PRESIDENT: And excludes other (indistinct).

PN985

MR WARNES: Yes. Because everybody - when the document was written, we're going to invite the Commission to find this. Although, strictly, there's not really any evidence about it, that when this document was written, all guards that went into Intercity work went through Sydney terminal or Sydney - Intercity depot before branching out, and you'll see that it's subclause (i) in clause 18. On completion of Intercity training schools - so when you finish your school, guards will not be permitted to transfer away from Sydney depot for a period of 12 months unless such a transfer is to a depot which Intercity trains are worked.

PN986

So it says Gosford or Lithgow, but that includes Newcastle and Lithgow - well, it says Lithgow - now Victoria and Wollongong, but we say it would be absolutely absurd that there would be really specific and really quite onerous conditions on getting into Sydney - Intercity guard school, but only based at one single depot, and you might - even if we read subclause (b), nominations are accepted based on - initially on agreed lines of succession - are succession, sorry, which is loosely characterised as seniority. You have to be a sufficiently senior suburban guard assuming there's a decent waiting list to actually get into Intercity training school.

PN987

Now, I don't know why there would be a distinction between Intercity training school located at Sydney Intercity depot and one at Newcastle depot. There isn't

one at Newcastle depot. So it's - we say that that's really the only interpretation that can be made there. You have to be qualified. You have to go through a school to become qualified, and to get into the school, these are the conditions upon which you have to meet to get into the class.

PN988

Now I've got to catch up. As I said in - to - in response to a question that you had, Your Honour, clause 18 actually envisages this sort of situation. Sure it doesn't envisage that there aren't any transferees at all. I can't imagine that the NIF situation was envisaged when they wrote this document, but they did take into account that at some point in time, there might not be guards with 24 months' experience, and there would be consideration given to those with less.

PN989

So I just want to turn now to what we say are clauses that support our interpretation within both the GRAWA and the enterprise agreement. If you go back to page 40 of the court book. This is clause 8.4 which talks about new guards, and it talks about new guards into suburban depots. I'm looking at 8.4, placement of new guards in suburban depots, and it reads, 'Vacancies in suburban depots will be filled by guards on the transfer waiting list before vacancies are offered to newly qualified guards'.

PN990

So the reason it's drafted this way on our submission is because newly qualified guards can't - it neglects to mention Intercity depots because they can't be offered positions in Intercity depots. I know the respondent's contention is that the absence of the reference to Intercity depots in 8.4 somehow means that there's no restriction, but we say that in the context of the document, that's somewhat implausible, but 8.4 actually provides somewhat of a fetter on suburban depots offering new guards jobs as well. Like, they have to exhaust their transfer list. So if you've got a need for guards at Hornsby, they've got to go to the transfer list before they can hire new guards. So there's actually fetters to that managerial prerogative that I spoke about right at the beginning of my submissions all through this document.

PN991

So Sydney Trains in this context who run the suburban depots are actually stopped from going and hiring guards off the street into a particular depot that's got a shortage unless their transfer list is exhausted. So we say that that supports our contention in relation to Intercity depots and the contention in relation to the - I suppose the restrictive nature of the GRAWA when it comes to the hiring practices of New South Wales Trains.

PN992

I then take the Commission to page 36 of the GRAWA which is 6.1. We say that this supports our contention in relation to the clause 18 as well, and I took the - I took Mr Brandse to this line in cross-examination. It's the single line paragraph three paragraphs from the bottom. Appointments to the roster will be made solely on the basis of lines of succession.

PN993

Now, I think Mr Ferguson was asked this in cross-examination, but, essentially, the roster is the main lines on the roster plus the relief lines on the roster. That's a roster, and in order to perform work in a depot, you have to be on the roster to work. So we say that appointments to the roster will be made - and these are important words - will be made solely on the basis of lines of succession assists in, once again, creating that context around what the GRAWA's supposed to do, and it's supposed to restrict the way that guards are engaged and rostered and qualified, for example. It all sort of combines to create what we say is a context that would allow the Commission to comfortably say that the GRAWA prevents New South Wales Trains from, colloquially, hiring off the street. I just turn quickly now - - -

PN994

THE DEPUTY PRESIDENT: There's no volunteers whatsoever.

PN995

MR WARNES: That - and I think that's really what the contention in this case comes down to. It doesn't seem like there's a great deal of dispute around if the transfer list is full, then they're allowed to do it. I actually don't know if New South Wales Trains contends that that's the case. I think they say that - putting words in my friend's mouth here, but if they say that the transfer list is full, they'll just go off the transfer list. They won't go and hire new guards.

PN996

THE DEPUTY PRESIDENT: But you said that you couldn't hire staff off the street (indistinct).

PN997

MR WARNES: We say they can't.

PN998

THE DEPUTY PRESIDENT: (Indistinct) you can on your - tell me if I'm wrong - just provided they're (indistinct) transfer list (indistinct) of interest throughout the breadth of the network, and it still nobly puts their hand up.

PN999

MR WARNES: No. We say that the prerequisite at clause 18 requires a particular amount of experiences of urban guard, and the reason for that is because of, once again, the unchallenged evidence of Mr Howser, and Mr Ferguson and Mr Haskins also gave evidence around the complexity of the work of an Intercity guard.

PN1000

THE DEPUTY PRESIDENT: What about (n) and (o) of the clause 18?

PN1001

MR WARNES: Pardon? Sorry.

PN1002

THE DEPUTY PRESIDENT: Paragraphs (n) and (o) of clause 18.

PN1003

MR WARNES: Yes. So that brings the requirement down to 12 months, but that's still 12 months' experience as a suburban guard.

PN1004

THE DEPUTY PRESIDENT: So if they can't find anyone who fits that, then they've just got to start stopping services.

PN1005

MR WARNES: Who wants to transfer? Well - and this is what I was going to go to before, and I am sort of delving into the world of hypotheticals here, but it's the same if you're running a café. All right. And I hear about it all of time. It's a real bugbear of mine. My in-laws would be screaming right now if they heard me making this submission, but all - in any employment situation, you need to attract staff. Right. Like, you're running a café, you need to attract enough people to run your business. It's no different with TrainLink.

PN1006

So if TrainLink operating within their contractual requirement, their industrial requirements, say, 'We need to find suburban guards that have at least 12 months' experience because we're really short in Newcastle depot', they need to figure out a way to make that attractive to 12-month suburban guards. Now, that could be through incentivising moving to Newcastle, paying for removal costs.

PN1007

I don't know if there's a clause in the enterprise agreement that covers that, but I'm not sure if it would cover this situation. Adding a supplement, adding a week's annual leave in their contracts of employment. There's nothing that stops New South Wales Trains from making that move more attractive. It's not simply, 'We did everything we could. We couldn't find anyone. We haven't put anything new on the table. So now we can just skirt around and go and hire new people off the street'. That's now how we say the proper construction of clause 18 is.

PN1008

THE DEPUTY PRESIDENT: We're dealing with your interpretation.

PN1009

MR WARNES: Yes, absolutely.

PN1010

THE DEPUTY PRESIDENT: And it has the initially higher level of skills, and then the acknowledgment of where the insufficient numbers can be obtained and the lower level, and I was just exploring whether that's it, or whether you say - or whether there can be trainees off the street.

PN1011

MR WARNES: No. That - so that's it. We say that - - -

PN1012

THE DEPUTY PRESIDENT: (Indistinct).

PN1013

MR WARNES: - - - the requirement to have 12 months' suburban experience is absolute. And you - and when I say 'absolute', it's - that's just one of the requirements. So you're meant to have 24 months. Yes, you can go down the 12 if you're exhausted, but that's an absolute requirement. There's also an absolute requirement to have a satisfactory work history which you can't really have a satisfactory work history if you're getting hired off the street.

PN1014

A commitment to complete the guard's training school. There's a few requirements in there that you have to be satisfied before you get to go to Intercity guard school in the first place, and I think - as I said, it's uncontroversial, but you have to go to guard school to become Intercity qualified. So no. On our reading, just in response to the question, it is absolute, and the Commission shouldn't be persuaded by, you know, if we can't do this, then we're going to have to cancel services because, to be frank, that's a nonsense.

PN1015

It's like any other employment relationship, employment attraction process. You need to make it more attractive. In the past, it's been attractive because it's Newcastle and because it's Gosford and cheaper houses, things like that. That hasn't been doing it over the last few years, and there's got to be other ways to incentivise experienced guards to come and work your services in the Newcastle depot.

PN1016

Now, just - clause 21 of the enterprise agreement, it goes to how Sydney Trains and New South Wales Trains in general fill positions. So the clause is titled Filling of Authorised Positions. And, essentially, the whole clause is designed around ensuring that Sydney New South Wales Trains when somebody leaves a business refills a position. It's been a problem in the past, but importantly - and you'll see that in 21.6, it talks about selecting, appointing and promoting people on the basis of merit determined by skills, et cetera, et cetera, commitment to non-discrimination, equal employment, but then if you look at 29.7, it actually carves out train crew.

PN1017

So guards are part of train crew. When it comes to transfers between depots and the - here's that term again, 'obtaining lines on rosters'. So, essentially, going into a depot. So transfers between depots and obtaining lines on rosters. It excludes guards from the obligations placed on both Sydney New South Wales Trains from clause 21 which we say gives support to our interpretation of how clause 18 of the GRAWA's meant to work. That's meant to say despite your obligation to fill positions as soon as you can off the street using merit based processes, it doesn't apply to train crew.

PN1018

I do want to pick up on - and, once again, it goes to the question that we spoke about in relation to - or what I was talking about in relation to general employment practices trying to attract people to a depot. There is actually an express way in the enterprise agreement to achieve what New South Wales Trains

have been trying to achieve or have been doing and are trying to persuade the Commission to allow them to continue to do, and that's clause 12, a clause I took Mr Brandse to in cross-examination.

PN1019

Clause 12 - at 12.2 - it's on page 11 of the enterprise agreement - 12.2 covers train crew in this respect, and it allows the parties to enter into a process whereby they can meet, negotiate and agree on changes to particular parts of the enterprise agreement. So you'll see at (i) clause 25 as it pertains to train crew, clause 106 in (ii), but you look at (iv) and it talks about the GRAWA specifically. So there's a specific part of the enterprise agreement which New South Wales Trains could have and, on our submission, should have come and said, 'We want to engage clause 12. We need to change the GRAWA because we don't have enough people to satisfy the requirements of clause 18'.

PN1020

It stands to reason that they didn't if the interpretation they're taking is the one that they're contending or the one they're trying to convince the Commission to go with. It stands to reason they didn't, but there is a mechanism to fix it, and that mechanism importantly deals with - it results in a vote of the affected employee. So it allows for you to actually go to an affected - group of affected employees and say, 'Here's our problem. How do we fix it?', and negotiate an outcome, and that's during the life of an enterprise agreement.

PN1021

Now, it might seem a bit airy fairy, but it's been done before. So clause 12, as I said to Mr Brandse, New South Wales Trains tried to engage it in relation to the new Intercity fleet when that dispute was ongoing. Throughout the mid-2010s, if I can call that decade that, Sydney Trains successfully engaged it in relation to Sydney Trains guards and successfully negotiated away some things that it could no longer do like practice drives, for example, in exchange for something called the WOBOD, which I'm not going to go into today, but, essentially, a new condition for the guards in exchange for something that they needed gone in what is a quite clunky and technical enterprise agreement and does contain a lot of restrictive provisions.

PN1022

Now, I'm almost done, you'll be pleased to know, Your Honour. The trainee guard classification which is a contention made by the respondent. It does exist in the New South Wales Trains part of the enterprise agreement within section 7 in relation to train crew, and it is curious. It is something that is quite rightly raised by the respondent in this matter.

PN1023

Our submission on the existence of that provision in the New South Wales Train section is that it's a remnant of when the organisations were one, and when they split apart, they went into two separate enterprise agreements, a Sydney enterprise and a New South Wales Trains enterprise agreement, and there was a - some sort of drag and drop process undergone. We agree it doesn't make a great deal of sense that it's there if our contention is that clause 18 is fully restrictive.

PN1024

I do want to draw your attention, though, to one subclause which is in 216.4 on page 213. And that's subclause (c). Now, as I said, this - these provisions are more or less copied from the Sydney Trains classification structure for guards, and if one was to go into - it's now in the same enterprise agreement, section 4 which contains the suburban train guard conditions. It has the same words under trainee guard.

PN1025

Aside from subclause (c) which reads, 'It's further acknowledged that the application of a guards rostering working arrangement 2008 will continue to operate as currently applies for transfers within and across the entities'. So it actually anticipates that the guards rostering and working arrangements has some impact upon this trainee guards clause.

PN1026

Now, as I said at the start, there's about 100 ways that this could be drafted better, and the Commission needs to keep that in mind when it's coming to its deliberations around how these instruments are to be interpreted keeping in mind the comments of Justice Madgwick in *Kucks v CSR*.

PN1027

It wasn't - it was drafted by people with an industrial bend in mind, and that does need to be kept in mind, and it also needs to be kept in mind that this is the first iteration of the Sydney and New South Wales Trains enterprise agreement. Previously, it was a Sydney Trains enterprise agreement and a New South Wales Train enterprise agreement as separate agreements. This is the first time it's appeared in one document which explains why it's so big.

PN1028

Now, I did - and it might have seemed like a really curious question to ask Mr Brandse, but if the Commission was concerned about the trainee guard classification doing any sort of work in New South Wales Trains, there is part of the disciplinary clause in clause 33.17 of the agreement. The capacity for guards to be - commonly called regressed - but reduced in pay grade. If one was to - if one wanted somebody to continue as a guard, but regress them in pay grade, there is the capacity for them to reduce the rate of pay for a guard to the trainee guard level which does give, I suppose, that classification level some work to do.

PN1029

I know Mr Brandse's somewhat said that back in re-examination, but we say that the trainee guard level is, essentially, just a rate of pay, and it's something that if the business wanted a guard to continue doing guard work, but sufficiently punish them, then they could put them back to the trainee rate of pay for a period of time.

PN1030

Now, I just quickly wanted to touch on - the respondent made somewhat of a constitutional argument in their submissions. The case that was cited involved an award, and that's an important distinction from what the current case is. So the nature of awards is obviously something that's imposed upon the parties by a tribunal. I mean, they can be agreed to, of course, but they also can be

imposed. Like, the modern awards are imposed upon employers. The state awards were always that, too.

PN1031

This case differs from the case cited by the respondent. I don't have the actual case with me right now. I might let my friend talk about that, but this case involves an enterprise agreement which is agreed to between, as I said at the outset, not only New South Wales Trains, but New South Wales Trains and its 3,000 employees. This isn't the Federal government imposing on a state government what they can and can't do as is sometimes the case with awards.

PN1032

This is the State government making an enterprise agreement with its employees and agreeing to restrict itself in what it does. That's not the Commission dictating by approving the - by simply approving the agreement. That's not the Federal government or this tribunal as part of the executive of the Federal government imposing restriction on what a State government does.

PN1033

That's a State government agreeing with its workforce how it will conduct its business, and we say that is a clear distinction from what the - I think it was the Australian education union - I think it was a TAFE teacher's case that the respondent cited in its material. So we say that the Commission wouldn't bother itself with that constitutional argument made by the respondent, and unless there's anything further, Your Honour, they're my submissions.

PN1034

MR HUTCHINSON: Your Honour, there is a lot of material been raised by the applicant in these submissions today. I think we'll just start at a principle level, and if we consider the interpretation principles, the case is actually relatively simple. The agreement says what it says. Now, I've - unfortunately, I think I'm probably going to have to repeat a lot of what's in my written submissions, but I'll attempt to be relatively brief and refer you to those.

PN1035

So, primarily, the agreement provides for trainee guards. Mr Warnes just raised a point around the fact of this being, you know, a relatively new agreement which two organisations form together. Unfortunately, I don't have it with me today, but it would be certainly in the Commission's historic material that the same provision around trainee guards has been there in the prior instrument which was a standalone New South Wales TrainLink only agreement. So the ability for New South Wales TrainLink to rely on that clause, the clause that is now 2.16, has been there for some time.

PN1036

So we say there's no restriction on New South Wales Trains hiring and training new guards and acknowledging subject to honouring the other industrial obligation to transfer people. So this really only arises where there are no transfers or insufficient transfers according to the organisational needs.

PN1037

THE DEPUTY PRESIDENT: Would you be able to provide a note with the history of the trainee guard provisions in agreements that relate to the respondent?

PN1038

MR HUTCHINSON: Yes. I can provide that as well as the other material you asked about earlier today. The transfer arrangements records.

PN1039

THE DEPUTY PRESIDENT: Yes. All right. If Mr Warnes presses for the second category - do you?

PN1040

MR WARNES: The second category of transfers?

PN1041

THE DEPUTY PRESIDENT: Yes.

PN1042

MR WARNES: Yes. Thank you, your Honour.

PN1043

MR HUTCHINSON: So, so far as the union puts a restriction on guards moving to Newcastle who are inexperienced in suburban work, you know, we say that's plainly incorrect on the construction. So there've been a lot of points raised today that we would say go to context or related material, but for the most part, we - you don't even need to consider those because the text is plain that the interpretation principles provide that guidance.

PN1044

The union hasn't really provided a convincing case around that construction. Mr Warnes referred to clause 2.16 as being a remnant. We say the - unfortunately an - and we also agree with the submission that, you know, some of the drafting is less than what would be preferred, but in that same vein, clause 18 is also a remnant, and it should be read in that light.

PN1045

Now, our written submissions are - paragraph 24(c) of our written submissions outline the reasons for that, but primarily, as - again, as Mr Warnes said, Sydney Trains, New South Wales Trains back in 2009 when the GRAWA was written were one organisation, RailCorp, and the Sydney Central Depot, essentially, formed of two depots operating in a conjunctive kind of way, and that's - this is what's outlined in our submissions.

PN1046

Clause 18 makes perfect sense when you read it in that context. There's a Sydney Intercity depot. There is a Sydney depot as per paragraph (a). If you want to come to the Sydney Intercity depot, you need to either be at the Sydney depot or apply to go there. You need to have a certain level of experience. You need to - as you work through the paragraphs, there's various provisions from (g) through to (m) that talk about the ability to move back and forth between those two

groups. That provides some understanding of why that clause would be written that way.

PN1047

As Mr Brandse gave evidence today, we don't do that anymore. If the clause is a remnant, that is of little relevance. At the very, very most, you could argue whether it still applies to Sydney Intercity depot, but even though given the different organisational context is a stretch. It certainly doesn't apply to Newcastle depot. Now, where does the organisation sit as at today? Mr Ferguson and Mr Haskins have both acknowledged today that at least some of the cancellations of services at Newcastle depot are due to guard shortages. There may be some debate about how many. We maintain that Mr Brandse's evidence is correct, but at the least, there is some.

PN1048

It's also been made clear today in the evidence that the roster, as it stands, as management sees fit to best service - provide its services is - has less resources than is desired, and, you know, it is within managerial prerogative to want to have sufficient staff to ensure services. So there's no doubt that there are additional staff needed. It's been accepted, I believe, that there is no further staff currently on the transfer list.

PN1049

There's been some discussion of the - so some discussion why there would be - why this clause may exist in the interpretation that the union puts around the prerequisites for work or for experience due to more complex Intercity working. However, we say the evidence that's been put today is the work is really not that different. Yes, it's different, but it's work that can be trained for. It's work that, as Mr Brandse puts and hasn't been contested or challenged to any reliable degree, those 80 something people that have been performing this Intercity work have done so reliably and competently.

PN1050

So the idea that there must - you must have this extended 24 months of service or at least 12 months, that's been refuted in the sense that there's been 80 something people already doing this work that are proven competent. So there's been no evidence to suggest that a newly-trained guard subject to New South Wales Trains training program is incapable of doing the work. The only evidence is that it might be useful to have a more experienced guard, but you could say that of any role in all of society. Of course you take someone who's experienced over someone who's brand new, but the key point here is that's not an option available to New South Wales Trains.

PN1051

There's no guards willing to transfer. We're already cancelling train service of, perhaps, a contested number, but one service is too many. Even where we're not cancelling trains, it forces an extremely inefficient way of operating in the sense of, as is outlined in our - in Mr Brandse's evidence to cover what could be done by one Newcastle guard may require two guards from Gosford to do the same work and requires - but that's without going to the back of house administrative functions required to organise that.

PN1052

THE DEPUTY PRESIDENT: You said there's no guards willing to transfer.

PN1053

MR HUTCHINSON: Yes.

PN1054

THE DEPUTY PRESIDENT: Is the (indistinct) in Newcastle or on the Newcastle list, or is that within the respondent's organisation?

PN1055

MR HUTCHINSON: No. That - as at today, it's at Newcastle. Although it also applies at some, but not all of the other depots. So Central Intercity has had a long-running problem and has been continuously recruiting since 2020 because there are inadequate transfers. That's the other primary location, but we have also recruited to Wollongong and Lithgow and now Victoria.

PN1056

THE DEPUTY PRESIDENT: (Indistinct) the circumstances of Newcastle, you look at transfer waitlists and see if there's anyone on there. What more did you do?

PN1057

MR HUTCHINSON: Well, Mr Brandse's evidence today was back in March this year, there was also a waiver issued as well as one issued in November this year. Now, a waiver is a document that is published in a - an information pack that goes out to staff of both Sydney Trains and New South Wales Trains.

PN1058

It publicises that there is a availability of roles. As Mr Brandse gave evidence as well, they went out to other depots and locations to promote availability. The transfer list remains empty, though, or very low, and now we would say that even where there might be a small number on the transfer list, if that is less than the rejected requirements, New South Wales Trains has an obligation to ensure services and do what's necessary to achieve that.

PN1059

THE DEPUTY PRESIDENT: If I'm to understand using Wollongong as the example - so in Wollongong where it's said that there were - there was previous non-compliance with what is said now to be required, were there people that were engaged at Wollongong without experience?

PN1060

MR HUTCHINSON: Yes. There was a point where - - -

PN1061

THE DEPUTY PRESIDENT: (Indistinct).

PN1062

MR WARNES: I don't have instructions. I'd have to get some, Your Honour.

PN1063

THE DEPUTY PRESIDENT: (Indistinct).

PN1064

MR WARNES: Yes.

PN1065

MR HUTCHINSON: There was a point at Wollongong where there were inadequate staff on the list. So training school was commenced. The dispute, as I recall it, arose because some existing staff then placed themselves on the transfer list when they learned that some trainees were about to be placed, and we - a dispute emerged. There were some discussions, and, effectively, both the transferees and the trainees were all placed in the end.

PN1066

Now, as - in line with your statements already today, Your Honour, there's been no need for further recruitment at Wollongong because the transfer list is now more healthy, but that's not the case at Newcastle. So, you know, we say that so far as clause 18 may be read to have application to restrict the recruitment of guards, it's a - it's not an - a terminal restriction.

PN1067

So while it might provide for certain levels of service, we say it's - as I've already outlined at Sydney in the Sydney depot, but even then, it's a hierarchy of a process for sourcing the guards who will have the opportunity to go to Intercity depot. It's not something that must stop once - if there's no one willing to transfer.

PN1068

A guard who is properly trained and competent, but inexperienced, is better than no guard at all in a cancelled train. The objectives of the Transport Administration Act and the agreement guide us as to how the clause should be interpreted. So as Mr Brandse gave evidence, it may be that more people will come on the transfer list next year or next month or who knows when, but the organisation and its management representatives' obligations is to ensure services, not hope that there might be enough staff at some undetermined future date to ensure services.

PN1069

I guess further to that point, there are some submissions made around the new Intercity fleet, that now that that's clearer - although we would submit that it's been abundantly clear since the enterprise agreement was made - as it becomes more clearer or more well understood amongst staff that more staff will come, well, that's all well and good, but that's not a certainty, and that doesn't align with the organisations obligations to assure services.

PN1070

Now, to address a few of the clauses that were raised, I've addressed clause 18, I think, as far as necessary. Mr Warnes made a lot of submissions around - some submissions around clause 21. Again, our written submissions have addressed that point. It's really a restating of what was already raised, but - and I'm happy to take any questions, if it would assist, but fundamentally, clause 21.7 exists because the transfer list being on the seniority basis would otherwise conflict with

the rest of clause 21. Clause 21, essentially, states that recruitment must be on a merit basis and, by its definition, a seniority transfer list isn't merit based. Therefore, you need clause 21.7 to even allow the seniority process.

PN1071

Clause 12, look, again, as outlined in our submissions, it's not needed because the agreement allows for New South Wales Trains to do this. It's as simple as that, really. So fundamentally, just to conclude, the clauses are abundantly clear as to their intent. The only possible ambiguity is around clause 18 which is addressed in our submissions at - as I said at clause - sorry, 24(c), and those are our submissions.

PN1072

THE DEPUTY PRESIDENT: Anything in reply?

PN1073

MR WARNES: No, nothing arising, Your Honour. I haven't been able to gain instructions that quickly. I've just made contact with a couple of people and trying to figure it out, but I believe there was certainly a process by which New South Wales Trains wanted to recruit directly to Wollongong depot, and I think it came for conciliation in front of you, Your Honour. I'm just trying to figure out what the outcome was.

PN1074

THE DEPUTY PRESIDENT: It was Deputy President Bull.

PN1075

MR WARNES: It was in front of Deputy President Bull. My apologies. I wasn't there. Yes. As soon as I find out, I might be able to send your chambers a note or something like that.

PN1076

THE DEPUTY PRESIDENT: I don't - no one's said anything to me about the status quo.

PN1077

MR WARNES: Your Honour, I think that ship might have sailed given that we're at the final determination of the matter. I think making an order as to status quo would probably take you the same amount of time as it would take you to determine the matter. So I think we're content to just say let's determine the matter in its finality, obviously subject to the parties rights after that.

PN1078

THE DEPUTY PRESIDENT: (Indistinct).

PN1079

MR HUTCHINSON: Our written submissions deal with the issue, but I'm happy with Mr Warnes' approach.

PN1080

THE DEPUTY PRESIDENT: (Indistinct). Well, (indistinct) reserve my decision. It will take between four and 12 weeks. I thank the parties for their detailed submissions and otherwise adjourn the matter. Thank you.

ADJOURNED INDEFINITELY

[3.38 PM]

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