

Determination in respect of reference ADP18

(following a Hearing held at Central House, Euston on 9th August 2006)

The Panel

Bill Davidson: appointed representative of Network Rail
Elaine Davies: elected representative for the Non-Franchised Passenger Class
Lindsay Durham: elected representative for Non-Passenger Class, Band 2
Nick Hortin: elected representative for Franchised Passenger Class, Band 2

Panel Chairman: **Sir Anthony Holland**

Brief Summary of Dispute, and the jurisdiction of the Panel

1. The Panel was asked, in a joint reference from Network Rail Infrastructure Limited ("Network Rail") and Silverlink Train Services Ltd ("STS") to determine whether
 - 1.1. *"the existence of "stained" ballast on the track bed at Barking station due to normal operation of Class 150 diesel multiple units constitutes an Environmental Condition as defined in Part E of the Network Code; and*
 - 1.2. *if so, and Network Rail is required to take steps to mitigate this problem, how this cost should be apportioned – either;*
 - 1.2.1. *as Silverlink believes these costs are part of Network Rail's infrastructure maintenance obligation and therefore covered by Silverlink's track charges; or*
 - 1.2.2. *as Network Rail believes, that it should be reimbursed a fair proportion of reasonable costs which it considers would be the total avoidable incurred by Network Rail in taking steps to address the problem of track effluent; or*
 - 1.2.3. *some other apportionment of costs."*
2. The Panel noted that its possible jurisdiction in a case involving Network Code Part E derived from Condition E2.1.5 which states that

"If an affected Train Operator shall be dissatisfied with Network Rail's assessment or with any other statement or information provided by Network Rail pursuant to Condition E2.1.3, it shall be entitled to refer the matter for resolution to the Industry Committee and thereafter to arbitration pursuant to the Access Dispute Resolution Rules. It shall lose that entitlement if it fails to make the reference within 120 days of the later of:

 - (a) the date of its receipt of Network Rail's assessment; and*
 - (b) the date upon which it receives any further information to which it is entitled pursuant to this Condition E2.1."*

3. The Panel noted that whilst the original Network Rail assessment at the core of this dispute is dated 24th January 2005, there has been significant subsequent correspondence between the parties, which could potentially qualify the date from which the specified 120 days should be counted. The Panel sought, and obtained, from both parties, the assurance that both are of the view that the point at issue needs to be determined by a Panel, and that there would be no attempt to challenge the validity of the proceedings on the grounds that it could be represented as having “timed out”.

The Panel’s findings in respect of fact (and practicalities)

4. The Panel found the following matters of fact in relation to the definition of the dispute.
 - 4.1. Barking Bay platform (Platform 1) is a buffer-ended bi-directional single line, on the Northern edge of Barking station. It is used as one terminus of a shuttle service (the Gospel Oak-Barking service or “GOB”) operated by STS between Barking, and another single bay platform at Gospel Oak.
 - 4.2. GOB trains are formed of 2-car class 150 DMU units introduced to the service in 1998, at which time they replaced life-expired first generation DMUs. The parties are agreed that the changeover of stock was effected in a manner compliant with the provisions of Network Code Part F “Vehicle Change”.
 - 4.3. The Bay platform at Barking is 183m in length: a class 150 train is roundly 41m long. In all normal circumstances each arriving service comes to a stand in proximity to the buffer stops, at that point which permits easy exit from the station, or transfer to connecting services.
 - 4.4. In 1998 a major clean up of the Bay Platform at Barking was undertaken, at Network Rail’s (then Railtrack’s) expense. Conflicting accounts were given as to whether this clean-up involved the ballast being cleaned or replaced.
 - 4.5. In January 2005 Network Rail carried out a paper Environmental assessment of Barking Bay Platform, incorporating a map showing that an arc of 650m radius centred on a groundwater abstraction point, and defining the boundary of a source protection zone 2, intersects the Barking Bay platform, the buffer end of the platform lying outside the zone, and the remainder, including the points connecting the Bay platform to the rest of the system, lying within the zone. A source protection zone 2 is described in the Network Rail assessment as the area from which “it takes 400 days for any contaminants to reach the abstraction point”.
 - 4.6. The same assessment
 - 4.6.1. asserts that “*The River Roding (a controlled water) is also within 650m of the station*”. and
 - 4.6.2. contains Photographic evidence of oil contamination of approximately two rail lengths of track in the vicinity of the TPWS grids in the Bay platform, and
 - 4.6.3. concludes that “*an Environmental Condition regarding track bed effluent exists and remains ongoing*” “*as a direct or indirect result of the activities of a Train Operating Company (TOC)*” such that Network Rail can, under the provisions of Network Code Part E request the Train Operator to instigate “*steps to*

prevent mitigate or remedy this Environmental Condition". [quotations from Paragraph 6.0 of Network Rail assessment].

- 4.7. This assessment was shared with STS who disputed that the circumstances described fulfilled the Network Code definition of an Environmental Condition, and any implication that STS therefore had any liability for the instigation, or costs, of mitigation measures.
- 4.8. On 18th October 2005, at Network Rail's behest, 7 samples of ballast for chemical analysis were taken from the Barking Bay platform road, at regular 37-yard intervals starting at 13 miles and 1075 yards (distances from St Pancras) and terminating at 13 miles and 1282 yards (the last interval approaching the buffers is only 22 yards). Of these 7 samples, two (from sample points 4 and 5, those approximately 80 and 50 yards from the final sampling point, failed both the Checklist C and Special Waste Trigger thresholds for total petroleum hydrocarbons. The threshold level for both tests is set at 1000mg/kg: at sample point 4 the level was recorded as 1100 mg per kg, and at sample point 5, 3700 mg per kg. At point sample point 7 the level was 370 mg per kg, and at the other 4 sample points ranged between 26 mg per kilo to 180 mg per kg.
- 4.9. In May 2006 the full length of the Bay platform was re-ballasted. It was asserted by Network Rail that, because of the extent of the contamination identified by the chemical analysis, the ballast removed had required to be disposed of under special conditions incurring additional costs, and that such additional cost was a charge that STS should meet. No evidence was submitted as to the precise proportion of the ballast recovered that had actually required special disposal, and Network Rail had advised that it was no longer seeking any contribution from the Train Operator for any of the costs incurred in re-ballasting.
- 4.10. Photographic evidence was presented that since re-ballasting some limited fresh staining of the track-bed had occurred, again in the area where the TPWS track grids are situated. Network Rail had made representations to STS that such fresh re-staining was indicative of an ongoing Environmental Condition, and that STS should meet the cost of mitigating measures, including possible absorbent track matting.
- 4.11. The parties are agreed that the STS rolling stock is properly maintained. No evidence was presented that any element of oil staining had resulted from a particular mechanical failure of a train.
- 4.12. STS trains working the GOB service stand for a period of time in the Bay Platform at Gospel Oak. Network Rail stated that, at this location, to counter oil drop problems, it has installed absorbent track matting which it services at its own cost.
- 4.13. Network Rail had inaugurated its environmental assessment programme following the outcome of the prosecution for pollution of a Blue Flag beach adjoining tracks in the area of Colwyn Bay. The Parties were of differing views as to the significance of this prosecution:
 - 4.13.1. Network Rail appeared to represent that it made a potential Environmental Condition out of any stretch of track upon which track effluent accumulated;
 - 4.13.2. STS asserted that the prosecution arose because oil interceptors in the trackside drainage owned by Network Rail had been allowed to fall into inadequacy, allowing effluent, that would otherwise have been contained, to escape and pollute.

The Panel's findings in respect of law and entitlements

5. The Panel considered the structure of Part E of the Network Code, given that this was the ground upon which the reference had been brought, and found that the definition of an environmental problem derives from a hierarchy of conditions, and that a failure to fulfil one condition ought logically to frustrate fulfilment of later dependent conditions. Thus
 - 5.1. it must be evident that the matter at issue is one that adequately fulfils the criteria for "Environmental Damage"; then
 - 5.2. that the defined Environmental Damage, or prospect of Environmental Damage is such that *"in Network Rail's reasonable opinion [it] could result in Network Rail incurring any material liability or being subject to the Direction of any Competent Authority"*; and that
 - 5.3. *"Network Rail's ... opinion"* must be demonstrably *"reasonable"* by reference to both a clear and proper understanding of its legal responsibilities, and to a due assessment of the risks arising from the perceived condition.
6. If, taking all matters into account, Network Rail has demonstrated that an Environmental condition exists, then the liability of Train Operator to take action, and/or to meet the costs of addressing that Environmental Condition is dependent upon fulfilment of a further hierarchy of conditions, namely that
 - 6.1. the Environmental Condition is *"a direct or indirect result of the activities of a Train Operator"* and that
 - 6.2. *"Network Rail reasonably considers that action is required to prevent, mitigate or remedy that Environmental Condition"* and that Network Rail shall have due regard
 - *"(a) to the likelihood that the person in question may be liable (other than pursuant to this Part E) to make any payment or to take or omit to take any action in relation to the Environmental Condition or Direction in question, whether under any Access Agreement to which it is a party or otherwise;*
 - *(b) in relation to the steps to be taken and the objectives of those steps, to the efficiency and economy with which the steps may be taken, and the effectiveness of those steps, if that person takes those steps, irrespective of the matters referred to in paragraph (a) above; and*
 - *(c) all other relevant circumstances of the case"* [Part E. Condition 2.1.2 "Relevant Criteria"].
7. Condition E2.3 ***"Network Rail's right to take relevant steps"*** grants Network Rail the right, in defined circumstances, to take action, *"and to be reimbursed by the Train Operator for a fair proportion of the reasonable costs of doing so"*. This course of action is still subject to *"Network Rail [giving] notice to the Train Operator in question of any step taken pursuant to this Condition E2.3"*.
8. The Panel reminded itself that under the terms of Access Dispute Resolution Rules A1.18, *"The Panel shall reach its determination on the basis of the legal entitlements of the dispute parties and upon no other basis."* In this respect, and taking account of the provisions of Part E of the Network Code, the Panel considered that, in order to resolve the particular circumstances of the case, it had to address two issues of principle, namely

- 8.1. where does the onus of proof lie to establish
 - 8.1.1. that there does exist an Environmental Condition;
 - 8.1.2. that it does require to be addressed; and that
 - 8.1.3. it is causally “*a direct or indirect result of the activities of a Train Operator*” and therefore potentially to the charge of the Train Operator to remedy? And
 - 8.2. what is the range of “normal behaviour” that either the Train Operator or Network Rail is entitled to expect of the other as part and parcel of the normal discharge of contractual obligations under the Track Access Contract, that do not warrant invoking the provisions of Part E.
9. The Panel found that the overall responsibility for the safe operation of the Network was vested with Network Rail, and that therefore it was logically the responsibility of Network Rail to discover risks, threats and Environmental Conditions, and to prescribe, and, if necessary, deliver the appropriate remedies or mitigations. It follows that
- 9.1. the onus of proof as to the existence of an Environmental Condition, and a liability of a Train Operator, rests unequivocally with Network Rail;
 - 9.2. Network Rail has the protection of Condition E 2.3 to ensure that it cannot be frustrated in carrying out any necessary actions to address an Environmental Condition, but that
 - 9.3. a test of the reasonableness of a proposed action is that it is one that Network Rail would consider necessary even where it is not demonstrated that it should be explicitly paid for by a Train Operator.
10. The Panel considered that in relation to the question of “normal behaviour”
- 10.1. it was likely that any rail vehicle powered by under-floor diesel would, in the course of functioning normally, exude some quantity of oil, but that the Train Operator would have a vested interest in keeping such losses of oil to an absolute minimum;
 - 10.2. the normal operation of rail vehicles on track is covered under the variable element of the track access charges paid by operators, and as such any action necessary to contain or remove such oil could reasonably be construed as part of Network Rail’s obligation to the Train Operator; by contrast
 - 10.3. action (or inaction) by a Train Operator resulting in a serious malfunction of rolling stock, with consequential spillage contamination, would not be normal behaviour, and, in consequence it would be reasonable for the costs of remediation or mitigation of a resultant Environmental Condition to be attributed to a Train Operator in accordance with the provisions of Condition E2.1.3.
11. In relation to the specifics of this case the Panel noted the points made by STS in relation to the Contaminated Land (England) Regulations 2000 as implemented as Part IIa of the Environmental Protection Act 1990. In particular, the Panel took note of STS’ exposition that these regulations require that in seeking to establish causes of possible pollution there is a need to identify not just that there is a possible source of contaminants, and a potential sensitive receptor of such contaminants, but that there is also a credible pathway by which the one might reach the other. The Panel noted that STS was not stating that no such path

existed but that no such path had been credibly demonstrated, and that the onus of proof on this count also rested with Network Rail.

The Panel's Determination

12. Taking all the foregoing considerations into account, the Panel determined that
 - 12.1. it accepted that STS's class 150 trains were causing some staining of ballast in Barking Bay Platform; but that
 - 12.2. the extent of staining did not appear, on the basis of the evidence presented, any different in kind or intensity from the staining that might be expected from any other comparable rolling stock operating in accordance with the terms of a Passenger Track Access Contract;
 - 12.3. Network Rail had not demonstrated that the staining represented any *"material ...damage to...persons, living organisms or property...or impairment of the environment"*; and therefore constituted Environmental Damage; and that therefore
 - 12.4. Network Rail could not substantiate the existence of an Environmental Condition;
 - 12.5. in the absence of a demonstrable Environmental Condition (or Direction of a Competent Authority) there are no grounds for Network Rail to make an assessment, nor to promote measures of mitigation; in which circumstances the issue of which party (other than Network Rail) might pay for such mitigation measures does not arise.
13. The Panel therefore finds in favour of the case as argued by STS, and against that argued by Network Rail.
14. For the avoidance of doubt, the Panel does not, by this determination, make any direction as to whether any works of mitigation should, or should not, be carried out at Barking Bay platform; this is essentially a matter for Network Rail to decide. However, Network Rail, in making that decision is to understand that any costs consequential upon that decision shall be to its sole charge.
15. The Panel has complied with the requirements of Rule A1.72, and is satisfied that the determination, in all the circumstances set out above, is legally sound, and appropriate in form.

Sir Anthony Holland

Disputes Chairman