

THE ACTIVIST



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KIWI RAIL MECA TALKS TO BEGIN

KR and the Union have agreed that the wage talks will begin on Thursday this week in Wellington. All KiwiRail Industrial council representatives, except for those based in Auckland (4), will be attending face to face at the Thorndon Hotel. On Thursday the Union shall meet to prioritise and finalise the claims received from Branches and the parties will meet in joint session on Friday. A joint statement will be released following this session.

NO LOSS TO SICK LEAVE FOR CALLING IN FATIGUED

People who are fatigued from bad rostering are not 'sick'. The RMTU is challenging employers who deduct sick leave from workers when they call in fatigued, if the cause of their fatigue is from unsafe rostering arrangements.

Unsafe rosters that prevent workers from getting adequate sleep are a contributing factor to fatigue. If a person is too fatigued to work safely and using their legislative right to cease unsafe work (red card), they must notify their Manager and potentially do another non-safety critical task instead. The Union believes the deduction of sick leave is unlawful.

KNIC REPORT: HEADING INTO STORMY WATERS?

The RMTU-KiwiRail Networks Industrial Council met on 18 August via remote video link as a consequence of the re-imposition of Alert Level 3 restrictions in Auckland and Alert Level 2 restrictions elsewhere. In hindsight your representatives think this was an error as meeting in this way did not make a difficult conference any easier.

The circumstances in which we met were very challenging. As a consequence of an ill-advised recruitment freeze post-COVID, and now partly rescinded, KNIC representatives, regional organisers and site delegates have been dealing with what appears to be an increase in the desire to contract out core work. In short, running down staffing levels to the point where it is difficult to fulfil maintenance and renewal commitments has meant increasing pressure on managers to out-source work. This has created a climate of mistrust and suspicion

and relations have deteriorated.

This has been compounded by the failure of the KNIC to deliver on joint commitments made by KiwiRail and the RMTU at the conclusion of the last wage round. There are good reasons for this, in large part they are related to COVID19, but it has contributed to the frustration representatives are feeling and is reflected in the conversations they are having with front line members.



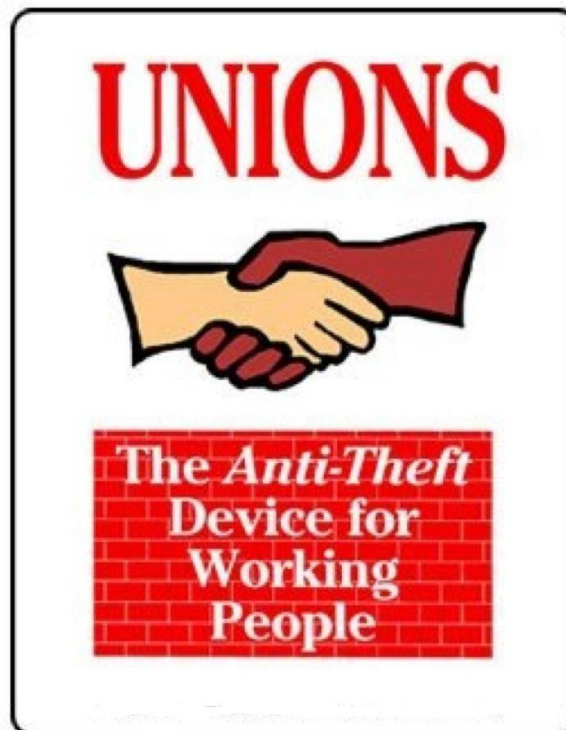
This is for the information and guidance of RMTU members only!

Representatives are of the view that elements in KiwiRail management are paying lip service to the obligations under the Industrial Council's terms of reference and there is no meaningful commitment to participation in some parts of the country. Further, it appears that management are being less than transparent in sharing information (see separate article on Culverts). Representatives report that front line members are disconnected from HPHE and there is a growing sense of disenchantment with this initiative as the perception is that there is no real commitment towards it at the very top of the organisation.

If we don't deliver something tangible very quickly for Network Services members around items like OJT allowance; pay and progression (including but not limited to internal and external relativities e.g. ganger pay rates compared to senior track maintainers and traction workers compared to the external labour market); and standby and call-out arrangements we are heading for very stormy waters indeed. We are going into substantive MECA renewal talks as this is written and the outlook is far from positive given the above circumstances.

In the interests of balance, things are not completely negative. KiwiRail and the RMTU have worked well together on finding an engineering solution to the risk posed by hi-rail diggers and KNIC was pleased to hear a report from the joint working party on this and approve progress to the next steps in procurement and commissioning. Thank you to our representatives Ron Nijssen and Rowan Hodgson for their work on behalf of members.

Secondly, we have made some progress on jointly developing an e-learning module for managers on their obligations around Clause 29 of the MECA – that's the one on proper consultation if the contracting out of work is being considered. KiwiRail Employment Relations Manager Maryan Street has worked really hard with us and the Learning and Development people on this so credit where it is due.



RED CARD ON ASBESTOS EXPOSURE

Delegates and H&S reps representing maintenance and operating staff at Transdev Wellington and Hyundai Rotem have 'parked up' the AG 222 generator van due to the presence of potentially friable asbestos on the underside of the vans. The asbestos containing bitumen seal is degraded with pieces falling off potentially releasing asbestos fibres. RMTU Delegates urge Transdev to expedite the removal of the asbestos so it is safe to come back into service.

SMOKES AND MIRRORS AND CULVERTS

In the last issue of The Activist we were pleased to able to report that a \$26m cash injection had been given to KiwiRail for a 'shovel ready' project to undertake deferred maintenance and drainage work across the country. We had been told this would create around 200 jobs nationwide, 90 of which were to be filled by filled by trainees. On this basis the RMTU agreed these roles will be filled by people employed on a fixed term basis i.e. for the duration of the project.

Since then we have discovered that the work is the equivalent of the hours 200 workers would do over ten months, not 200 new jobs. That is, some of the work would be being

done by existing staff. Further, we have been told only between new 55-65 front line workers on fixed term agreements will be directly employed by KiwiRail. To add insult to injury, it appears the intention is to contract out an as yet unspecified proportion of the work and some of the funding will be used to train contractors. Naturally we are seeking more clarification as getting this information proved challenging to say the least and our more mature members will understand when we say the discussions were like a scene out of the 1970s TV series 'Yes Minister'.

WORKERS ON AUCKLAND METRO RAIL DISADVANTAGED

The union for rail workers has major concerns about the treatment of workers on the Auckland Metro Service through the latest Level 3 lockdown for COVID-19.

Rail and Maritime Transport Union Northern Regional Organizer Rudd Hughes says operators Transdev and maintenance contractor CAF are effectively labour hire companies for staff on the Auckland Transport owned commuter rail system.

He says workers who are at higher risk from COVID-19, who have family members or partners who are at risk, and those over the age of 70, will have to use sick leave, annual leave, and then either leave without pay or advanced annual leave, to cover their absence when protecting themselves or their families.

"This will mean those without leave have the stark choice of either coming to work and putting themselves and their families at risk, or going without pay."

Mr Hughes says this is a disgrace and companies who take millions of dollars of profit out of New Zealand every year should be giving something back to the people who work for them.

He says the RMTU is calling upon Transdev and CAF to do the right thing and show their owners understand what it is to be a team of five million by paying discretionary leave to these vulnerable and essential workers.



SECOND WAVE OF SUPPORT FOR DUNEDIN RAILWAYS

The RMTU backed campaign against the mothballing of Dunedin Railways Ltd rolling stock and the axing of our members' jobs, may not have stopped the redundancies and cessation of passenger services going ahead, but it did generate a great deal of community and public support for keeping the trains rolling. Dunedin Railways operated tourist trains on the Taieri Gorge line as well as elsewhere and for 30 years was an iconic tourist attraction in Dunedin.

The Council called for expressions of interest from parties interested in buying and operating the railway's assets and fifteen such parties submitted applications. A reference group has been formed including Dunedin City Holdings Ltd (the investment arm of Dunedin City Council) Chair Keith Cooper, City Councillor Jim O'Malley, Council Group Manager Transport Jeanine Benson, rail specialist and former Dunedin Railways director Graeme Smart, Dunedin Host member Ralph Davies and former trustee of the Taieri Gorge Railway, and former City Councillor and current Otago Regional Councillor Kate Wilson. The RMTU is seeking to join this group as it is charged with making recommendations to Council by October on the future of the assets.

We remain confident that with the requisite vision and will there is a future for this iconic railway and its rolling stock and for experienced and knowledgeable rail workers and RMTU members to operate it.

We may have lost the first round of the fight to save jobs but we are far from out for the count and the struggle carries on.

LIFELINE FOR WAIRIO BRANCH LINE?

Readers of the last issue of The Activist will recall that KiwiRail had confirmed they were planning for the closure of the Ohai to Invercargill Branch Line, commonly referred to as the Wairio Branch.

Since then there has been some encouraging signs that may see the line remain in

operation and even upgraded. The absurdity of threatening the closure of a line in which a great deal of investment has been sunk in recent years is self-evident.

As we understand it the ink is still not on any binding documents but discussions have been positive between KiwiRail and Fonterra. WE understand that the cost of road bridging the coal in the event of the line closing is vastly more expensive than the rail pricing being sought by KiwiRail.

RECENT EMPLOYMENT AND PRIVACY LAW DEVELOPMENTS

Over the past few weeks there have been a number of significant developments affecting employers, including introduction of new privacy and employment legislation, and the first (of likely many) cases dealing with employers reducing wages to 80% without consent during lockdown. Information about these are set out below.

New Privacy Legislation

New privacy legislation was passed by Parliament in late June. There are a number of new obligations on businesses, including:

(a) A legal obligation to notify both the Office of the Privacy Commissioner, and affected individuals, of any breach of privacy if that breach poses a risk of serious harm. Penalties can be awarded for a failure to notify;

(b) The Privacy Commissioner will now have the power to demand release of personal information (before it could only make recommendations);

(c) The Privacy Commissioner will be able to issue compliance notices: failure to comply may result in fines of up to \$10,000. New criminal offences are also introduced;

(d) The new legislation governs cross-border disclosures, with controls on disclosing New Zealanders' personal information overseas; and

(e) Application of the new law to businesses dealing with New Zealanders' personal information, whether they have a legal or physical presence in New Zealand or not.

This new law comes into force on 1 December 2020.

Triangular Employment Relationships

A new law came into force on 27 June 2020 allowing employees to raise a personal grievance against not only their employer, but also any "controlling third party" who has control or direction over the employee's work. Employers can also apply to add a "controlling third party" to personal grievance claims brought by their employees.

A triangular employment relationship is where a worker is employed by one employer, but works under the control

or direction of another. Secondment arrangements may be impacted, as well as organisations who engage temporary workers/contractors from labour hire or personnel/recruitment companies (as well as the labour hire or personnel/recruitment company itself).

The criteria for adding a controlling third party to a grievance claim include that there is an arguable case the third party's actions caused or contributed to the grievance, and

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notification timeframes were complied with. Different 90-day timeframes apply for notification to the controlling third party by either the employer or employee:

- By the employee: 90-days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee (the standard timeframe);
- By the employer: within 90-days of the personal grievance being raised with the employer (this is new).

This means that a "controlling third party", previously shielded by contractual arrangements being between the worker and labour hire agency (or other employer), now has legal exposure to any grievances that an employee may raise. Assuming the employee is successful on their claims, and that the actions of the controlling third party caused or contributed to the grievance, the controlling third party may be ordered to pay reimbursement of wages and/or compensation. The extent to which the actions of both the employer and the third party contributed to the situation must be taken into account in determining what remedies are payable by each.

That means that where the controlling third party no longer has work for the person to do, it might not be as simple as notifying the original employer/labour hire company. As usual, the best defense for any personal grievance is by acting justifiably, including by being as fair and reasonable as possible in the circumstances. This could involve the third-party consulting with employees hired on contract if a situation that will affect them arises.

If you are a labour hire or recruitment company, your legal position is not

necessarily altered, but we suggest that it is best practice for you to keep communication lines open with your employees and clients, addressing any problems before they arise. If a personal grievance is raised, you and your client might both need to respond to the employee.

Covid-19 updates - Recent cases

Recent Employment Relations Authority determinations consider whether an employer's decision to pay staff 80% of their wages during lockdown, without the consent of those employees, constituted an unlawful deduction under the Wages Protection Act 1983 and/or their employment agreements. The result in both cases was the same:

reduction of wages to 80% of usual salary or wages, without the consent of employees, was unlawful.

In one case, Sandhu and others v Gate Gourmet New Zealand Limited [2020] NZERA 259, reduction of wages to 80% resulted in employees being paid less than their minimum wage entitlements, which was unlawful under the Minimum Wage Act 1983. The employer argued that no money was owing as the employees were not working. The Authority disagreed.

Gate Gourmet provides inflight catering services

at Auckland airport. Although it is considered an essential service, there was very little work to do and it had to partially shut down operations. Employees were entitled under their employment agreement to be paid minimum wage for full time employment (minimum 40 hours a week). Employees were offered three options: (a) take all of their entitled annual leave, (b) be paid 80% of their normal pay, or (c) be paid 80% of their normal pay and use their annual leave entitlements to supplement their income to receive 100% of their normal pay. Although there was initially some agreement, the union later objected on the basis Gate was not



entitled to reduce the pay of any employee below the minimum wage of \$756 per week for a full-time employee.

The Authority found that the parties cannot contract out of the Minimum Wage Act 1983, so the agreement or otherwise of the parties to the proposal was irrelevant. If the employees were ready, willing and able to carry out their function in an essential industry, then Gate was required to pay at least the minimum wage regardless of any agreement they may have made to the contrary. The employees were entitled to be reimbursed the shortfall in wages. No penalty was awarded however because of the difficult and complex situation the parties found themselves in as a result of the pandemic.

In the second case (Raggett and others v Eastern Bay Hospice Trust t/a Dove Hospice [2020] NZERA 266), after Dove Hospice's retail stores were closed, employees were paid 80% of their wages and then made redundant. The employer extended the notice period to provide employees with additional financial support during lockdown, with the first half of the notice period to be paid at 80%, and the second half at the wage subsidy rate. This was also considered to be unlawful:

(a) None of the grounds for deducting money from wages set out in the employment agreement covered the circumstances caused by Covid-19 restrictions;

(b) The workers were ready and willing to work. They would have been able to fulfil their obligations under their employment agreements had it not been for the Covid-19 restrictions and Dove Hospice's decision to not require them to work;

(c) There was a contractual obligation to pay, and no consent to deduct from, full wages;

(d) Where Dove Hospice extended the contractual notice period, it could not then set a different remuneration rate for that. The extended notice period at a new rate would have been allowed had employees agreed to that – here it was imposed on them.

The Authority ordered Dove Hospice to pay the shortfall in wages. The question of whether a penalty should be ordered has been left open, until the second part of the claim dealing with the dismissal on grounds of redundancy has been heard.

These are early cases and the approach taken by the Authority cannot be taken as the last word on the subject.

The Employment Court also dealt with an application from a former employee to freeze the assets of the employer on an interim basis, which was granted. The employee's claim includes that she was only paid the wage subsidy during lockdown, instead of her usual wages, and was eventually dismissed. The Court has not yet considered this claim, or issued a decision on reduction of wages during lockdown – watch this space.

In the meantime, several recent cases have dealt with the more general issue of remote participation in the Covid-19 environment. The Employment Court has shown a willingness to progress matters by allowing the hearing of evidence by audio-visual link. The Court has also granted applications to serve documents on defendants living outside of New Zealand. It is assumed there will be no opportunity to attend a hearing from overseas (at least in the near future) and so those cases are likely to proceed by AVL also.

Wage Subsidy Extension

In other Covid-19 related news, the Wage Subsidy scheme has ended. The Wage Subsidy Extension scheme is currently available. Applications are open from 10 June to 1 September 2020. Employers can apply to cover the wages of their employees for an 8-week period.

There have been some changes to the criteria for accessing this support. To qualify, employers must have experienced at least 40% decline in revenue for a continuous 30-day period, as compared to the closest period in 2019. The relevant 30-day period must be in the 40 days before an employer applies for the Wage Subsidy Extension. The decline must be Covid-19 related. The business must also have taken active steps to mitigate their loss.

The employees named in the application for the Wage Subsidy Extension must be retained

for the duration of the subsidy extension. If an employee has been made redundant, a Wage Subsidy Extension application cannot be made for that employee, unless the redundancy notice is cancelled and the employee is re-hired.

Employers must try their hardest to pay employees at least 80% of their usual wages. There is no criterion about what 'trying their hardest' looks like. If that is not possible, then at least the wage subsidy extension rate must be paid. Consent issues will arise.

WORKSAFE REP- HEALTH AND SAFETY REP & SUPERVISOR TRAINING

WorkSafe Reps is now offering online courses as well as face to face classroom based learning.

For KiwiRail HSAT Reps, contact KiwiRail's Learning and Development on KLE to arrange a course KLE.Help@kiwirail.co.nz Or go to Worksafereps.co.nz Phone: 0800 336 966

2/3 September, Initial Stage 1 H&S Rep - Blended Learning, Virtual Learning

8 September, Managers/ Supervisors/ Team Leaders Health & Safety Training, Virtual Learning

9 September, Preventing & Managing Fatigue, Virtual Learning

15 September, Stage 2 - Investigation & Risk Management, Virtual Learning

16 September, Creating Positive Workplaces, Virtual Learning

1/2 October, Initial Stage 1 Health and Safety Rep Training, Whangarei

17 September, Creating Positive Workplaces, Auckland Central



18 September , Stage 2 - Investigation & Risk Management, Auckland Central

29/30 September, Initial Stage 1 Health and Safety Rep Training, Auckland Central

9/10 September, Initial Stage 1 Health and Safety Rep Training, Auckland South

23 September, Preventing & Managing Fatigue, Auckland South

24 September, Creating Positive Workplaces, Auckland South

11/12 August, Initial Stage 1 Health and Safety Rep Training, Hamilton

25 August, Preventing & Managing Fatigue, Hamilton

26 August, Creating Positive Workplaces, Hamilton

8 September, Stage 2 - Investigation & Risk Management, Hamilton

9 September, Managers / Supervisors / Team Leaders Health & Safety Training, Hamilton

19 August, Creating Positive Workplaces, Palmerston North

20 August, Stage 2 - Investigation & Risk Management, Palmerston North

NORTHERN REGION

TDK MAKE MASKS MANDATORY

Pre-empting any government directives, TDK have made the wearing of masks mandatory for staff. This wholeheartedly approved of by the RMTU. The Ministry of Health have come out and stated plainly that Companies should provide masks and make people wear them, especially where there is contact with the public or where social distancing is difficult. While it is not yet law to wear a mask in public, this is a lawful instruction by the Company, especially as it will keep workers, their families and the public safer. It is the same as wearing any other PPE.

NORTH TUGZ BARGAINING

The North Tugz bargaining continues to be problematic and that is just getting to the negotiation table. Currently, at Level 3 we can't continue the bargaining. However, prior to the current lockdown, North Tugz indicated that they would not go back to the table while there was an outstanding claim for backpay, from another union, still on the table. Clearly this has not sat well with the RMTU and we have put them on notice that this is not in good faith and is unacceptable. At the time of writing they are seeking advice. Watch this space

SPEED RESTRICTIONS ON THE AUCKLAND METRO NETWORK

There is currently a 40 kph speed limit on the Auckland Metro Network while repair and maintenance on the track is done. It is ridiculous that the track has been allowed to get to this state. For years the RMTU have warned KiwiRail about their failure to staff correctly. Now, of course, KR are scrambling to get the number of workers necessary to complete the work. Inevitably, KR have turned to contracting out. The RMTU never likes to see the core work of its members contracted out and we questioned KR about the need for this. Their reply was they had very few takers when the work was offered around the country while Auckland has been at Level 3 lockdown, therefore they have had to go to contractors. There will be more jobs coming up and these will be advertised in house and (hopefully)

Auckland will be back down to, at least, Level 2 and these jobs will be more attractive for our members.

There are also knock on effects for trainee drivers. We have been in discussions with TDAK over how they are going to sign off drivers when they only have experience at driving at 40kph. TDAK have put forward a proposal and we are currently in consultation with them.

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BOP REGION

KIWI RAIL MURUPARA

The Murupara Terminal has operated six trains per day seven days a week for a number of years. Operations at the Murupara Log Yard have been significantly impacted due to Covid-19 affecting log markets worldwide. For the foreseeable future, Kaingaroa Timberlands have decreased the amount of trains mostly during the weekends.

Due to these changes the Murupara Roster Committee have entered into the consultation process with Murupara's Terminal Operations Manager, Ashley Burton and have put forward some great discussion. They have actively designed several rosters that encompass the new requirements. Through this process, we have almost agreed to a new roster that is beneficial to both KiwiRail and our RMTU members.

C3 SULPHUR POINT DELEGATE CHANGES

C3 Straddle Delegates Nate Brown and Ravi Bhatia have resigned from C3 and Brian Henry would like to step down as a RMTU Delegate. The RMTU would like to thank them all for their contributions but pay special

mention to Nate as a Port Exec Committee Member. He offered a lot of advocating on behalf of his colleagues. Delegate Positions have now become available in our Straddle Operation Team. Nominations were called last month and we are pleased to announce we have three elected delegates in Andrew Bulloch, Ravi Brar and Rick Henry to work alongside our wonderful Rata Sidwell.

CHAMPION

Due to the loss of one of their biggest contracts, Champion made some redundancies. Our Delegates Gary Cluitt and Dennis Collins were unfortunately a part of this decision. Therefore, members have elected two new delegates in Michael Hopa and Aroha Te Haara. They have been busy at negotiations and now have a proposed settlement that we will be putting forward to members at a report back meeting.

For years one of our main claims has been to increase the coverage clause to as many departments/employees as possible. We are confident we have finally achieved this.

IXOM

Ixom Morrinsville negotiations went really well. Bargaining largely involved the rewriting of the Training Matrix and we are pleased to announce that we have come to a full agreement and the new Collective is currently sitting with RMTU Head Office to be signed off. We would like to thank our delegate Kurt Spencer for his hard work during the negotiation process.

Ixom Mount Maunganui would also like the same opportunity to rewrite their Training Matrix so we have asked for a meeting to clear this up as well as a few other small issues.

PORT OF NAPIER CRANES

The Mobile Harbour Crane Agreement at the Port of Napier has expired. The local Branch and management are reviewing options around its renewal. Thank you to our RMTU Branch Officials and delegates for their assistance with this process.

CENTRAL REGION

ANNIVERSARY DATE ANOMALY – TDW

We were recently contacted by a member employed by Transdev Wellington who observed that their Annual leave entitlement accrual was incorrect. He was getting 4 weeks a year and not the 5 he should be getting for more than 7 years service. Upon closer scrutiny it was found that the information on his employment history provided to Transdev in 2016, when the operation transferred to Transdev, was incorrect. We have requested that Transdev undertake an audit on anniversary dates provided by KiwiRail to ensure the accuracy of the data used for leave purposes.

SOUTHERN REGION

SOME SOUTH ISLAND BRANCH AGMS GO AHEAD IN COVID LEVEL 2 & CANTERBURY RAIL BRANCH MAKES HISTORIC DECISION

Strict physical distancing and application of COVID19 protocols meant the Canterbury Rail Branch, the West Coast Branch and the Otago Rail Branch could all hold their AGMs during the week of 17th August under Alert Level 2.

The Lyttleton Port Branch on the other hand was forced to postpone its AGM scheduled for 19th August as it was likely the attendance would breach the 100 person limit on gatherings. Whilst this was disappointing the Branch took the correct decision – health comes first!

The Canterbury Rail Branch elected our first woman rail branch chair in Annette Telfer, a delegate and train manager on Scenic Journeys trains based in Christchurch. This is a historic moment in the RMTU and one of which we can be proud. The Branch acknowledged the invaluable contribution made by outgoing chair Graham Elam who has been a stalwart in maintaining unity in Canterbury Rail and supporting other branches and unions in their struggles over the years.



The Port Otago Branch is scheduled to hold their AGM for 25th August under Level 2 protocols.

DELEGATE TRAINING IN CHRISTCHURCH SET DOWN FOR 15TH SEPTEMBER

COVID19 restrictions have stymied face to face delegate training in the South Island this year and whilst the RMTU has been innovative and developed modularised training to be delivered by platforms like ZOOM, there is no substitute for getting people together in a room.

Accordingly we are inviting new and some not so new delegates and active members to attend training in Christchurch on 15th September. At this stage we have invitees from Canterbury Rail and Port, Southland, Otago and the West Coast.

If any other South Island based members want to find our more please contact our South Island Regional Organiser John Kerr on 027 246 4941 or jkerr@rmtunion.org.nz.



LYTTLETON PORT BARGAINING UPDATE

Readers will be aware for the last issue that these negotiations are formally underway. The Branch is collating remits but COVID19 has prevented us meeting to endorse a log of claims.

In the meantime senior Branch officials have been engaged in very positive pre-bargaining discussions with LPC, sorting out items such as the Bargaining Process Arrangement and discussing the general shape of a potential settlement.

It is very early days but there are positive signs that in a number of areas our interests are aligned.

FATIGUE RISK MANAGEMENT GROUP MAKES PROGRESS AT LPC

The terms of reference for this work have been agreed in principle and future meetings have been scheduled. LPC has also initiated discussions with other waterfront unions on fatigue and is using the same approach and facilitator that was used with the RMTU. It's been a long time in coming and we are a long way from reaching agreement on substantive issues but to date there has been a willingness to discuss matters in an open and transparent way between RMTU and LPC representatives.

QUALITY MARSHALLING AND PRIME PORT NEGOTIATIONS IN TIMARU CLOSE TO SETTLEMENT

Members have instructed their negotiation teams in both sets of bargaining at Timaru to proceed towards settlement. We are sorting through the fine print and hope to have proposed terms of settlement and collective agreements ratified over the next couple of weeks.

**BE SAFE, BE
HEALTHY, BE KIND
AND ABOVE ALL
ELSE**

BE RMTU!