



# RTBU

RAIL, TRAM & BUS UNION AUSTRALIA

19 October 2015

Fair Work Commission  
80 William St  
East Sydney 2010

By email: [amod@fwc.gov.au](mailto:amod@fwc.gov.au)

## Modern Rail Award 2010

### Part-time employment (AM2014/196) and casual employment (AM2014/197)

#### *Introduction*

1. This submission is in support of the RTBU's (amended) draft determination for the Rail Industry Award 2010.
2. The (amended) draft determination differs from the original draft determination only in the drafting of clause 6.4(f) of the Exposure Draft of the Rail Award.
3. The matters raised in the draft determination were referred to the part-time employment (AM2014/196) and casual employment (AM2014/197) full bench by President Ross on 17 November 2014
4. The variations proposed in the draft determination have been the subject of Award review proceedings AM2014/87. The RTBU is also aware of the common claims submissions being filed by the ACTU, which will affect the Modern Rail Award 2010. The RTBU supports these submissions.

## *Issue*

5. The (amended) draft determination for the Rail Industry Award 2010 sets out the relevant desired changes. The most contentious of the issues is the casual loading interaction with overtime and penalties.
6. At present the Modern Rail Award 2010 remains silent on the issue of casual loading interaction with overtime and penalties. While there is a provision for casual employees to receive 25% in casual loading, it does not clarify whether the casual loading is calculated before or after applying penalty rates, or whether the casual loading is applied at all in these circumstances. The exposure draft relevantly states:

### ***6.4 Casual loading***

- (c) For each ordinary hour worked, a casual employee must be paid:
  - (i) the ordinary hourly rate; and
  - (ii) a loading of 25% of the ordinary hourly rate, for the classification in which they are employed.

- (d) The loading constitutes part of the casual employee's all-purpose rate.

- (e) The casual loading is paid instead of annual leave, paid personal/carer's leave, notice of termination, redundancy benefits and other entitlements of full - time or part -time employment.

7. The ordinary hourly rate is defined as 'the minimum hourly rate of pay for an employee plus any allowance payable for all purposes to which the employee is entitled.' The minimum hourly rate is not defined in the award.
8. In the AIRC [2008] AIRCFB 1000 decision, the Full Bench discussed briefly this very issue. It held at 50 that 'as a general rule, where penalties apply the penalties and the casual loading are both to be calculated on the ordinary time rate.' Nonetheless, the Full Bench does not define what is meant by ordinary time rate and whether a casual's ordinary time rate includes the casual loading for the purposes of calculating penalties.

## Background

9. Partly responsible for the lack of clarification around the casual loading interaction with overtime and penalty rates was the insignificant number of casual employees at the time of Award modernisation. The Rail industry has been subject to profound changes over the past two decades, and particularly in recent years. This change is most prominent in the casualisation of labour in the rail industry.
  
10. It is fair to say that prior to the introduction of the Modern Award casual employment was limited in the rail industry. According to the Department of Employment's register of agreements, there has been a sharp increase in casual employees covered by enterprise agreements in the rail industry since 2010: a total of 1590 casual employees were covered by agreements negotiated by the RTBU and other unions between 2010 – 2015, compared with 632 casual employees covered during the period of 2000 – 2010.<sup>1</sup>
  
11. The most significant change has occurred in the rail infrastructure area in which there has been a proliferation of labour hire companies breaking into the rail industry. These companies include, but not limited to:
  - Morson International
  - Skilled Rail Services
  - Safeworking Solutions
  - Workpac
  - TrueNorth
  - Anderson Recruitment Group
  - 2XM Projects
  - Kruzer Recruitment
  - Nash Rail
  - Sunstone
  
12. This change is also reflected in the pre-reform rail awards, which originally formed the basis for the Rail Industry Award 2010. Only 3 of the 12 pre-reform rail industry awards included casual employment as a category of employment: *Locomotive Operations Award 2002*, *Railway Traffic Operating, Workshops and Miscellaneous Grades Award 2003*; *Railways Salaried Employees Award 2003*. However, these pre-reform awards do not include provisions for calculating overtime and penalties for casual employees.

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<sup>1</sup> Department of Employment

*Application in current negotiated rail awards*

13. In the absence of provisions for casuals in the pre-reform rail awards it may be appropriate to regard state and national negotiated agreements. Provisions pertaining to overtime for casuals in these agreements can be categorised in two ways: silent or the loading is paid in addition to overtime and penalties. However, the dominant trend in these agreements is the latter arrangement. The following is a non-exhaustive list of state and national agreement illustrating this trend.

***Rail Tram and Bus Union and Safeworking Solutions Agreement 2012 – 2015***

**15.1 Casual Employment**

A casual employee shall be engaged as such. A casual employee shall be paid a 25% all purpose loading in addition to the employees classification prescribed in this agreement for all hours worked.

Where a casual performs overtime then the 25% loading shall form part of their ordinary rate. Any relevant penalty rates shall be paid in addition to the casual loading.

***Safeworking Solutions Pty Ltd National Infrastructure Agreement 2015***

**5.5 Casual Employees**

5.5.1 Casual employees will be for a minimum of four (4) hours or eight (8) hours in Victoria (only):

a) A person engaged as a casual, will be paid a casual loading of 25% on the rates prescribed herein

b) Any relevant penalty rates shall be paid in addition to the casual loading

for the avoidance of doubt, a casual employee required to work overtime or weekend shall be entitled to the relevant penalty rates prescribed in this agreement provided that where the relevant penalty rate is time and a half the employee shall be paid 175% of the

hourly rate prescribed in this Agreement for the employee's classification and where the relevant penalty rate is double time, the employee shall be paid 225% of the hourly rate prescribed for the employee's classification.

***Laing O'Rourke Australia Construction Pty Ltd Rail Infrastructure – Rail Track and Associated Works Enterprise Agreement 2012-2016 – New South Wales***

**3.3 Casual Employees**

When a casual employee is required to work overtime, weekend work or on public holidays, the following penalties shall apply:

- a) When the penalty rate is time and a half, the casual employee shall be paid 175% of the hourly rate prescribed.
- b) When the penalty rate is double time, the casual employee shall be paid 225% of the relevant hourly rate prescribed
- c) On a public holiday the casual employee will be paid 275% of the hourly rate prescribed.

***Skilled Rail Services collective Agreement Victoria 2011***

**13.3 Casual Employment**

*The casual loading shall apply for the purposes of calculating overtime, shift work and penalty rates* and is in lieu of all leave except in the case of eligible casuals as prescribed by the National Employment Standards (NES) in the Fair Work Act 2009

***Rhomberg Rail Australia Pty Limited Enterprise Agreement 2015-2018***

**6.1.2 Casual Employees**

A casual employee required to work overtime or weekend work will be entitled to the relevant penalty rates:

- Where the relevant penalty rate is time and a half, the employee must be paid 175% of the ordinary time hourly rate prescribed for the employees classification
- Where the relevant penalty rate is double time, the employee must be paid 225% of the ordinary hourly rate prescribed for the employees' classification

- A casual employee required to work on a public holiday prescribed by the NES must be paid 275% of the ordinary time hourly rate prescribed for the employees classification

***John Holland Pty Ltd Rail Queensland Agreement 2015***

**12. Contract of Employment**

A casual Employee is one who is engaged on an hourly basis. A casual loading of 25% shall be paid. The casual loading is paid in lieu of annual leave, personal/carer's leave, other paid leave and public holidays as contained in this Agreement. *In calculating overtime payments for casuals the following should apply: base rate then 25% loading and then the relevant overtime rate/loading.*

***John Holland Rail Pty Ltd Country Regional Network (CRN) Agreement 2015***

**13. Contract of Employment**

13.1 Employees may be employed on a full-time, part-time or casual basis. A casual Employee is one who is engaged on an hourly basis. A casual loading of twenty five percent (25%) shall be paid. The casual loading is paid in lieu of paid annual leave, personal/carer's leave, other paid leave and public holidays as contained in this Agreement. In calculating overtime payments for casuals the following should apply: base Wage Rate then 25% loading and then the relevant overtime rate/loading.

***John Holland Pty Ltd WA Rail Agreement 2012***

**12 Types of Employment**

12.2 A Casual Employee shall receive a Casual loading of 25% of the applicable ordinary base rate of pay. The casual loading is paid in lieu of annual leave, personal leave, parental leave and public holidays as contained in this Agreement. *In calculating overtime payments for casuals the following should apply: base rate then 25% loading and then the relevant overtime rate/loading.*

***ITS and ITS Rail Enterprise Agreement 2013***

**4.4 Casual**

4.4.3 The Employer will pay each Casual Employee an hourly rate calculated on the basis of the hourly rate for a full-time employee

prescribed in this agreement for the work performed plus a casual loading of 25%. This loading will be applied only to the base hourly rate component of a penalty rate. The casual loading will be paid in lieu of and compensate for all benefits such as leave, notice, redundancy and other full-time entitlements that do not apply to casual employees.

#### *Similar industry interpretations*

14. Similar industries to the rail industry have applied casual loading in a similar fashion to the above negotiated agreements. The most relevant of these is the *Building and Construction General On-Site Award 2010*. The Construction relevant states:

14.6 A casual employee required to work overtime or weekend will be entitled to the relevant penalty rates prescribed by clauses 36 – Overtime, and 37-Penalty rates: provided that:

a) Where the relevant rate is time and a half, the employee must be paid 175% of the ordinary time hourly rate prescribed for the employee's classification; and

b) where the relevant penalty rate is double time, the employee must be paid 225% of the ordinary time hourly rate prescribed for the employee's classification.

14.7 A casual employee required to work on a public holiday prescribed by the NES must be paid 275% of the ordinary time hourly rate prescribed

15. The Construction Award is a useful comparative tool due to the extensive cross over into the rail industry. This is particularly the case for rail infrastructure wherein the largest number of casual employees are located in the rail industry.<sup>2</sup>

#### *Other considerations*

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<sup>2</sup> Gary Talbot witness statement

16. In addition to the above, it is our contention that overtime and penalties for casual employees should be paid in conjunction with the casual loading because casual employees are paid a casual loading to make up for the precarious nature of their employment.
17. The casual loading is also paid instead of annual leave, paid personal/carer's leave, notice of termination, redundancy benefits, sick leave, paid community service leave and other entitlements of permanent part-time and full-time employees.

#### *Concluding Remarks*

18. The rail industry is continually evolving and adapting to the increase in casualised labour. It is imperative that the Modern Rail Award 2010 reflects this change to ensure that casual employees are paid adequately and fairly. The provisions proposed by the RTBU in its (amended) draft determination are aimed at providing this certainty.



## FAIR WORK COMMISSION

Matter nos: AM2014/196  
AM2014/197

### Award Modernisation

#### WITNESS STATEMENT

Name of deponent

Date sworn/affirmed.....<sup>16</sup>/<sub>10</sub>...../<sub>15</sub>.....

I Gary Talbot of Suite 210, Trades Hall, 4-10 Goulburn St Sydney NSW 2000,  
National Organiser of the Rail, Tram and Bus Union affirm:

1. I have been employed with the Rail, Tram and Bus Union (RTBU) as a National Organiser for approximately 8 years. Before this I worked as an Organiser at the state level for the RTBU for about 8 years.
2. As a National Organiser, I am responsible for negotiating national and state rail infrastructure enterprise agreements. I negotiate approximately 10 -15 national and state agreements per year.
3. In my experience as an Organiser I have found there to be an increasing level of casualisation in the rail infrastructure industry. Approximately a third of the infrastructure workforce is now made up of casual employees. This is the result of a proliferation of labour hire actively seeking a slice of the rail industry maintenance pie. These include:
  - Morson International
  - Skilled Rail Services
  - Safeworking Solutions
  - Workpac
  - TrueNorth
  - Anderson Recruitment Group
  - 2XM Projects
  - Kruzer Recruitment
  - Nash Rail
  - Sunstone
4. In my experience, the increase in labour hire companies has created a lot of job insecurity. It has also had a negative impact on the RTBU's member's wages and conditions and also made it very hard for workers who are employed casually to secure loans.

5. The increase in casual labour has also led to a need to clarify how the casual loading interacts with overtime and penalty rates. In my role I am very familiar with the Modern Rail Award 2010. My interpretation of the casual loading clause in the Modern Award has always been that penalties and overtime are paid in conjunction with the casual loading for casual employees. This is due to the fact that the loading for casual employees forms part of their base rate of pay to make up for the precarious nature of casual work.
6. My understanding of this comes from negotiating a number of agreement general and specific agreements, particularly agreements that cover casual employees in the rail construction industry. The agreements that contain this interpretation that I have been involved at varying levels include:
  - *Rail Tram and Bus Union and Safeworking Solutions Agreement;*
  - *ITS and ITS Rail Enterprise Agreement 2013;*
  - *Safeworking Solutions Pty Ltd National Infrastructure Agreement 2015;*
  - *John Holland Pty Ltd Rail Queensland Agreement 2014;*
  - *Skilled Rail Services Collective Agreement Victoria 2011.*
7. I am also aware of other national and state agreements which include similar provisions
  - *John Holland Pty Ltd Rail New South Wales Agreement 2014;*
  - *Laing O'Rourke Australia Construction Pty Ltd Rail Infrastructure - Rail Track & Associated Works Enterprise Agreement 2012-2016;*
  - *John Holland Pty Ltd Rail Queensland 2015;*
  - *John Holland Rail Pty Ltd Country Regional Network (CRN) Agreement 2015;*
  - *John Holland Pty Ltd WA Rail Agreement 2012.*
8. On the ground I am also aware that there is much crossover between the rail infrastructure and the construction industry. In my experience the *Building and Construction General On-Site Award 2010* can often be applied alongside the *Rail Industry Award 2010* in the construction of rail infrastructure. As such I have drawn my interpretation of casual interaction with overtime and penalties from the *Building and Construction General On-Site Award 2010* in which the casual loading is paid in conjunction with overtime and penalties (the relevant clause in 14.6 of the Construction Award).
9. It is my understanding that this is how it is applied across the rail industry given the considerable overlap, particularly in the construction of rail infrastructure. As far as I am aware, and until very recently, this is how companies with which I have negotiated agreements calculate overtime and penalties for casual employees.

