

**ADA06: First Greater Western Statement of Reply**  
**for Determination by Access Dispute Adjudication ("ADA")**  
**in accordance with the provisions of**  
**Chapter G of the ADR Rules**

**4 April 2011.**

**1 THIS REPLY AND THE ARGUMENTS ALREADY RAISED BY THE PARTIES**

1.1 This reply is served in accordance with Rule 17(c) of the ADR Rules. It replies to the Statement of Defence served by Network Rail on 28 March 2011 (the "Defence"). In accordance with Rule 17(c), it is limited to new matters and contentions of law raised in the Defence. Consequently where issues have already been addressed by FGW in its Statement of Claim (the "Claim"), this Reply does not make any further comment. Where no comment is made on any allegation raised in the Defence the allegation is denied by FGW.

1.2 It is apparent from the Claim and the Defence that the issue between the parties is very narrow. FGW's understanding is that the parties are agreed that compensation should be paid for a Type 2 RoU ("T2 RoU") on the basis of the definition of "RoU Direct Costs" as set out in Part 3 of Schedule 4 of the TAC:

"RoU Direct Costs" means the aggregate amount of:

...

(c) train planning and diagramming costs; and

(d) other costs directly related to the organisation and management of the Train Operator's response to a Type 2 Restriction of Use

reasonably incurred by the Train Operator as a result of a Type 2 Restriction of Use..."

1.3 It is also agreed that FGW staff worked overtime (including on weekends) on train planning and diagramming in respect of the T2 RoU and were subsequently given time off in lieu of that overtime.

1.4 The dispute consequently appears to be limited to whether or not, according to the above definition, FGW can recover costs referable to the time worked by those staff as a result of the T2 RoU.

- 1.5 In its Defence, Network Rail argues that the relevant staff costs are not recoverable as:
- (a) Network Rail alleges that the work was undertaken within the ordinary course of employment of FGW staff (Defence 6.7, 6.9, 6.10, 6.13, 6.16) and thus cannot be claimed as a cost.  
  
In this respect Network Rail misunderstands the basis upon which FGW provides such train planning and diagramming and its need for retaining the relevant staff to deal with significant disruption which qualifies as a T2 RoU. This is discussed further from paragraph 2.1 below;
  - (b) Network Rail also suggests that the costs of these employees to FGW are not direct costs as envisaged by the definition or are not reasonable or incurred as a result of the T2 RoU (Defence 6.11, 6.12).  
  
Network Rail accepts that where a train operator recruits staff or pays overtime to meet demand, then such costs would be recoverable (Defence 6.10). Nonetheless, where (as here) FGW employs staff to meet the same needs Network Rail does not accept that the costs of those staff can be recovered. This is inconsistent;
- 1.6 FGW considers that Network Rail's objections fail to reflect the true nature of the costs being incurred by FGW to provide support to Network Rail in respect of T2 RoU's caused by Network Rail's operations.

## **2 THE COST OF TRAIN PLANNING AND DIAGRAMMING STAFF FOR ROUS**

- 2.1 It is clear from Network Rail's Defence that its arguments are based upon an assumption that the costs of FGW's train planning staff who worked on this T2 RoU are ordinary costs of FGW's business and their work in respect of the T2 RoU was provided at no extra cost to FGW. Network Rail goes further (Defence 6.16) to suggest that these costs are the '*ordinary running costs of such a business*' and that
- "TOCs therefore know that their train planning teams will be required to a greater or lesser extent to assist in planning in these kinds of circumstance. It is for FGW to determine how to manage that assistance. The salaries for planning employees were an anticipated cost which would, in Network Rail's view, have formed part of FGW's franchise bid."*
- 2.2 At 6.13 of the Defence, Network Rail suggests that if it were permitted to recover such costs *"FGW would effectively be double recovering. If the RoU had never been planned in the first place, FGW's employees would still have been paid the same salary."*
- 2.3 This interpretation is, however, flawed. FGW's requirements for the ordinary running of its business are for train planners to deal with periodic revisions to the timetable and strategic or minor adjustments to services which FGW wishes to run. The normal running costs of FGW's business therefore include train planning and diagramming in relation to those matters. They do not include the costs of train planning and diagramming in respect of Network Rail's planned large scale disruptions to the service.
- 2.4 These latter costs are covered by Schedule 4. i.e. Network Rail compensates FGW for the cost of such additional work (it therefore does not form part of the costs which FGW would anticipate in its franchise bid).
- 2.5 In this case Schedule 4 is relevant. It provides for formulaic compensation for the additional costs associated with planned disruption. However, it explicitly excludes certain costs from that formula (as they do not appear to be susceptible to reasonable modelling by a formula). Those costs are recoverable in their actual amounts (rather than in accordance with the formula).

- 2.6 One of the costs which is not compensated through the Schedule 4 formula is Train Planning and Diagramming costs associated with T2 RoUs. It is for this reason that those costs are specifically referred to in the definition of RoU Direct Costs (see paragraph 1.2 above). They clearly include staff costs in principle (Network Rail accepts that staff costs could be payable in Defence 6.10. In any event, it is not clear what type of cost could have been intended to be covered by train planning and diagramming costs other than staff costs).
- 2.7 These additional staff costs associated with T2 RoUs are therefore recoverable under Schedule 4 in their actual amounts. Network Rail recognises this – it confirms (Defence 6.10) that if FGW recruited staff to meet demand or paid overtime, such costs would be recoverable.
- 2.8 It is not, however, commercially practical or efficient to seek to retain specialist staff (capable of planning timetables) on an ad hoc basis potentially at short notice when a T2 RoU is proposed. It is in fact likely to be impossible to do so as there are only a limited number of individuals with the necessary skills and they are not generally available to be retained as consultants on a short term basis. It is also not commercially practical to rely upon staff retained for normal business planning and diagramming to work overtime for every T2 RoU. This is likely to be more expensive than retaining additional staff members and relies upon the existing members of staff being prepared to work when asked (and potentially excessive hours due to number of T2 RoUs which Network Rail has imposed on FGW's routes and the size of such T2 RoUs – by definition these are the larger works).
- 2.9 In order to provide the necessary skills and assistance when an T2 RoU arises, FGW is consequently obliged to retain staff on a permanent basis above and beyond those individuals required for train planning and diagramming as part of the normal running of its business. Network Rail appears to recognise that FGW may need to take such a commercial view (see Defence 6.16 *"it is for FGW to determine how to manage that assistance"*).
- 2.10 This is what has happened in this case. FGW employs staff to manage normal business (which it accepts are at its cost and formed part of the costs anticipated in its franchise bid). It has however been obliged to increase this team in order also to manage the costs associated with T2 (and T3) RoUs for which it should be compensated by Network Rail (and which fall outside of the costs anticipated in the franchise bid).
- 2.11 As a consequence Network Rail's suggestion (Defence 6.13) that FGW's employees would still have been paid the same salary if the T2 RoU had never been planned misses the point. It is likely that FGW would not have had to employ the relevant staff in the first place if assistance on T2 RoUs was not required. Alternatively, if T2 RoUs were planned and FGW had not retained (and paid) these staff, FGW would have had to purchase assistance from consultants (which it is not feasible to do) and as a result incurred costs which Network Rail would apparently have agreed to pay.
- 2.12 In order to compensate TOCs for such additional costs of staff required to handle T2 RoUs it has long been accepted that hourly rates of planning and diagramming staff involved in Type 2 and 3 RoUs (or previously SROUs and Network Changes) are recoverable. Failure to allow this would cast the additional cost of retaining such staff upon the TOC when the cost arises as a result of Network Rail's decision to plan disruption (and should therefore be met by Network Rail).
- 2.13 In respect of the arguments about current and previous practice at Defence 6.17 and 6.18, FGW will rely upon the points made in its Claim. FGW believes that Network Rail was aware that the train planning work it compensated in CP3 was being undertaken by staff under their normal contracts and (correctly) agreed to compensate such costs.

- 2.14 FGW will rely upon the material referred to in the Claim in respect of the intention of the compensation provided by Schedule 4. However, FGW believes that in light of the points made above it is not surprising that the ORR and its consultants took the view that such staff costs for Type 2 and 3 RoUs should continue to be paid in their actual amounts.

### **3 DIRECT REASONABLE COSTS INCURRED AS A RESULT OF THE ROU**

- 3.1 In light of the above analysis of the costs incurred by FGW in respect of T2 RoUs FGW considers the costs claimed to be entirely reasonable (and obviously less than the alternative of retaining consultants).
- 3.2 FGW does not accept that the definition of the recoverable costs requires such costs to be direct (use of the word direct in the definition itself does not mean that the items within that definition must be direct). However, in this case such costs clearly are direct. They arise as a result of Network Rail's need for assistance in connection with its T2 RoUs and consequently are directly related to such T2 RoUs.

### **4 CONCLUSION**

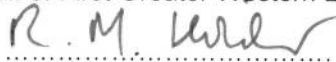
- 4.1 In this claim Network Rail is seeking to avoid liability for part of the costs arising as a result of T2 RoUs which Network Rail has taken. In order to cater for the train planning and diagramming costs of such T2 RoUs FGW has retained additional staff above and beyond those it would need to retain for the normal running of its business if such assistance was not required by Network Rail.
- 4.2 Network Rail accepts that it would be liable for the costs of such assistance if FGW had retained and paid additional temporary/ consultant staff or if FGW had chosen to take on fewer staff and pay overtime. Instead FGW took the cheaper and more reliable option of retaining sufficient staff on a permanent basis and thereby reduced the overall cost (which Network Rail would have to pay) by avoiding the need for consultant fees or higher rates for overtime. Because of this commercially more efficient decision Network Rail now refused to pay any costs relating to such staff.
- 4.3 In doing so Network Rail has cancelled its long standing procedure for paying such costs and acted contrary to the intentions of ORR and its consultants in respect of Schedule 4 compensation.
- 4.4 FGW therefore requests that the Chair determine this matter in line with the Decision sought by FGW at paragraph 7 of the Claim.

### **5 ANNEXES**

None

### **6 SIGNATURE**

For and on behalf of First Greater Western Limited

Signed  .

Robert Holder

Network Access Manager, First Greater Western.