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No. 4

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999
Industrial Relations (Tribunals) Rules 2000

NOTICE

The following Agreements have been certified by the Commission:

No/s	Title	Date certified	Cancelling
CA361/02	CS Energy Swanbank Power Station (Enterprise Bargaining) – Certified Agreement 2002	3/9/02	CA63/00
CA367/02	Churinga Investments Pty Ltd t/as L & D Contracting - Certified Agreement Queensland 2000	9/9/02	
CA368/02	Churinga Investments Pty Ltd T/As L & D Contracting - Certified Agreement	9/9/02	CA388/97
CA370/02	Commercial Waterproofing Services Pty Ltd - Certified Agreement	9/9/02	
CA371/02	Jeff Ugarte t/a Naturelink Landscapes & Design - Certified Agreement	9/9/02	
CA372/02	Rex John Hopkinson & Glenn Warren Hill t/a AAA Scaffolding & Rigging - Certified Agreement	9/9/02	
CA373/02	Greg Poole t/a GW Commercial Fixers & Glaziers Pty Ltd	9/9/02	
CA375/02	JK & MW Commercial Fixers & Glaziers Certified Agreement	9/9/02	
CA376/02	First Terrazzo Australia Pty Ltd Certified Agreement	9/9/02	
CA377/02	Robert Douglas Collins t/a Collins Brothers Painting Services Certified Agreement	9/9/02	
CA378/02	James Cook University Halls of Residence - Catering Staff Certified Agreement 2002	9/9/02	CA140/01
CA382/02	Millmerran Shire Council Certified Agreement 2002	9/9/02	CA23/00
CA383/02	Atherton Shire Council Enterprise Bargaining Certified Agreement 5/2002	9/9/02	CA77/01
CA364/02	Power Personnel Pty Ltd - Certified Agreement 2002	11/9/02	
CA365/02	Vulcan Energy Pty Ltd t/a South Coast Electricity – Certified Agreement 2002	11/9/02	
CA366/02	HVAC Process Service Pty Ltd - Certified Agreement 2002	11/9/02	
CA387/02	Gold Coast Turf Club - Certified Agreement 2002	12/9/02	CA724/00
CA390/02	Autism Queensland Inc - Ancillary Staff - Certified Agreement 2002	12/9/02	

CA354/02	Austraform Pty Ltd - Certified Agreement	13/9/02	CA79/97
CA355/02	MDI Interiors Pty Ltd t/a MDI Interiors - Certified Agreement	13/9/02	
CA356/02	Guardwell Security Pty Ltd T/A Rollashield - Certified Agreement	13/9/02	
CA369/02	Balonne Shire Council - Certified Agreement (State) 2002	16/9/02	CA708/00

The following Agreement has been withdrawn:

No/s	Title
CA367/01	Coco's Fresh Food Markets - Certified Agreement

E. EWALD
Industrial Registrar

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INDUSTRIAL COURT OF QUEENSLAND

Industrial Relations Act 1999 – s. 341(1) – appeal against decision of industrial commission

Suzanne Rimland AND Queensland Health (No. C47 of 2002)

PRESIDENT HALL

13 September 2002

DECISION

This is an appeal against the decision of the Queensland Industrial Relations Commission reported at 170 QGIG 235. The appeal was lodged out of time. By a decision on transcript given 16 July 2002 I granted the appellant the indulgence of an extension of time. I did so because the delay was minimal (a document which should have been filed on the Friday was filed on the following Tuesday) because there was a frank, full and adequate explanation of the delay (attributing it to representative error), and there was no prejudice to the respondent. In reliance on the admission of representative error the respondent made an application for costs founded on s. 335(1)(b). I granted the application and ordered the appellant to pay the respondent's costs to be taxed by the Industrial Registrar (if need be) as if they were costs in a Supreme Court matter. It is difficult to sustain an application for an extension of time based upon representative error without implicitly conceding that there has been an unreasonable omission connected with the conduct of the appeal.

Both before the Court and the Commission, the issue was a narrow one and involved only issues of law. The issue was whether the limitation period at s. 75(4) commences to run when the Commission has informed the parties to a conciliation of its assessment of the merits of the application as described at s. 75(3)(b)(i) or whether the limitation period at s. 75(4) commences to run only when the certificate referred to at s. 75(3)(a) has been issued. It is useful to set forth the terms in s. 75.

“75 Conciliation before application heard

- (1) The commission must hold a conference to attempt to settle an application under section 74 by conciliation before it hears the application.
- (2) The commission may, by written notice, require the applicant, employee or employer to attend the conference at a stated time and place.
- (3) If the commission is satisfied all reasonable attempts to settle the matter by conciliation are, or are likely to be, unsuccessful so far as it relates to at least 1 ground of the application or because the applicant is a person to whom section 73(1) does not apply, it –
 - (a) must issue a written certificate stating that the commission –
 - (i) is so satisfied for a stated ground; or
 - (ii) considers the applicant is a person to whom section 73(1) does not apply; and
 - (b) inform the parties to the conciliation of –
 - (i) the commission's assessment of the merits of the application in relation to the stated ground or in relation to how the applicant is a person to whom section 73(1) does not apply; and
 - (ii) the possible consequences of further proceeding on the application; and
 - (c) may recommend the application be discontinued, whether or not it also recommends another way of resolving the matter.
- (4) The application lapses if the applicant has not, within 6 months after the applicant has been informed by the commission under subsection (3) –
 - (a) taken any action in relation to the application; or
 - (b) discontinued the application.
- (5) The parties may seek further conciliation, or settle the matter, at any time before an order is made under section 78, 79 or 80.
- (6) The commissioner administrator may delegate the functions of the commission under this section to the registrar or a deputy registrar.”

Section 75(1) is a barrier to the relief otherwise available at chapter 3 part 2 of the *Industrial Relations Act 1999*. Until such time as an application for reinstatement has been submitted to conciliation and the conciliation process is complete, an applicant may not progress his/her case. It is therefore of

critical importance to an applicant to be able to demonstrate that the Commission has formed the opinion which brings conciliation (subject to subs. (5)) to an end, viz the opinion that "all reasonable attempts to settle the matter by conciliation are, or are likely to be, unsuccessful so far as it relates to at least one ground of the application". It seems to me that the scheme of the section is that the applicant is to do that by producing the "written certificate" referred to at s. 75(3)(a). I reject the contention of the respondent that s. 75(3)(a) contemplates no more than that the Commission will bring the "written certificate" into existence and place it (or note it) on the Commission file. One may readily acknowledge that in some circumstances "issue" used as a verb may mean "issue to the world at large (or some part of it)"; e.g. a reference to issuing a proclamation or issuing a prospectus. But it seems to me that when used with reference to a document of critical importance to one person in the community above all others, "issue" requires that the document be issued by delivering it to that person. The point is not free of authority. It was considered in *Koon Wing Lau v Calwell and Another* (1949) 80 CLR 533 at 568 by Latham CJ and at 574 to 575 by Dixon J. The effect of the discussion was summarised by Emmett J in *Prudential-Boche Securities (Aust) Ltd v Warner* [1999] FCA 1143 at [19] as follows:

"[19] The word 'issue' involves the idea of something passing from one person to another, sending forth or delivering. Thus, a document which is at all times retained by a person in his own sole control cannot be said to have been issued by him. He might execute or create the document and then decide not to give it to anybody. In such a case, he would not have issued the document – *Koon Wing Lau v Calwell* (1949) 80 CLR 533 at 568 per Latham CJ. More specifically, a certificate is not 'issued' to a person until it is delivered to him, which means that it must pass from the possession of the authorities either into his manual custody or under his control or into his legal possession so as to be at his command – per Dixon J at 574."

Inevitably, once the applicant receives the certificate she/he is informed that the Commission has formed the opinion at s. 75(3)(a) and the conciliation is (subject to subs. (5)) at an end. The applicant is both aware that his claim for relief can be progressed and is in the position to do so. It is perfectly sensible to treat the limitation period as running from that point in time. Whilst one may understand why the Commission treated "informed" at s. 75(4) as referring back to the other form of the word "informed" at s. 75(3)(b), I find it difficult to accept that the legislature would have connected the commencement of the limitation period to a transaction irrelevant to the applicant's capacity to progress the matter further and to a transaction for the proof of which no adequate provision is made. By s. 14B(1)(c) of the *Acts Interpretation Act 1954* I am entitled to refer to the explanatory note to confirm an interpretation. So far as it is relevant, the explanatory note is in the following terms:

"The commission is required to issue a written certificate if it is satisfied that all reasonable steps to settle the matter by conciliation are, or are likely to be, unsuccessful.

An application lapses if the applicant has not, within 6 months after receiving such a written certificate:

- taken any action in relation to the application; or
- discontinued the application."

I regard that as confirmation.

One final matter I should mention. Although the matter has not been explicitly argued I am not at all sure that a certificate of the type referred to at s. 75(3)(a) has yet issued. The document which was treated as a "certificate" below is not sealed. In my view it is entirely arguable that a document which is simply signed by a Commissioner is not a "certificate" at all.

I allow the appeal. I remit the matter to the Queensland Industrial Relations Commission in order that it may be heard and determined according to law.

Dated 13 September 2002.

D.R. HALL, President.

Released: 13 September 2002

Appearances:

Ms J. Ryrie, instructed by Nicol Robinson Halletts, for the appellant.

Mr C. Murdoch, instructed by Crown Law, for the respondent.

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 230 – action on industrial dispute

**Queensland Rail AND Australian Rail, Tram and Bus Industry
Union of Employees, Queensland Branch (No. D297 of 2002)**

COMMISSIONER THOMPSON

16 September 2002

RECOMMENDATION

Background

On 22 July 2002 a notification of an industrial dispute was lodged in accordance with s. 229 of the *Industrial Relations Act 1999* (the Act) by Queensland Rail (QR) which notified of the existence of an industrial dispute between QR and the Australian Rail, Tram and Bus Industry Union of Employees, Queensland Branch (ARTBU) at Charters Towers.

The particulars of the dispute related to work performed under the Queensland Rail Station and Yards – Certified Agreement 1997 (the Agreement) by persons employed as Rail Operator Level Two (RO2's) who were required to perform safety train testing duties which entailed the payment of higher duties at the Rail Operator Level Three (RO3) rate.

According to the notification, the train testing duties were but a minimal part of the RO2's employment, occupying approximately 1% of the total day's work (over a 24 hour period).

The ARTBU had sought that the RO2's be reclassified to RO3's in accordance with the provisions of the Agreement for the reason that as no persons were employed in Charters Towers as RO3's, and therefore it was not possible under the terms of the Agreement for persons to "act up" in positions that did not exist.

In correspondence to QR on 18 July 2002, the ARTBU formally issued seven (7) days' notice of industrial action following the failure of discussions between the parties to resolve the matter.

A conference was convened by the Commission on 23 July 2002 at which each of the parties, through submissions, provided to the Commission their respective positions.

At the conclusion of the conference, the parties reached an agreement on terms that would enable the matter to further progress.

Those terms were:

- The Commission would carry out on-site inspections of the work in question at Charters Towers on Tuesday 13 August 2002.
- The parties would provide to the Commission on Friday 23 August 2002, submissions (written and/or verbal) supportive of their positions.
- The Commission, after consideration of the submissions, material (placed before the Commission) and inspections, would make a recommendation that each of the parties would then take to their respective principals.

Inspections

At 9.30 a.m. on 13 August 2002, the parties assembled at the Charters Towers Railway Station where an inspection of duties performed by RO2's, in the shunting and train safety testing of a fifty (50) wagons (in length) freight train, were observed.

The Commission, with the assistance of QR staff and the presence of an ARTBU official, was given a comprehensive demonstration of the work tasks performed within the classification levels of RO2's and RO3's (where it related to the train safety testing) in a most practical environment.

The circumstances where a full train safety test and a modified test were performed were identified with specific clarity as was the actual time spent by the employees in conducting such tests.

Submissions

Queensland Rail

Mr Lucas in opening his submissions provided information of the rates of pay pertaining to each of the classifications in question.

RO2 (OS1.6) \$15.96 per hour \$1213.10 per fortnight

RO3 (OS2.1) \$16.19 per hour \$1230.80 per fortnight

The history of the dispute revolved around RO2's performing higher duties (that of RO3's) in accordance with clause 2.7 of the Railway Award – State in that they conducted train safety tests a responsibility that fell within the duties of an RO3.

Investigations by QR following the inspections established that the majority of testing performed by the RO2's was modified testing as opposed to full testing with modified testing falling within the scope of the RO2 classification.

The Queensland Rail Station and Yards – Certified Agreement 1997 at clause 2.1.2(b) and (c) identified the classification responsibilities of each classification:

“(b) Rail Operator level 2 – Employees at this level plan and undertake a range of routine tasks associated with station and/or yard activities associated with low volume station and/or yard activities which may include but not be limited to:

- Limited safeworking
- Shunting operations (non DOO)
- Operating signals, zone release and switching devices etc.
- Modified testing of trains
- Operating and maintaining light lifting and vehicular equipment
- Providing effective service to customers
- Identifying and solving routine problems within a semi-autonomous environment
- Operating basic communication and computer equipment including but not limited to two way radios and mainframe applications
- Accepting, handling and delivering freight including minor cash handling
- Quote basic freight rates
- Applying Workplace Health and Safety requirements within the job role including the application of dangerous goods procedures
- Closing wagon doors
- Carrying out all tasks listed in level 1 as required

(c) Rail Operator level 3 – Employees at this level plan and undertake a range of routine tasks associated with station and/or yard activities associated with low volume station and/or yard activities which includes:

- Train safety testing
- Carrying out all tasks listed at level 1 and 2 as required”.

It was QR's position that a situation exists where they are able to utilise employees to work in higher positions whether a position or vacancy exists or not and they formed this view by relying upon clause 2.1(5)(a), (b) and (c) of the Railway Award – State.

“(5) Work Flexibility (incidental and peripheral) – (a) An employer may direct an employee to carry out such duties as are reasonably within the limits of the employee's skill, competence and training.

(b) An employer may direct an employee to carry out such duties and use such tools and equipment as may be required, provided that the employee has been properly trained in the use of such tools and equipment (where relevant).

(c) Any direction issued by an employer pursuant to provisions (a) and (b) shall be consistent with the employer's responsibilities to provide a safe and healthy working environment.”.

Further supportive of that position was clause 2.8(1) of the Award Higher Level Pay:

“(1) Higher Level Payment – Contingent upon principles underpinning the classification structure, any employee who is working temporarily in a class higher than that in which such employee is classified, if employed for more than 4 hours on any day in such higher class, shall be paid the rate for that class for the whole time during which such employee works on that day; if employed for 4 hours or less in a higher class, such employee shall be paid the rate for the higher class for 4 hours. In any case, the employee shall work under the conditions of the higher class whilst so employed.”.

Mr Lucas at page 42 line 18 of transcript in justifying QR’s position on higher level payments for positions not currently filled or vacancies stated:

“Okay. The higher level payment provision does – above does not have a limited or preconditioned that the higher level work performed must be as a result of a position or vacancy at a specific location occurring. It’s QR’s view that where a particular task is required to be performed and it has been identified as being at a specific rate of pay in work value this provision enable the employee to be paid at a higher rate in accordance with the criteria on hours actually worked at doing the higher level duties.”.

In terms of the principles underpinning the classification structures in the operation stream reliance was placed on clause 3.2(5) of the QR Enterprise Agreement Four – Certified Agreement 2000.

“(iii) Operations Stream – Definition –

The Operations Stream comprises those offices, the duties of which apply to various operational areas, the incumbents of which are required to possess a range of skills appropriate to this stream.

Such Operational areas include freight and passenger transport and handling, train services, operational support and station services.

(b) Movement between classification levels:

(i) between levels one and two, two and three for non-supervisory staff either by appointment to advertised vacancies or in areas where a work group based competency system operates by competency acquisition as defined elsewhere.

(ii) from level three to higher levels and supervisory positions in all levels by appointment to advertised vacancies using QR recruitment and selection policies.

(c) Movement within classification levels:

(i) within levels one, two and three shall be by appointment to advertised vacancies or in areas where a work group based competency system operates by competency acquisition as defined elsewhere.

(ii) within levels four and above shall be subject to the employee achieving the agreed performance objectives which are to be reviewed annually.

Provided that an increase shall not be made to the salary of any employee until:

(6)(a) Competency acquisition – Competency acquisition will be based on a realistic assessment as to whether those competencies will be utilised. Payment for such competencies will only be made where the competencies are required to be used by QR.”.

In deciding whether a vacancy for RO3’s exists at Charters Towers Mr Lucas drew to the attention of the Commission clause 6.9 Vacancies of the QR Enterprise Agreement Four – Certified Agreement 2000 to further highlight QR’s logic on the matter in question.

“(1) Where vacancies are identified they will be, as far as practicable, advertised in the weekly notice.

(2) When an employee has acted in a higher class of work for a period of nine months continuously, except when relieving in cases of sickness or leave of absence, it shall be taken as an indication that there is a vacancy in the class of work.”.

On matters of a similar nature concerning the filling of vacancies reliance was placed upon previous decisions by the then Railway Interpreter including:

7851	clause 86(12) of 1949 Award
9335	clause 86(12) of 1959 Award
12504	clause 86(12) of 1974 Award

All of the interpretations referred to support the stance of QR in not acknowledging the RO3 classifications in Charters Towers.

In a further reference to the Queensland Rail Station and Yards – Certified Agreement 1997 Mr Lucas visited clause 1.5 Objectives of the Agreement and in particular 1.5.2 and 1.5.3:

“1.5.2 To meet the challenges of a competitive rail industry through the adoption of a commercial operational culture which delivers the productivity and efficiency measures contained in this Agreement.

1.5.3 To record the commitment of the parties to implement work practice changes, methods of rostering and local work arrangements which reflect, foremost, both Queensland Rail’s operational requirements to ensure competitiveness, efficiency and quality services to customers and to improve the social and working conditions of employees.”.

According to Mr Lucas adherence to these objectives to further enhance the commercial situation of QR was a part of the reasoning behind the negotiation of the Agreement in the first place.

Statistics had been prepared by QR (exhibits 10, 11 and 12) to demonstrate matters relating to the number of trains “worked” by the RO2’s in Charters Towers over the previous 12 months and of the number of modified tests opposed to full safety tests carried out in this time.

The statistics identified to QR that the actual amount of full train safety testing was minimal and that QR was within their rights to draw from the local workforce persons with the appropriate skills to perform the relief work at the higher grade.

In terms of reviewing a substantive position held by an employee in the case of the employee performing higher duties (the subject of this matter) this should only occur when such higher grade duties are carried out on a regular basis.

It was QR's submission that the performance of less than one full train safety testing per day could not be construed as being regular in terms of the provision contained within the Agreement.

Finally in summation at page 69, line 25 of transcript Mr Lucas offered the final comments:

"In closing, QR considers that the award in Station and Yard Certified Agreement provisions support QR's ability to reasonably expect employees to perform higher level duties from time to time. This is based on the fact that employees are appropriately trained, skilled and competent to perform the task required. Further when the employee performs that higher level task the appropriate level rate of pay is paid in accordance with the Award. When a higher level task isn't required to be performed, it is not necessary for a vacancy or position to be in place at that location.

Previous interpretation of the Award support this position by QR. In view of that QR is seeking a recommendation from this Commission that the current practice in Charters Towers using RO2s to perform RO3 responsibilities from time to time is correct and should continue without any *status quo* arrangements being in place and that is what we're doing. Using RO2s to work as RO3s and paying for the – for when that work's performed under clause 2.8 of the Award. That's all I have to say, Commissioner, at this point in time."

Australian Rail, Tram and Bus Industry Union of Employees, Queensland Branch

Mr Doogan on behalf of the ARTBU firstly provided some background to the Commission as it related to the establishment of the RO3 position.

In 1995 following a job redesign program QR advised the Union that they wished the then shunters employed in the Mackay region to be trained to undertake train safety testing duties.

That work had previously been carried out by trades employees and examiners.

It was the contention of the Union that in the job redesign process QR had failed to address the remuneration recognition for operational staff and as a consequence of that the Union had at the time advised QR that they were not prepared to accept employees performing the requested task "until the matter had been dealt with through job redesign and that remunerative recognition for utilising additional skills was available."

The actions of the Union effectively stalled the process and after a significant period had passed the parties finally reached an agreement on an interim basis that employees would be paid the OS2.1 level which is the same rate as the RO3 to carry out functions required of them by QR.

In 1996 the arrangement according to Mr Doogan spread to other depots throughout the State, however, shunters in Rockhampton "got fed up waiting for job redesign as a number of these changes were occurring without remunerative recognition and they determined that they would no longer work in higher grade duty.

This action brought about a level of concern that drew the parties together in negotiations for the now Queensland Rail Station and Yards – Certified Agreement 1997.

Mr Doogan stated that the negotiations were conducted in an environment where there was little, if any, trust between the parties with almost all items being fought "tooth and nail" by the parties.

An eventual outcome of the negotiations was that the Union accepted the RO3 position subject to the insertion of certain clauses into the Agreement which precluded QR from employing persons as RO2's and acting in RO3 positions in locations where there were no RO3 positions in existence.

On the submission of QR where it was suggested that the Union was seeking to have RO3 positions at Charters Towers advertised Mr Doogan scoffed at such a suggestion stating that in the Union's view vacancies do not exist and the Agreement was carefully worded so that employees could be reclassified without having to re-apply for their jobs.

The interpretation (exhibit 9) relied upon by QR according to Mr Doogan "dated back to his granddad's days" and such interpretations were considered by the Union when negotiating the Queensland Rail Station and Yards – Certified Agreement 1997 and hence the inclusion of clauses 2.2.2 and 2.2.3 in the Agreement.

"2.2.2 Acting in higher-grade duty may apply at locations in certain circumstances. Employees may be required to work at higher-grade positions which exist within that location.

2.2.3 If employees in non-supervisory positions are to act in higher grade duties carrying out non-supervisory functions on a regular basis, then the classification of such employees should be reviewed with a view to elevating the position to an appropriate level or filling vacancies that may exist at that level."

Whilst conceding that the main functions of the RO2 classification is work other than the train safety testing, the provisions of 2.2.2 and 2.2.3 ensure that QR have the flexibility they require and that employees also have their rights preserved.

In conclusion Mr Doogan at page 80 line 35 of transcript stated:

"Yes. Commissioner, I understand there's six RO2's in Charters Towers. One of them is actually a higher grade already. He's a redeployee, so he's actually getting paid above that level at the present time, so there's actually five employees involved in Charters Towers that I want to – yes, we would – obviously what happens in every other location where RO3 is accessed, all the employees are at RO3. The reason for that is that there's rosters and we would have real problems – if some employees were getting advantages and overtime et cetera it would cause real problems for us if they were selecting one person that would take over as an RO3 and be rostered as the trains are coming in. I would say that the idea of having the multi-skilling within QR was to – so they wouldn't have the old situation where one person did this and one person did that and it goes against the principles, so we would certainly be looking for all the employees working on the roster where that sort of duty is required to – to carry out the - - -".

Conclusion

In respect of this matter the task for the Commission was to determine whether the existing practice of QR at Charters Towers in requiring RO2 employees to act as RO3's when performing the function of safety train testing (for which they received a payment under clause 2.8(1) of the Award – Higher Level Pay) was compliant with the industrial instruments that govern the employment conditions of the said employees (six (6) in number).

If the answer to the above question is in the negative then the Commission should provide to the parties a recommendation that identifies an appropriate alternate arrangement.

On the other hand if the position of QR is accepted then the existing arrangement would continue unhindered.

Having considered the submissions, material provided by each party and having had the advantage of the "on-site" inspections it is my intention to in the briefest of summaries firstly identify the positions put by both QR and the Union.

It would be fair to say that QR relied upon the Award, QR Enterprise Agreement Four – Certified Agreement 2000 and the Queensland Rail Station and Yards – Certified Agreement 1997 to justify the existing work practice.

They claimed that through the provisions of clause 2.1(5)(a), (b) and (c) of the Award there was sufficient flexibility available to allow for a direction to be given to the RO2's to perform the safety train testing function.

Still with the Award at clause 2.8(1) the ability to utilise the higher-level payments was in their view quite clear.

In clause 3.2(5) of QR Enterprise Agreement Four – Certified Agreement 2000 there existed principles underpinning the classification movement between different levels.

The Agreement through the objects of clause 1.5.2 and 1.5.3 allow for the matters of productivity, efficiency measures, work practice changes and local work arrangements to be implemented in the workplace.

The previous interpretation (by the Railway Interpreter) going back in time validates the QR position that a vacancy does not exist for the RO3 position at Charters Towers.

The train safety testing forms the most minimal portion of the RO2's duties at the Charters Towers location.

The Union position was that simply the work in question had been covered specifically in Station and Yards Agreement 1997 firstly through the classifications at clause 2.1.2(b) and (c) and secondly at clauses 2.2.2 and 2.2.3 which had been inserted deliberately to only allow for employees to act in a higher grade duty where such "higher-grade positions which exist within that location."

In addressing the work practices in Charters Towers the Union put forward argument that when the RO2's were conducting the train safety testing, in the absence of any RO3 or RO4 positions then the level of higher-level payment should be that of RO5 whilst performing that task.

There is certainly no shortage of industrial instruments covering the employment of the RO2 in their work and whilst the Award and the QR Enterprise Agreement Four – Certified Agreement 2000 have the widest of all coverage in that they pertain to the full employment circumstances for all employees within QR that does not question the particular relevance and the importance of the Agreement that was finalised in 1997.

I have looked closely at the arguments advanced by QR and whilst not doubting the integrity of their position in placing reliance upon the provisions of the Award and the QR Enterprise Agreement Four – Certified Agreement 2000 to support the current arrangements for the RO2's it is fairly evident that the Station and Yards Agreement 1997 provides the more finite detail relating to the direct employment arrangements in this instance.

The submissions from the Union were most pointed when they gave to the Commission the history surrounding the negotiations of the Station and Yards Agreement 1997 and the agreed document that was signed off by the parties reflects the position of the Union and would seem to endorse the argument advanced by the Union.

On the other hand QR's submission as they related to the Queensland Rail Station and Yards – Certified Agreement 1997 were somewhat less enthusiastic.

Mr Lucas at page 54, line 18 of transcript stated in response to a comment by the Commission:

"That's right. And that was basically a negotiated outcome because of a dispute the organisation was having. In the previous transcript Mr Doogan eluded to that and the outcome of that was, we agreed to pay the 2.1 rate of pay for train safety testing and as such it was accommodated within a separate classification or position within the Agreement, but it was never QR's expectation that we would have RO3's carrying out – RO3 positions around the place.

Because of the small number of occasions of – particularly in the regional areas, of full train safety testing taking place. At the major departing stations like Townsville, Cairns and Brisbane, the classifications who work there are generally aligned to the RO4 rate of pay and if you look at the RO4 they can do all of what they do plus all the levels below.

So it was QR's expectation that we wouldn't be having classifications of RO3, but where we needed to be able to accommodate that particular role within a location and there wasn't an RO4 available we had the ability to use the higher level situation and I've discussed that, when we use those provisions, going under 2.1(5) and the requirements of the flexibility of this Agreement, we can get people to do that and then when they do it we pay them."

In considering the relevance of the expectations of QR as to the application of the Agreement I have looked to the decision of Hall P. in *The Australian Workers' Union of Employees, Queensland and James Hardie Australia Pty Ltd* (No. C28 of 2001) 167 QGIG 13 at 280 as quoted below:

"Counsel for the Respondent seeks to go to extrinsic materials both to create and to resolve an ambiguity in clause 3.2. For reasons which I developed in *Queensland Police 'Union of Employees' and Commissioner of Police* (2000) 164 QGIG 16 at 16 and which I do not now repeat, I accept that on the current state of the authorities such use may be made of extrinsic materials in the interpretation of Awards, Industrial Agreements and Certified Agreements. (I am indebted to counsel for the reference to *Ambulance Service Victoria v ALHMWU* (1998) 80 IR 275 where, at 281, Northrop J applied the rule to Certified Agreements under the *Workplace Relations Act 1996* (C'th)). However, I rather think that much of the material which was put in at first instance goes beyond that which may legitimately be regarded as admissible extrinsic materials. The passage in *Short v F.W. Hercus Pty Ltd* (1993) 40 FCR 511 at 518 to 519 per Burchett J upon which counsel for respondent principally relies draws heavily upon the judgment of Mason J (with which Stephen and Wilson JJ expressed agreement) in *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337 at 347 to 353. At 352, immediately after the paragraph commencing 'the true rule' quoted by Burchett J in *Short v F.W. Hercus Pty Ltd* (1993) 40 FCR 511 at 519, Mason J went on the observe –

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

Consequently when the issue is which of two or more possible meanings is to be given to a contractual provision we look, not to the actual intentions, aspirations or expectations of the parties before or at the time of the contract, except in so far as they are expressed in the contract, but to the objective framework of facts within which the contract came into existence, and to the parties' presumed intention in this sitting. We do not take into account the actual intentions of the parties and for the very good reason that an investigation of those matters would not only be time consuming but it would also be unrewarding as it would tend to give too much weight to these factors at the expense of the actual language of the written contract.'

Here, the bulk of the material put in by affidavit or witness statement went to the actual intentions, aspirations and expectations of the parties. The evidence was not receivable for the purpose of showing the actual intentions, aspirations and expectations. It was, of course, receivable for the purpose of showing what it was that the parties were negotiating about."

Therefore in determining whether QR is compliant with the various industrial instruments it is my finding that whilst the Award and QR Enterprise Agreement Four – Certified Agreement 2000 provisions contribute to the overall position the most crucial provisions of all are clauses 2.2.2 and 2.2.3 of the Queensland Rail Station and Yards – Certified Agreement 1997.

In respect of clause 2.2.2 it states in unambiguous terms that employees "acting in higher-grade duty apply at locations in certain circumstances".

Further on in the clause it is my reasoning that the wording "higher grade positions which exist within that location" in their ordinary meaning makes it mandatory for the position of RO3 to be in existence before a person can genuinely act in the said position.

The reading of clause 2.2.3 in my view allows for a review of such employees classifications who regularly perform the higher duties with a view to elevating the position an appropriate level or filling vacancies that may exist at that level.

On the issue of "regular" the meaning in the Macquarie Concise Dictionary is shown as:

"**regular** . . . **1.** usual; normal; customary . . . **2.** conforming in form or arrangement; symmetrical . . . **3.** characterised by fixed principle, uniform procedure, etc. . . . **4.** recurring at fixed times; periodic . . . **5.** adhering to rule or procedure . . . **6.** observing fixed times or habits . . . **7.** orderly; well-ordered . . . **10.** properly qualified for or engaged in an occupation. . . ."

The application of that meaning would in my view fit the work patterns of the RO2 employees to the extent that the function of train safety testing occurs on a regular basis *albeit* for a limited period of time.

On that basis I would make the finding that the existing practice of QR in having RO2 employees act at the level of RO3 when no such position is in existence at Charters Towers does not in real terms or spirit comply with the provisions of the applicable industrial instrument.

In framing a recommendation for an appropriate alternate arrangement I believe that a number of options exist that may be exercised in the circumstances.

Options

- (a) QR could simply not require the RO2 employees to conduct the train safety testing and have such testing performed when required by the RO5 personnel at the work site. This option in my view would not necessarily be the wisest use of labour but nevertheless an option.
- (b) QR could effectively utilise the provisions of clause 2.2.3 and elevate one RO2 on each shift to the position of RO3 which would in my view meet the requirements of clause 2.2.2 of the Agreement.
- (c) All six (6) RO2's at the location could be elevated to the classification of RO3 and therefore provide full coverage of the train safety testing in all circumstances.

Whilst each of the options in my view would allow QR to meet their industrial obligations it would be my intention to recommend that option (c) be considered most strongly in that it, in my view not only provides the better "on-the-job coverage" but is also in terms of equity the fairest of each of the options.

The financial burden in option (c) is greater than that of option (b) however, with a cost of 23 cents per hour or \$8.74 per week for each employee it is hardly prohibitive.

It would appear that the ability to elevate the RO2's to the classification of RO3 rather than create a vacancy exists by way of the provisions of clause 2.2.3 and should be the recommended path QR should follow if either options (b) or (c) were to be accepted.

If the parties are unable to reach a position where the recommendation is accepted as satisfactory then they retain their rights to proceed with a more formal application.

J.M. THOMPSON, Commissioner.

Appearances:

Mr P. Lucas for Queensland Rail.

Mr W. Doogan, with him Mr L. Moffitt for the Australian Rail, Tram and Bus Industry Union of Employees, Queensland Branch.

Released: 16 September 2002

QUEENSLAND INDUSTRIAL REGISTRAR

Industrial Relations Act 1999 – s. 482 – arrangement for conduct of elections

Queensland Police “Union of Employees” (No. Q31 of 2002)

REGISTRAR EWALD

12 September 2002

Conduct of Election – Prescribed Information – Reason for Election – Electoral Commission to Conduct Election.

DECISION

On 10 September 2002 the Queensland Police “Union of Employees” lodged in the Registry under section 481 of the *Industrial Relations Act 1999*, the information as prescribed in section 36 of the *Industrial Relations Regulation 2000* in relation to the conduct of an election by the Electoral Commission of Queensland for the following position of office:

Office	Number of Positions
General President.....	1

Rule 22 provides for a General President to be elected for a term of 4 years. The current term of office will expire in February 2003.

I have considered the application, the Act and Rules and I find that the elections being sought are for positions of office within the meaning of the Act.

I am satisfied that an election for the above named position is required to be held under the Rules of the Industrial Organisation. The Organisation’s Rules are affected by s.458 of the *Industrial Relations Act 1999*. By virtue of this section the Organisation’s Rules are taken to contain the Model Election Rules.

Therefore, under section 482 of the *Industrial Relations Act 1999*, I am making arrangements for the conduct of the election of the above named position by the Electoral Commission of Queensland.

Dated 12 September 2002.

E. EWALD,
Registrar

Released: 12 September 2002

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 125 – application to amend award

Australian Building Construction Employees and Builders’ Labourers’ Federation (Queensland Branch) Union of Employees AND Queensland Master Builders Association, Industrial Organisation of Employers and Others (No. B1495 of 2001)

BUILDING CONSTRUCTION INDUSTRY AWARD – STATE

COMMISSIONER SWAN

20 September 2001

AMENDMENT

THIS matter coming on for hearing before the Commission at Brisbane on 20 September 2001, this Commission orders that the said Award be amended as follows as from 16 August 2001:

1. By deleting from clause 3.6.38 the amounts of “\$19.70”, “\$16.20”, “\$14.00”, “\$10.30” and “\$4.90” and inserting the amounts of “\$20.90”, “\$17.20”, “\$14.80” “\$10.90” and “\$5.20”, respectively, in lieu thereof.
2. By deleting from clause 3.7.1 the amount of “\$12.60” and inserting the amount of “\$13.30” in lieu thereof.
3. By deleting from clause 3.7.4 the amount of “37 cents” and inserting the amount of “39 cents” in lieu thereof.
4. By deleting from clause 3.7.9 the amount of “69 cents” and inserting the amount of “73 cents” in lieu thereof.
5. By deleting from clause 4.6 the amount of “\$8.30” and inserting the amount of “\$9.30” in lieu thereof.
6. By deleting from clause 6.5.3(b) the amounts of “\$303.00” and “\$43.30” and inserting the amounts of “\$308.50” and “\$44.10”, respectively, in lieu thereof.
7. By deleting from clause 6.5.4(a)(iii) the amount of “\$8.30” and inserting the amount of “\$9.30” in lieu thereof.
8. By deleting from clause 6.5.4(b)(i) the amount of “\$15.30” and inserting the amount of “\$16.10” in lieu thereof.
9. By deleting from clause 6.5.6(a) the amount of “\$25.70” and inserting the amount of “\$27.10” in lieu thereof.
10. By deleting from clause 6.5.7(b) the amounts of “\$120.10” and “\$17.30” and inserting the amounts of “\$127.80” and “\$18.40”, respectively, in lieu thereof.

11. By deleting from clause 6.9.2(b) the amounts of "\$55.90" and "\$2.90" and inserting the amounts of "\$59.30" and "\$3.00", respectively, in lieu thereof.
12. By deleting from clause 6.9.2(c) the amounts of "\$55.90" and "\$2.90" and inserting the amounts of "\$59.30" and "\$3.00", respectively, in lieu thereof.
13. By deleting from clause 6.10.2(a) the amount of "\$1146.00" and inserting the amount of \$1215.00" in lieu thereof.

Dated 20 September 2001

By the Commission,
[L.S] E. EWALD,
Industrial Registrar.

Operative Date: 16 August 2001
Amendment – Allowances
Released: 20 September 2002

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