IN THE MATTER OF THE ARBITRATION ACT 1996

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N :

GREAT NORTH EASTERN RAILWAY LIMITED

Claimant

- and -

NETWORK RAIL INFRASTRUCTURE LIMTED

Respondent

PARTIAL AWARD

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1. I make this Partial Award in connection with an application by the Claimant, Great North Eastern Railway Limited ("GNER"), to lift a stay on these arbitration proceedings which I ordered, with the consent of both parties, on 4th June 2004. For the reasons I give in paragraphs 16 – 23 below, I have decided to lift the stay for the limited purposes I refer to in paragraphs 24 and 27. However, although the ultimate question I have had to decide might be thought quite a short case management decision, it has raised a number of issues on which I have had the benefit of considerable written and oral submissions from the parties. In order properly to explain the reasons for my decision, therefore, it is necessary to elaborate a little upon the background to this arbitration, and its relationship to a different dispute resolution procedure to which the Respondent, Network Rail Infrastructure Limited ("Network Rail"), wishes to refer the present dispute with GNER.

Background

This arbitration

2. In February 2004 I, Stephen Moriarty QC, was appointed sole arbitrator in relation to a dispute between GNER and Network Rail concerning alleged damage to rolling stock leased by GNER, which arose out of a derailment at Hatfield which occurred on 17th October 2000. I was appointed arbitrator pursuant to clause 11.1 of a Track Access Agreement ("TAA") between GNER and Network Rail, under which disputes arising under certain provisions of that agreement were to be resolved by mediation followed, if necessary, by arbitration, pursuant to the Access Dispute Resolution Rules ("ADR Rules"). My appointment was confirmed on behalf of the parties by Mr Chris Blackman, the Disputes Secretary of the Access Disputes Resolution Committee ("ADR Committee") on 19th February 2004, following the failure of mediation to resolve the dispute between the parties. The seat of the arbitration is England.

3. GNER's claim against Network Rail is pursued under clause 8.2 of the TAA, which is one of the provisions which is subject to mediation/arbitration under the ADR Rules if a dispute arises. Clause 8.2 requires Network Rail to indemnify GNER against *inter alia* loss and damage in certain circumstances, including damage to vehicles arising directly from Network Rail's negligence. GNER contends that it suffered loss in the amount of £5.2 million on account of damage to rolling stock, and that Network Rail is liable to indemnify it under clause 8.2 because, amongst other things, the damage arose directly from Network Rail's negligence. For the purposes of the arbitration, Network Rail admits that it is liable to GNER under clause 8.2, and it also admits the quantum of GNER's loss.

4. However, the indemnity to which GNER is entitled under clause 8.2 of the TAA is expressly stated to be *"subject to any limitations provided for in the Claims Allocation and Handling Agreement"*. The reference to the Claims Allocation and Handling Agreement is to another agreement between GNER and Network Rail ("CAHA") which contains,

amongst other things, a number of limitations (in clause 16) upon the extent to which a railway industry party may recover its loss in respect of damage to property resulting from a single event or circumstance for which one or more other industry parties would be liable at law. In particular, by clause 16(ii) of CAHA, the recoverable loss is subject to a £5 million cap.

5. The effect of this limitation, however, is strongly disputed by the parties. GNER contends that clause 16(ii) is void for ambiguity and/or uncertainty; alternatively that, on normal principles of construction applicable to exclusion clauses and limitation clauses, it is not effective to limit liability in cases of negligence. Even if neither of those arguments is right, GNER also contends that, on the proper construction of clause 16(ii), it is entitled to recover £5 million from Network Rail (plus interest) if not the full £5.2 million. Network Rail, on the other hand, argues that clause 16 of CAHA does effectively limit the extent of its liability under clause 8.2 of the TAA; and that, on the proper construction of that limitation, it may not be obliged to pay GNER anything at all, because of claims which it, Network Rail, has against two other parties – Jarvis PLC ("Jarvis") and Balfour Beatty Rail Infrastructure Services Limited ("Balfour Beatty") – for damage to Network Rail's infrastructure arising from the same derailment incident at Hatfield which caused property damage to GNER.

The RIDR Committee procedure

6. By clause 22.1 of CAHA, it is provided that (except for a proviso which is inapplicable to this case) any dispute arising out of or in connection with CAHA shall, unless resolved or referred to mediation by agreement, be referred to a committee known as the Railway Industry Dispute Resolution Committee ("RIDR Committee") pursuant to the Railway Industry Dispute Resolution Rules ("RIDR Rules"). Clause 22.1 goes on to provide for referral to the RIDR Committee to be followed, if necessary and if permitted, by arbitration pursuant to the RIDR Rules. The RIDR Committee is a committee established under the RIDR Rules, comprising representatives from various sections of the railway industry, with a chairman who also has experience of the railway industry, but

who during his term of office is not to be connected with any railway industry party. Under Rule A1.1 of the RIDR Rules, the RIDR Committee has power to discuss and settle disputes between railway industry parties which have been referred to it, either pursuant to a provision in CAHA (or other agreement between two or more industry parties) which requires an issue to be resolved pursuant to that part of the RIDR Rules, or pursuant to an express reference by the parties to the dispute.

7. After the conclusion of a hearing before the RIDR Committee, the RIDR Rules (Rule A8.8.1) provide for the members of the committee, and one representative of each of the parties to the dispute, to try to resolve it by unanimous agreement. If the dispute is not resolved by unanimous agreement, Rule A8.8.1 provides (subject to a limited power of postponement) either for the Chairman of the Committee to make a ruling as to the resolution of the dispute, or to declare that the dispute has not been resolved. In either eventuality, a party to the dispute may then refer it to arbitration under Part C of the RIDR Rules, subject to the time limits referred to in Rule C1.

8. Given the potential for an arguable overlap between the application of the RIDR and ADR procedures to a railway industry dispute, provision is also made for resolving any dispute as to which procedure is the applicable one. Under the ADR Rules in force when this arbitration was commenced, such a dispute was to be resolved, in the first instance, by the Secretary of the ADR Committee, followed by a reference to the Chairman of the RIDR Committee if either party refused to accept the ruling of the Secretary of the ADR Committee. (Under the current version of those rules, it is now the Chairman of the ADR Committee who is initially to decide the question, followed by reference to the Chairman of the RIDR Committee.) Under the RIDR Rules, if there is a disagreement between the parties as to whether a dispute falls to be resolved in accordance with the ADR Rules or the RIDR Rules, the matter is to be determined by the Secretary of the RIDR Committee, followed by reference to the Chairman of the RIDR Committee, if either party refuses to accept the ruling of the RIDR Committee Secretary. Thus, although there is a difference under the ADR Rules and the RIDR

Rules as to the person initially charged with deciding by reference to which set of Rules a dispute should be resolved, under both set of Rules it is ultimately the Chairman of the RIDR Committee who makes the decision if one or other party to the dispute refuses to accept that initial decision.

9. I mention the existence of these provisions for resolving a dispute as to the applicable dispute resolution rules because, prior to my appointment as an arbitrator under the ADR Rules in February 2004, there was indeed a dispute between GNER and Network Rail as to whether this dispute should be determined under the ADR procedure, or under the RIDR procedure. On 11th June 2003, Burgess Salmon wrote to Network Rail on behalf of GNER summarising the property damage claim against Network Rail under clause 8.2 of the TAA, and making clear that they were instructed to ask the Secretary of the ADR Committee to initiate the dispute resolution procedure under the ADR Rules (initially mediation) if Network Rail did not admit liability by the date specified. However, Network Rail responded on 3rd July 2003 that this was a case in which the relevant provisions of the ADR Rules called for the dispute to be referred to the RIDR Committee under the RIDR Rules (because the interpretation of clause 16 of CAHA was a matter for that committee), and inviting GNER to agree. When agreement could not be reached on the appropriate procedure, GNER referred this preliminary matter to the Secretary of the ADR Committee (Mr Blackman) under the ADR Rules, who ruled in GNER's favour on 4th September 2003 that the dispute should be referred to mediation followed, if necessary, by arbitration, under the ADR Rules. Network Rail then referred the matter to the Chairman of the RIDR Committee, as it was entitled to do under the ADR Rules. However, the Chairman of the RIDR Committee (Mr George Renwick) published his decision on 15th October 2003 determining, again in GNER's favour, that the dispute should be resolved by mediation (followed by arbitration if necessary) under the ADR Rules.

The earlier stay of this arbitration

10. It was against that background that I was appointed arbitrator under the ADR Rules, following the failure of mediation to resolve the dispute. Before I turn to the question which I have now been asked to decide, however, there is one other matter bearing upon that question, which I should mention; namely the stay of this arbitration which I ordered in June 2004. I have already referred to the fact that GNER is not the owner of the rolling stock which was damaged in the Hatfield derailment, but rather the lessee of those vehicles, leased from HSBC Rail (UK) Limited ("HSBC"). In its Statement of Claim, GNER claimed that a part of the loss sustained as a result of the derailment (the write-off costs of train carriages damaged beyond repair) was sustained by HSBC as owner rather than by itself as lessee (albeit reserving the right to claim the loss as lessee if it was wrong on its primary contention). If GNER was correct on that point, any loss which HSBC was entitled to recover from Network Rail would, of course, be free from the cap under clause 16 of CAHA.

11. Upon close of pleadings with service of GNER's Reply, Burgess Salmon therefore wrote to Kennedys on 22nd April 2004 suggesting that this point could most effectively be resolved in Court proceedings, and Network Rail was invited to agree to a stay of these arbitration proceedings pending determination of that issue. Eventually, it was agreed that a stay was appropriate, and on 4th June 2004 I ordered that this arbitration be stayed on the basis that each party had liberty to apply on 24 hours notice to re-instate the arbitration. Thereafter, HSBC commenced proceedings in the Commercial Court against Network Rail seeking damages for damage to the rolling stock of which it was owner, but on 16th March 2005 Mr Justice David Steel handed down a judgment in those proceedings determining that HSBC was only entitled to recover damages for damage to its property as owner in respect of any permanent injury to its reversionary interest; and holding that HSBC had not suffered any such permanent damage in this case. That decision was unanimously upheld by the Court of Appeal on 25th November 2005.

12. Since then, two things have happened which it remains to note. First, on 23rd March 2006, Burgess Salmon wrote to me, on behalf of GNER, formally applying for the stay of this arbitration to be lifted. Secondly, following earlier correspondence between the parties, Kennedys wrote to the Secretary of the RIDR Committee, on behalf of Network Rail, on 30th March 2006. In that letter it applied to the RIDR Committee to lift a stay on a CAHA dispute between itself, Jarvis and Balfour Beatty (which had already been referred to the RIDR Committee) as to which of those parties was liable in respect of CAHA third party claims arising out of the Hatfield derailment. It also sought to refer four other related disputes to the RIDR Committee, including the dispute between GNER and Network Rail which is currently the subject of the arbitration before me.

The application to lift the stay

13. It is against this background that the question of whether I should lift the stay of this arbitration falls to be considered. Network Rail objects to the lifting of the stay because it wishes the dispute to be resolved by the RIDR Committee, along with the four other disputes arising from the Hatfield derailment which have now been referred to that committee as well. Network Rail does not dispute that I have jurisdiction to decide the present dispute between itself and GNER if I choose to exercise it. It submits, however, that the RIDR Committee also has jurisdiction to decide that dispute, because the real issue in this case concerns the correct construction of clause 16 of CAHA, which is a matter which can be determined pursuant to RIDR dispute resolution procedure. It also submits that it makes good sense for the RIDR Committee to assume jurisdiction over this dispute, because it can then consider it in conjunction with the related disputes involving Balfour Beatty and Jarvis, over which the RIDR Committee also has jurisdiction, but over which I do not. This is particularly important, says Network Rail, in order to avoid the risk of inconsistent decisions being reached as to the correct construction of clause 16(ii) of CAHA. It is said that it also has the advantage that the RIDR Committee is a body comprised of industry members and with a legally qualified Chairman. I am asked, therefore, to decline to lift the stay pending a determination by

the Chairman of the RIDR Committee on Network Rail's application to have this dispute referred to the RIDR Committee.

14. GNER raises, however, a number of objections to this course. It is said that I do not even have power to grant the stay sought, because the matter has been referred to me under the ADR Rules, and there is no basis upon which I can stay those proceedings on the grounds of an argument that another tribunal may have a competing jurisdiction. It is said, moreover, that the competing jurisdiction issue has already been decided by the Chairman of the RIDR Committee by his earlier decision of 15th October 2003, and that there is no provision in the ADR Rules or the RIDR Rules under which it is open to him to reconsider that decision. GNER also contends that, even if it is open to the Chairman of the RIDR Committee to reconsider his decision, there is actually no legal basis on which the dispute can be referred to the RIDR Committee under either the ADR Rules or the RIDR Rules.

15. In addition to all this, GNER argues that, even if it was now open to the RIDR Committee to assume jurisdiction over this dispute, and even if it was within my power to stay this arbitration in favour of the RIDR Committee, I should not exercise that power. It contends that, on its construction of clause 16 of CAHA (even if valid and applicable in cases of negligence), its entitlement to recover from Network Rail subject to a £5 million cap is in no way affected by how much Jarvis and Balfour Beatty may be liable to pay Network Rail in respect of the latter's own property damage. Accordingly, GNER should not be forced to get involved in a dispute involving those parties as well, particularly as it will lengthen the time taken to resolve the dispute between Network Rail and GNER, and give rise to additional costs (which it says are not even recoverable in relation to disputes before the RIDR Committee, save in exceptional circumstances). It is only if clause 16 is enforceable against it, and applicable to cases of negligence, and if GNER is also wrong on its construction of that clause, that the amount it can recover from Network Rail will be affected by the amount(s) which Jarvis and/or Balfour Beatty may be ordered to pay to Network Rail. In that eventuality, GNER accepts that it would

not be possible for me to quantify its recoverable loss in advance of Network Rail's claims against Balfour Beatty and Jarvis being quantified. It submits, however, that this should not stop me now proceeding to determine the questions of construction and law which GNER raises, because if I was to rule in GNER's favour on one or more of its points of law, this position would never arise.

16. I am not convinced that GNER is correct in its submission that I have no power to stay this arbitration in favour of the competing jurisdiction of another dispute resolution procedure, even if I took the clear view that the present dispute could be decided more fairly by that alternative process. Notwithstanding the fact that I am seized of the dispute by virtue of it having been referred to me, and that I have a duty (both under Arbitration Act 1996, s. 33(1)(b) and under Rule 1.9 of the current ADR Rules) to adopt procedures suitable to the circumstances of the case, avoiding *inter alios* unnecessary delay, it seems to me that, in exceptional cases where there are two dispute resolution jurisdictions potentially available to deal with the same dispute, the arbitrator under one of those jurisdictions may well quite properly take the view that a suitable procedure entails awaiting the outcome under the other, before considering the matter himself, if he thinks that this would be the fairest way to determine the dispute. Otherwise, in the (admittedly exceptional) case where a dispute was referred to two bodies, each of which did have jurisdiction to decide the dispute, both would be required to proceed to determine it in tandem, however much one thought the other was better placed to deal with the dispute first.

17. Nor am I convinced that I should be deterred from taking the course which Network Rail asks me to take by GNER's submission that the RIDR Committee does not have jurisdiction over the present dispute – either because it does not have jurisdiction at all, or because, having decided the matter already, the Chairman of the RIDR Committee does not have power to reconsider that decision. The jurisdiction of the RIDR Committee, and the powers of the Chairman of that Committee are not for me to decide; and Network Rail does not ask me to decide those questions. It merely asks me to

decline to lift the stay until the Chairman of the RIDR Committee has determined these questions, and Network Rail quite accepts that the stay will indeed have to be lifted in due course, if he decides not to accept Network Rail's reference to the RIDR Committee for one or more of the reasons advanced by GNER. If I thought, therefore, that the present dispute could be decided more fairly under the RIDR process, if it had jurisdiction to do so, I would have declined to lift the stay to enable the Chairman of the RIDR Committee to decide for himself whether it was open to Network Rail to refer the dispute to the RIDR Committee, and whether it should now accept the reference.

18. Having thought very carefully, however, about the competing practical considerations applicable to this case, I have concluded that fairness does not require me to take this course. I agree with GNER that, if it is required to resolve its dispute with Network Rail alongside the other disputes which have been referred to the RIDR Committee by Network Rail, there is a real risk that the dispute will take longer to resolve, and result in GNER incurring additional irrecoverable costs, even though, on GNER's construction of clause 16(ii) of CAHA, Network Rail's disputes with Balfour Beatty and Jarvis have no bearing upon its liability to GNER at all.

19. So far as timing is concerned, Network Rail appeared originally to envisage the disputes being resolved by the RIDR Committee itself, with the correct construction of clause 16 of CAHA likely being determined as a preliminary issue before the Committee (albeit that Jarvis presently objects to such a course). However, it became apparent that, unless the disputes are resolved by agreement at the Committee stage, or the Chairman makes a determination which the parties accept, an initial reference to the RIDR Committee would then be followed by formal arbitration under the RIDR Rules. It is not clear to me how a preliminary issue before the RIDR Committee on the correct construction of clause 16 of CAHA would interrelate with subsequent arbitration proceedings if they proved necessary, and what the overall timescale would then be. On any view, however, I think it most unlikely that the matter could be dealt with on anything like the timescale within which I could deal with the matter in this arbitration. If it were to transpire that

the construction of clause 16 of CAHA was not taken as a preliminary issue, plainly the delay would be substantially longer.

20. As to irrecoverable costs, although Network Rail pointed out that a RIDR arbitrator has a general discretion to award a party its costs incurred in the arbitration (Rule C5.2) as do I under the present ADR Rules (Part C, Rule 1.22), it accepted that the power of the Committee to award a party the costs incurred before it is extremely limited. Although the wording of Rule A8.8.4 of the RIDR Rules is not wholly clear, Network Rail accepted that its effect was that the RIDR Committee would not be able to make an award of costs in GNER's favour unless the case against it was so lacking in merit that the reference should not have been made, or one or more of the other parties had so conducted themselves as to justify an award of costs being made against it, or the conduct of that party had added significantly to the costs incurred by GNER. Plainly, that limited discretion gives rise to a real risk that GNER would end up recovering none of its costs of proceedings before the RIDR Committee, even if it won its claim against Network Rail.

21. I consider, therefore, that I should proceed to deal with the dispute between the parties, unless there is some countervailing factor causing unfairness to Network Rail which outweighs GNER's legitimate expectation that I will determine as expeditiously as I can a dispute which has been referred to me for decision. In this connection, I acknowledge Network Rail's concern not to be placed in a position where it may be faced with a decision by me on the proper construction of clause 16 of CAHA which will not be binding on the RIDR Committee (or on the other parties to the proceedings before the RIDR Committee) and which the Chairman of the RIDR Committee and/or a RIDR arbitrator may decline to follow if they think my decision is wrong. Having said that, it is right to observe (as GNER pointed out) that Network Rail, itself, initially asked for a preliminary award by me on the true and proper application of clause 16 of CAHA (in paragraph 20 of its Defence) when the dispute was first referred to me.

22. More importantly, however, it seems to me that the potential injustice to which Network Rail draws attention is something which I can continue to bear in mind when considering the preliminary issue of law/construction which GNER wants (and Network Rail once wanted) me to determine. So, if after hearing full argument and any evidence the parties may want to adduce on the questions, I am not wholly confident of the right answer – in the sense that, even though I may have formed my own view on the questions before me, I consider there to be a real prospect of someone else taking a different view – then I could decline to determine the matter at that stage. It seems to me, however, that this possibility should not prevent GNER having the chance to persuade me that it is right on one or more of the points of law and construction on which it relies, if that is the course it wishes to take.

23. I should add that, on the timetable I have seen dealing with anticipated progress of the RIDR procedure, I doubt if such a course would create an unnecessary hiatus or further delay, since I think it should be possible for me to reach a decision in sufficient time to enable the matter to be slotted into the RIDR procedure if I do eventually decline to make a determination for the reasons I have given. I would accordingly encourage GNER to continue participating in the RIDR discussions, on the without prejudice basis which I understand has been adopted to date, in order to facilitate an appropriate timetable in those proceedings should I not determine the preliminary issues in its favour in due course.

24. For the above reasons, therefore, and on the above basis, I direct that the stay of this arbitration which I ordered on 4th June 2004 be lifted, and that a hearing be arranged with a view to my determining in this arbitration the questions of law and construction which GNER raises as to the effect and application of clause 16(ii) of CAHA, as referred to in clause 8.2 of the TAA. I understand those questions to be: whether the clause 16(ii) limitation is void for ambiguity and/or uncertainty; whether it is effective to limit liability in cases of negligence; and whether the correct construction of clause 16(ii) means that the amount which GNER is entitled to be indemnified under clause 8.2 of the TAA is

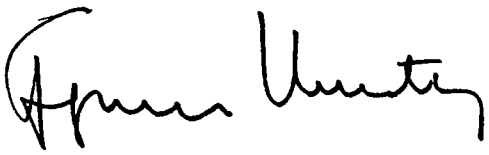
not affected by any amounts which other industry parties may be ordered to pay, even if the liability arises out of a single event or circumstance. I leave it to the parties, however, to decide the precise terms in which the preliminary issues should be framed, and to agree, if they can, a timetable up to the hearing.

25. There is one other point I should mention. In addition to its application to lift the stay of this arbitration, GNER also asked me, if I were minded not to accede to the application, to make a partial award at least ordering Network Rail to pay GNER a sum of money reflecting the minimum amount to which GNER was entitled under the clause 8.2 indemnity even if Network Rail were correct on its construction of clause 16(ii) of CAHA. It became clear, however, that the effect of Network Rail's proposed construction of clause 16(ii) was that GNER might recover absolutely nothing from Network Rail if that construction were correct. In spite of GNER's submission that Network Rail's suggesting reading of clause 16(ii) was so hopeless that I should rule that it stood no prospect of success, it did not seem to me that this was an appropriate course to take at that stage on the limited material I had seen, even were I to decide to maintain the stay. It was also common ground that I had no power to order an interim payment on a provisional basis, because of the terms of Arbitration Act 1996, s. 39.

26. I did canvass with the parties whether the presence or absence of any offer by Network Rail to pay to GNER a sum of money on account was a factor I could take into account when deciding whether to lift the stay. Network Rail accepted that it was a factor which could be taken into account in principle, and said that it would give consideration to whether to offer GNER a sum of money on a provisional basis (in the sense that it would be treated as having been made on account of any sum ultimately found due to GNER, but repayable if GNER were found not to be entitled to it in due course). GNER made it clear, however, that a purely provisional payment would be of little interest to it; and that, if I decided not to lift the stay, it wanted the chance to restore its application for a minimum sum to be paid to it on a final basis, on the grounds that Network Rail's proposed construction of clause 16(ii) was hopeless.

27. I mention this issue for two reasons. First, in order to make clear that, particularly given GNER's indication that it would not consider the offer of a provisional payment as acceptable, even if made, I ultimately took the view that it would not be appropriate to take into account the presence or absence of any such offer, and it has played no part in my decision to lift the stay. It is for that reason that I am publishing this award without waiting to hear whether Network Rail is proposing to make such an offer or not. Secondly, to make clear that, if the hearing of preliminary issues of law and construction on the effect of clause 16(ii) of CAHA are to go ahead, I would also be prepared to consider, at that stage, a renewed application for a partial award – since I will, as part of that exercise, have heard proper argument on Network Rail's construction of the clause, and might be in a position to determine whether it is appropriate to order a minimum payment to GNER, even if I did not think I was in a position to give a definitive ruling on the other questions raised by GNER for the reasons I have already given.

28. On the question of costs, I reserve my decision pending any submissions the parties may wish to make, and which I imagine can be dealt with in writing.



STEPHEN MORIARTY QC

19 June 2006

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