



RailCorp

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Ms Sally McManus
Branch Secretary
Australian Services Union
NSW & ACT (Services) Branch
Level 1, 39-47 Renwick Street
REDFERN NSW 2016

Dear Ms McManus

ASU – REPORT ON DISCIPLINE PROCESS WITHIN RAILCORP AND STRATEGIC REVIEW OF INVESTIGATION FUNCTION

I refer to the ASU Report on the discipline process within RailCorp provided under covering letter to RailCorp on the 11th of August 2009 ("**the ASU Report**"). The ASU Report advises of a collation of experiences of ASU members relating to the RailCorp discipline process and makes some Key Recommendations.

I also refer to the consultation meeting with the ASU and the RTBU held on Thursday the 17th of September 2009 in relation to the Strategic Review of the Investigations function within RailCorp. The meeting provided a welcome opportunity for constructive discussion on the forward planning of functions and responsibilities proposed for the new structure as well as touching on the issues raised in your ASU Report.

As discussed and agreed at the meeting we look forward to any further comments you may have and we understand you will provide these to us by the 2nd of October 2009.

The ASU Report is a comprehensive document and one we envisage will generate future discussions in addition to those initiated in our recent meeting. Unfortunately RailCorp is unable to comment on the individual experiences as reported by the ASU without being about to review the facts and circumstances of each matter.

RailCorp is however able to comment on each of the Key Recommendations as set out by the ASU and we are pleased to make these preliminary comments following our recent meeting.

The Key Recommendations as set out in the ASU Report are set out below in bold and our preliminary observations follow.

- **Matters should be dealt at a local level with local management.**

In the first instance matters are dealt with by local management in consultation with Human Resources and where appropriate are referred for investigation. Various issues are considered at this stage, including the seriousness of the matter, the complexity and the range of employees affected and the safety of the workplace.

As part of the preliminary process for all investigations a careful review is conducted by the Manager of the Investigations Unit (in consultation where appropriate with the relevant General Manager) where matters similar to those above are considered. The preliminary review does not aim to make any conclusions as to the substance of the complaint. Consequently, in this sense, it may be the case that matters that are accepted for investigation because on their face they raise serious issues may ultimately be matters that unfold to be suitable for local management action. This is a course that is also open for consideration at the time of decision on penalty.

- **Managers should be empowered to deal with performance management and minor disciplinary issues at a local level with their knowledge of the dynamics of the workplace and the circumstances of the employee.**

The *Managing Poor Performance Policy* provides the authority and guidance for Managers to deal with performance issues. The *Discipline Policy* provides authority and guidance for managers to issue local management 'warnings' for minor conduct matters that, should the conduct continue, may warrant further action, such as discipline action.

Combined with the review process conducted by the Investigation Unit RailCorp is confident that there are procedures in place to allow and guide matters that are appropriate to be dealt with at the local level.

- **If line management is expected to deal with performance and disciplinary issues they are given appropriate training.**

This is an important point and we will consider the expectations on local management in this regard. We welcome your comments in relation to this issue.

- **That the investigative process should be transparent and the investigative body, whether local or centralized should be communicative and accessible.**

This is an important point. RailCorp follows guidelines for investigations and the communications that issue from such investigations. I do note that these communications generally provide contact numbers for ongoing inquiries from respondents about their matters and we are confident that our investigation team is generally accessible to inquiries.

Further, additional opportunities are available for respondents to investigations to contact the investigator should they feel the need to add to their response, either

in writing or through a further interview and this is encouraged at all times.

- **Investigations, whether conducted locally or by a centralised unit, should be conducted timely and thoroughly. No investigation should take longer than a month.**

RailCorp of course agrees that all investigations should be conducted in a timely manner and with this in mind agreed to the timeframes set out in the *RailCorporation New South Wales Collective Agreement 2008 (UCA)*. You would be aware that clause 37 of the UCA provides that uncomplicated investigations should be completed after 10-12 weeks from when an employee is notified of an investigation. The UCA also provides that irrespective of the complexity of the matter RailCorp is to communicate to the respondent at the 12 week point to advise of the reasons for delays and the anticipated timeframe for the current stage of the investigation to conclude. RailCorp endeavours to conclude all investigations in compliance with the UCA and is seeking to provide continuous improvement in this regard.

- **The purpose of a policy should be in the forefront of the minds of the people enforcing it.**

We assume that this is a reference to the *Code of Conduct*. RailCorp endeavours to reinforce the standards set out in the *Code of Conduct* and notes in this regard that all employees have been briefed in the RailCorp *Code of Conduct* and have the opportunity to seek clarification in relation to any issues they may have with respect to it.

If this Key Recommendation is a reference to the *Discipline Policy* then we are confident that the personnel responsible for investigations are compliant with the processes and protections within the Policy and this issue will of course be subject to further focus with the Strategic Review.

- **Allegations should be put to employees within a short period of time to allow the employee to present as comprehensive a defence as possible.**

RailCorp endeavours to put allegations to the respondent employee as soon as possible after the events have occurred and notes in this regard that this may often be contingent upon notification of the complaint. It may be the case that complaints are received some time after the incidents are alleged to have occurred. RailCorp will make an assessment in these circumstances as to whether an investigation is feasible and appropriate. (see also our response to Key Recommendation number one)

- **Allegations made about conduct that occurred in the past should be judged as to whether it is reasonable that a person could be expected to remember details in order to defend themselves. Unless there is overwhelming evidence, an investigation should not proceed if it is judged that it is not reasonable to expect a person to remember such details.**

Please see our response to the first Key Recommendation. We emphasise that RailCorp is obligated to review all complaints with a view to assessing the appropriateness of an investigation and will continue to be mindful of evidentiary matters and procedural fairness issues that arise out of such matters.

- **Allegations should be carefully and clearly drafted and explained.**

RailCorp agrees and is endeavoring to continuously improve its processes in this regard.

- **All evidence being considered by the employer should be available to the employee.**

You would of course be aware that procedural fairness does not require that all available evidence be provided to the respondent. It is RailCorp's role to investigate matters and evaluate the relevant evidence. It is RailCorp's responsibility to ensure that any evidence that is adverse to the respondent employee is put to the employee in order to provide them with the opportunity to respond and we will continue this practice.

Interviews should be an opportunity for an employee to explain in their own words what happened. Should questions need to be put to an employee, they should have access to these questions in writing before an interview so it does not become a test based on their level of anxiety or ability to recall on the spot. The employee should choose whether or not it is taped.

- The purpose of a discipline interview is for the respondent to explain in their own words the conduct that is subject of the investigation so in this regard we agree with you. The purpose of an interview is to expand and explore issues already raised by the written allegations, the employee's written response or that may arise from evidence adduced from the employee's verbal response during the interview. It is not possible nor practicable to provide written questions to all the avenues of inquiry that could potentially arise out of the interview situation as these are matters that flow from and arise during the course of the interview.

Whilst we acknowledge that the discipline process can be stressful for some employees we do not agree that the interview is a test of the respondent's ability to recall 'on the spot'. The interview provides ample opportunity for respondents to clarify and expand their responses and there is nothing to preclude a respondent requesting a further interview or from providing further written responses should they wish to do so.

Taped interviews are critical to the accuracy and integrity of the investigation process and protect both the respondent and RailCorp with regard to the accuracy of the respondent's response. This is in the best interests of both the respondent and RailCorp and it is difficult to accept that there can be any criticism in this regard. The process also provides that a respondent is provided with a record of the interview for their records.

- **Where the employee requests it, advocacy should be an inherent part of the process.**

Advocacy, as you would be aware, is the art of conducting or presenting arguments. RailCorp does not accept that representatives and support persons have a role conducting or presenting arguments in discipline interviews at a time when RailCorp is seeking factual answers from an employee about their conduct in the workplace. The most accurate and first hand evidence about these matters comes from the employee. Where representatives present arguments on behalf of the respondent at other times, such as through written responses, RailCorp considers these arguments and also considers that any further facts provided in these responses are at the employee's instruction and therefore can be relied upon. We encourage our investigators to be responsive to questions raised throughout the investigation process and we trust that this will be an area for continuous improvement.

Thank you again for attending our meeting on 17 September. RailCorp welcomed the opportunity of being able to provide an outline of the proposed consolidated approach to investigations that we are confident will be a starting point for a dedicated and simplified process for managing investigations within RailCorp.

As agreed we look forward any further comments you may have in relation to the Strategic Review by the 2nd of October 2009.

Yours sincerely



Irene Rusak
Corporate Counsel & Company Secretary

24th September 2009