DECISION

Fair Work Act 2009
s.425—Industrial action

Application by Sydney Trains and NSW Trains
(B2025/255)

JUSTICE HATCHER, PRESIDENT
DEPUTY PRESIDENT EASTON — SYDNEY, 19 FEBRUARY 2025
COMMISSIONER HARPER-GREENWELL

Application for an order suspending protected industrial action in relation to bargaining for a proposed enterprise agreement to replace the Sydney Trains and NSW TrainLink Enterprise Agreement 2022 – cooling off – protected industrial action suspended until 1 July 2025.

[1] Sydney Trains and NSW Trains have jointly applied for an order under s 425 of the *Fair Work Act 2009* (Cth) (FW Act) that protected industrial action for a new enterprise agreement to replace the current *Sydney Trains and NSW TrainLink Enterprise Agreement 2022* be suspended until 6 September 2025. Section 425 applies where protected industrial action for a proposed enterprise agreement is being engaged in. The section requires the Commission to make an order suspending the protected industrial action where the Commission is satisfied that it is appropriate to do so. In considering appropriateness, the Commission is required to take into account:

- whether the suspension would be beneficial to the bargaining representatives because it would assist in resolving the matters at issue;
- the duration of the protected industrial action;
- whether the suspension would be contrary to the public interest or inconsistent with the objects of the FW Act; and
- any other matters which the Commission considers relevant.

[2] The application in this matter was filed last Friday, 14 February 2025. It has been heard on an expedited basis. Given the public interest considerations in this matter, to which we will shortly refer, we consider it appropriate to deliver our decision now, accompanied by some short reasons, and to give our full reasons at a later time.

[3] The background of this matter may be summarised as follows. The current enterprise agreement reached its nominal expiry date on 1 May 2024. On 31 May 2024, Sydney Trains and NSW Trains initiated bargaining for a new agreement. This bargaining primarily occurred with a group of rail unions known as the Combined Rail Unions (CRU). The Australian Rail, Tram and Bus Industry Union, known by the acronym RTBU, is the largest union in this group and represents, among others, train drivers and guards.

[4] There has been a large number of meetings between the parties, some facilitated by the Commission, but an agreement has not yet been reached. Protected industrial action has been undertaken by the CRU, principally by members of the RTBU and the Communications, Electrical and Plumbing Union, from September 2024 and, apart from some short intervals, has continued ever since. This has escalated into action which has disrupted the operation of the Sydney Trains rail network, caused significant inconvenience to commuters and engendered significant uncertainty as to the reliability of Sydney Trains.

[5] As recently as last week, the parties were involved in intensive negotiations. This reached the point where, on Thursday, 13 February 2025, it appeared that the parties would reach an agreement as to wages, enhanced conditions and productivity trade-offs. However, bargaining was derailed when the CRU advanced a claim for a 'sign-on' bonus of $4,500 to be paid to all employees or an additional pay increase in lieu thereof. From the perspective of Sydney Trains and NSW Trains, this was an entirely new claim which had never been raised before and did not form part of the CRU's log of claims. From the CRU's perspective, the sign-on bonus was an existing entitlement under clause 11.6 of the current agreement and, in the absence of any indication to the contrary, was to be retained in the proposed new agreement.

[6] Instead of the parties maturely seeking to work through this problem with the assistance of the Commission at a conference that had been scheduled to occur on Monday 17 February 2025, there was an immediate resort to disruptive industrial action. The RTBU commenced a previously-notified 'go slow' work ban on Friday, 14 February 2025. This enlivened notices issued by Sydney Trains pursuant to s 471(4)(c) of the FW Act to the effect that employees who engaged in this partial work ban would not be entitled to payment. As a consequence, and pursuant to s 471(4A)(b) of the FW Act, large numbers of train drivers and guards did not attend for work, and thereby engaged in protected industrial action by reason of s 471(4A)(c). At least some RTBU members encouraged or coordinated this. As a result, there was significant disruption to the rail network on 14 February 2025, with some 57 per cent of train services being cancelled and customer numbers down by about 70 per cent. This pattern of non-attendance and disruption has continued in the days following, albeit to a diminishing degree.

[7] There is no dispute that protected industrial action in a number of forms is currently being engaged in, thus satisfying the prerequisite for the operation of s 425. It is therefore necessary for us to make an evaluative judgment about whether the suspension of industrial action is appropriate. In undertaking this consideration, it is necessary for us to state our conclusions as to the matters required to be taken into account under the section.

[8] As to the first matter (s 425(1)(a)), notwithstanding that the unions strongly oppose any order for the suspension of industrial action, we consider that such a suspension would be beneficial to the bargaining representatives because it would assist in resolving the matters at issue. In this respect, a focus on the events of last week is necessary. As we have stated, the bargaining representatives appear to have been close to reaching an agreement in principle last Thursday, 13 February 2025, with the issue of the sign-on bonus having arisen as a last-minute impediment. Rather than concentrating upon the resolution of this issue, the availability of and the engagement in further protected industrial action had the consequence that there has been no further substantive negotiations and a conference in this Commission has had to be cancelled. Instead, Sydney Trains has had to concentrate on managing the consequences of the

protected industrial action, and the RTBU has had to deal with anger amongst its membership about the potential or actual loss of pay resulting from the operation of the s 471(4)(c) notices. The parties have engaged in mutual public recrimination, and both sides have come under significant pressure because of a public backlash against the disruption to train services and associated media attention upon this. A suspension would allow the parties to nail down the agreed matters and to focus on the merits, rationale and affordability of the outstanding claim for a sign-on bonus free of these pressures.

[9] In relation to the second matter (s 425(1)(b)), protected industrial action has been taken in various forms for about five months. We accept that it may be inferred that the pressure on Sydney Trains and NSW Trains caused by the protected industrial action has contributed to it improving its wages offer over time and thus has narrowed the gap between the parties. However, we consider that the bargaining has reached a point whereby the continuance of protected industrial action is very unlikely to contribute to the finalisation of the dispute about the claimed sign-on bonus, having regard to evidence concerning NSW Government funding constraints upon Sydney Trains and NSW Trains. Indeed, the mutual recrimination engendered by events since 13 February 2025 suggest that further protected industrial action may result in the parties moving further apart. Thus, the duration of the protected industrial action, considered in the entire factual context, weighs in favour of the grant of a suspension.

[10] The third matter for consideration (s 425(1)(c)) concerns the public interest and the objects of the FW Act. The public interest plainly invokes considerations wider than the direct interest of the parties. We consider that a suspension would not be contrary to the public interest and indeed would positively be in the public interest. In this respect, we take into account that a suspension would pause any disruption to train services in Sydney and regional NSW and would allow public confidence in the reliability of the rail network to be restored. In the absence of a suspension, we consider it likely that the protected industrial action will continue for a considerable period of time, and perhaps escalate, given the NSW Government's publicly-stated immovable opposition to the payment of the sign-on bonus. We do not consider that a suspension would be inconsistent with that part of the object of the FW Act in s 3(f), which concerns 'achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action'. The purpose of the suspension remains to assist the parties to make an enterprise agreement covering Sydney Trains and NSW Trains, and we would understand the 'clear rules governing industrial action' to include the temporary deprivation of the right to take protected action by way of a suspension under s 425. In terms of the specific enterprise bargaining objects in s 171, we likewise consider that a suspension would not be contrary to those objects since we consider it would improve the prospects of an enterprise agreement that 'deliver[s] productivity benefits to be achieved.

[11] The other matter which we consider relevant (s 425(1)(d)) is that the view of some RTBU members appears to have been inflamed by adverse publicity about the protected industrial action, and also by the s 471(4)(c) notices and the false characterisations of these by the RTBU as lockout notices. There is some evidence that this has meant that such members are taking matters into their own hands and are encouraging or organising industrial action beyond that authorised by the RTBU's leadership. We consider that a cooling off period, which would likely reduce ongoing adverse media publicity and render the s 471(4)(c) notices

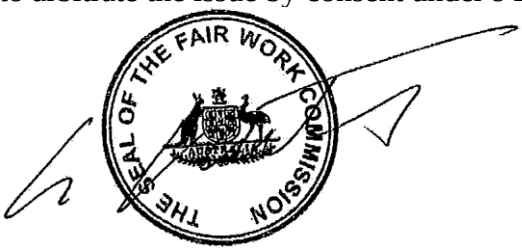
redundant, would allow this pressure to subside and for the RTBU leadership to obtain greater control over events.

[12] These matters all favour the grant of a suspension. For the reasons stated, we consider that a suspension of protected industrial action is appropriate. We are therefore required by s 425(1) to make a suspension order.

[13] We reject the submission of Sydney Trains and NSW Trains that the suspension should apply until 6 September 2025, being the earliest time they can apply for an intractable bargaining declaration to terminate all protected industrial action and proceed to arbitration. The purpose of a suspension under s 425 is to achieve a cooling off period in order to enhance the prospects of an enterprise agreement being reached, and not to operate as a de facto termination of bargaining. However, we consider that a relatively lengthy period of suspension is warranted. The evidence demonstrates that there have been previous instances of the voluntary suspension of protected industrial action for short periods, but this has not led to an agreement being reached, and protected industrial action has simply resumed at the end of each period. A longer period of suspension is, we consider, required to permit the parties to 'cool off', lock in the matters that have been agreed in principle, resolve the disputed issue, draft a final agreement and have it put to a vote free from the pressures imposed upon them as a consequence of taking protected industrial action.

[14] Accordingly, we have determined that it is appropriate to suspend protected industrial action until 1 July 2025. An order to this effect will be published together with this decision and will take effect from 10:00 pm tonight.

[15] The Commission will convene a further conference of the bargaining representatives on Friday 28 February 2025. This conference will be for the purpose, in the first instance, of confirming the matters agreed in principle and reducing those to writing. The next step will then be to endeavour to resolve the outstanding issue concerning the claim for a sign-on bonus. The parties may wish to consider whether one way to resolve this would be for the Commission to arbitrate the issue by consent under s 240(4) of the FW Act.



PRESIDENT

Appearances:

S Meehan SC for Sydney Trains and NSW Trains.

O Fagir, counsel, with *L Hamilton*, counsel, for the Australian Rail, Tram and Bus Industry Union, the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and

Allied Services Union of Australia, the Australian Manufacturing Workers' Union, the Association of Professional Engineers, Scientists and Managers, Australia and the Australian Municipal, Administrative, Clerical and Services Union.

J Emmett SC with *E Young*, counsel, for the Hon. Sophie Cotsis, New South Wales Minister for Industrial Relations.

Hearing details:

2025.

Sydney:
19 February.

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