

Determination in respect of reference ADP3

(following a Hearing held at Kings Cross on 1st June 2005)

The Panel

John Czyrko: elected representative for Franchised Passenger Class, Band 2

Nick Gibbons: elected representative for Non-Passenger Class, Band 1

Julia Glenn: appointed representative of Network Rail

Mike Price: elected representative for Franchised Passenger Class, Band 1

Panel Chairman: **Sir Anthony Holland**

Brief Summary of the Dispute

1. The Dispute was submitted by Thameslink Rail Ltd ("Thameslink"), and sought the determination of the Panel that Network Rail Infrastructure Ltd (Network Rail), should, in respect of possessions resulting from flooding of Kings Cross Tunnels in April 2004, compensate Thameslink under the particular terms of Schedule 4, Part 4 (CTRL POSSESSIONS) of the Thameslink Track Access Agreement. The parties were seeking to establish an issue of principle in relation to the specific circumstances of the case, and were not seeking the assistance of the Panel in any matter of quantification of amounts that might be payable.

The Jurisdiction of the Panel

2. Part 4 of Schedule 4 in the Thameslink Track Access Agreement provides, in Part IV, a mechanism for the calculation of compensation in respect of any "CTRL Possession", and, at paragraph 4.6, a stipulation that, where the parties are in dispute, and have exhausted other laid down procedures, *"either party may require that the matter be resolved by the Access Disputes Resolution Committee (ADRC)"*.
3. The dispute was first referred, in a joint submission from the parties, in February 2005. However, having reviewed the original submissions, the Chairman of ADRC directed that a certain report, that was referred to in the original submission, but which was not actually submitted to the Committee, appeared to have the potential for a material bearing on the facts upon which the Committee was likely to be required to base its determination. In consequence the parties were directed
 - 3.1. to make the missing report available to the Committee, and to the other party; and
 - 3.2. to allow the opportunity, where expert opinions that had been adduced in evidence had been subject to caveats, because the missing report had not been made available, for those opinions to be reviewed and/or revised.

4. Compliance with these directions resulted in there being no opportunity for the reference to be determined before, on 15th April 2005, the Access Dispute Resolution Rules were changed, at the direction of the Office of Rail Regulation, the ADRC was superseded by the Access Disputes Committee, and the responsibility for the determination of Disputes was vested in individually constituted Access Dispute Panels. This dispute therefore falls to be determined by this Panel duly constituted under the terms of the Access Dispute Resolution Rules applicable as at the date of the hearing.

The Panel's findings of fact in respect of the Dispute

5. At approximately 19:00 on 27th April 2004 reports were received from drivers of Thameslink trains that the Kings Cross Tunnel (between Kentish Town and Kings Cross Thameslink) was flooding.
6. The Drivers' reports were recorded as "*a deluge of water was coming through the roof near the CTRL site*" and, water "*was pouring through the tunnel roof*".
7. The line was blocked by the possession necessary to deal with the flood, until 0941 on 29th April, when the line was handed back for normal working.
8. The flooding of the Kings Cross Tunnel was a mixture of rainwater and raw sewage. The flood level built up very quickly.
9. The following Reports into the circumstances surrounding the flooding were completed:
 - 9.1. W S Atkins were appointed by Birse Rail to undertake an investigation in line with a technical remit set by Network Rail (received on 25th May 2004); "*The objective of this study is to establish sources of water which would have flooded the tunnel, and to determine contributory factors and causes which led to the temporary closure of the tunnel. The report will form the basis of a claim to recover delay and service cancellation (Schedule 4 and Schedule 8) costs in excess of £1M*" (MCL Kings Cross Tunnel Flooding Package P4B52 ("the Atkins Report"), Section 1 para.4). This report was submitted, by the parties, as an appendix to the Joint Submission.
 - 9.2. RLE/CORBER (CTRL Contractors) produced an "SHE Incident Report" ("the RLE/CORBER report") documenting all events, and actions taken, in respect of "Sewage entered the Thameslink tunnel". This report was completed and signed off on 4th May 2004. This report was not included with the original submission. In the Atkins Report, allusion is made to the existence of this report, but it was not available to Atkins to view. Network Rail obtained this report in February 2005, and, following direction from the Chairman of ADRC, made it available to Thameslink and the Panel.
 - 9.3. Having been given the opportunity to consider the RLE/CORBER report, W S Atkins were given the opportunity to review their findings in the Atkins Report, and produced a supplementary report (Review of RLE/CORBER Incident Investigation Report ("the Atkins Review")). This was submitted to both parties and to the Panel.
10. Although the perspective of the reports is very different, they corroborate each other in respect of certain key facts:
 - 10.1. as a part of the CTRL works

- 10.1.1. the roof of Kings Cross Tunnel was open to the ingress of water;
 - 10.1.2. the connection between the Midland Road sewer and the Fleet sewer in the proximity of the Thameslink tunnel had been severed to permit the diversion of the Fleet Sewer;
 - 10.1.3. whilst the diversionary works were in progress, the course of the Midland Road Sewer was dammed with a sandbag dam, and the contents of the sewer were being over pumped into the Fleet Deep Relief Sewer.
- 10.2. On the night of 27th April 2004 there were two periods of heavy rainfall. Following the first, the sandbag dam across the Midland Road sewer “*was breached and the sewer flooded the excavation over the Thameslink tunnel. Sewage flowed into the Thameslink tunnel between the existing tunnel and the temporary crash deck*” (RLE/CORBER report, 1st page “Line manager to complete within the same shift”).
- 10.3. The pumping arrangements for transferring Midlands Road sewage to the Fleet Sewer were not such that they were effective in preventing the sewage passing through the breached dam into the Thameslink tunnel.
- 10.4. Other debris was washed into the roof of the tunnel and had to be recovered by means of access from the CTRL site.
- 10.5. There are permanently installed pumps in the Thameslink tunnel designed to clear water and prevent flooding. Responsibility for these pumps lies with Network Rail, and renewals to some of the equipment were undertaken in 2002. These pumps were overwhelmed by the rate of ingress of liquid from all sources. In particular, when the flooding reached a certain depth, it exposed deficiencies in the installation of the control mechanisms for these pumps, which became inundated and lead to the pumps shutting down prematurely.
- 10.6. Extra measures were put in place very quickly on the CTRL site to supplement the pumping arrangements and to provide “*a direct overflow mechanism into Fleet Sewer*”. (RLE/CORBER report, 2nd page)
- 10.7. Network Rail has put in hand measures to ensure that the control mechanisms for the permanent pumps cannot again be neutralised by flooding.
11. The Atkins report gives specific consideration to the volume of water that was collected in the tunnel at the time of the flood, the rate at which it must have collected, and the possible sources for such a flow of water. In the particular, it considers the following possible sources
- 11.1. run off from the CTRL site;
 - 11.2. groundwater ingress;
 - 11.3. inflow from track drainage within the tunnel;
 - 11.4. flooding from the tunnel catchment; and
 - 11.5. run-off from other ongoing construction sites.

12. In addition the Atkins report considered
 - 12.1. whether there was any record of the specific tunnel having experienced flooding problems in the recent past, and
 - 12.2. the possibility that the tunnel track drainage might have been overcome by a build up of pressure in the Caledonian Road relief sewer, with the result that sewage could enter the tunnel from that source.
13. The Atkins report, in its conclusions, which were not considered to require significant modification once the authors had had the opportunity to review the RLE/CORBER report,
 - 13.1. does not confirm any previous propensity of the Thameslink tunnel to flood, except when, in 1999, a major power failure affecting all tunnel pumps *“led to water build up until the power came back on”*.
 - 13.2. discounts causes 11.2 to 11.5 above as not having the capacity to generate the volume of flooding, and only generating rainwater.
 - 13.3. suggests that the only possible sources of the necessary volume and flow of the dilute sewage would be either the Midland Road sewer on the CTRL site, or a back up of the Caledonian Road Sewer.
 - 13.4. does not find any evidence to support the hypothesis with regard to the Caledonian Road Sewer; and
 - 13.5. finds that *“there is strong evidence which demonstrates that flooding came from the CTRL site ..”*. (Atkins report, Executive Summary).
14. The failure of the permanently installed pumps under the control of Network Rail probably did contribute, to the ultimate depth and extent of the flooding; however, this failure does not have any direct bearing on the source of the flooding.

The issues of contract raised by the Dispute

15. The Thameslink Track Access Agreement includes, within its Schedule 4, both the “template” Part 3 “COMPENSATION FOR RESTRICTIONS OF USE”, and a bespoke Part 4 “CTRL POSSESSIONS”. This Part 4 sets out the specific arrangements relating to the potential impact on Thameslink including, “**Part IV: Compensation Terms**”. Within Part 4,
 - 15.1. terms are defined as follows

“CTRL Possession” means any restriction of use of all or any part of the routes as a result of the construction of the CTRL Project including, but without limitation, each of the following types of restriction: -

 - (a) *blockage,*
 - (b) *temporary speed restriction,*
 - (c) *single line working,*
 - (d) *interruption to power supplies,*
 - (e) *diversion, and*
 - (f) *weave;*

“CTRL Project” means CTRL together with the Thameslink Works (excluding the Thameslink completion Works), the Thameslink Enabling Works and all other works authorised by Schedule 2 of, or pursuant to paragraph 1 of Schedule 8 of, the CTRL Act in Relation thereto

“Part IV CTRL Possession” means any CTRL Possession which results or would result in the Train Operator being unable to operate or Bid to operate Services in either or both directions on the Routes or those parts of the Routes during the time in which such CTRL Possession takes effect.

“Non-Timetabled CTRL Possession” means any **Unscheduled CTRL Possession**, which is also a **Part IV CTRL Possession** and which is not provided for in the Applicable Rules of the Route during the time in which such **CTRL Possession** takes effect”

“Unscheduled CTRL Possession” means a CTRL Possession, or any part of a CTRL Possession, which is not provided for in the Applicable Rules of the Route supplied to the Train operator on or before the first day of the Drafting Period applicable to the relevant Timetable Period.”

15.2. Para 1.3 states that “For the purposes of this Part 4:-

(a) any Possession notified and/or taken in connection with the construction of the CTRL Project shall be a CTRL Possession subject to the provisions of this Part 4:

(b) reference to the “construction” of the CTRL Project shall be deemed to include the design, construction and/or commissioning of the CTRL Project”.

16. There is no dispute between the parties that the flooding of the Kings Cross Tunnel on the dates in question resulted in a possession that fulfilled the pre-conditions that determine that Network Rail should pay Thameslink compensation in accordance with the provisions of Part 3 of Schedule 4. The issue for the Panel is whether the circumstances of the possession are such that they fulfil

16.1. the terms of the definition of a **CTRL Possession**, and beyond that

16.2. **Part IV CTRL Possession**.

17. The nature of the incident, and the interruption to train operations over more than 36 hours means that there can be no question but that, if the possession is deemed to be a **CTRL Possession**, it will also axiomatically be deemed a **Part IV CTRL Possession**, and compensation will therefore be payable under the terms of Part IV of Part 4 of Schedule 4.

18. The Issues therefore at the core of the dispute are essentially ones of relating the circumstances of 27th to 29th April 2004 to the words on the face of Part 4 of Schedule 4, on the basis of

18.1. whether the sense of “any restriction of use of all or any part of the routes as a result of the construction of the CTRL Project” is to be construed as being fulfilled

18.1.1. only when the possession is taken, or requires to be taken, exclusively for the purposes of “the construction of the CTRL Project”; or

- 18.1.2. when the possession is taken or requires to be taken primarily, but not exclusively, for the purposes of “*the construction of the CTRL Project*”; or
- 18.1.3. when the possession is in any way, however small, associated with “*the construction of the CTRL Project*”. AND
- 18.2. whether different conclusions apply when the possession results from unplanned circumstances.
19. Network Rail, in addition to its Track Access Agreement with Thameslink, has a contractual relationship with the CTRL contractors. However, notwithstanding the existence of Part 4 of Schedule 4 in the Thameslink contract, there is no linkage between the two arrangements such that, for example, Network Rail is only liable to pay compensation to Thameslink to the extent that it can recover from its contractor, and therefore such considerations have no significance in relation to this dispute.

The submissions of the parties in respect of the evidence

20. The principal difference in the positions of the parties was that
- 20.1. Thameslink maintained that there was sufficient evidence that the principal source of the flooding was on the CTRL construction site; and that therefore the preconditions for a **CTRL Possession**, and thus for Part 4 compensation, had been met.
- 20.2. Network Rail maintained that whilst some of the flooding had originated on the CTRL construction site, there were other contributory factors, including the failure of the permanently installed pumps, it would be wrong to categorise the resultant possession as a **CTRL possession**, and that therefore compensation under Part 4 should not be payable.

The Panel’s determination

21. The Panel, taking all the evidence and representations into account, determined that
- 21.1. “*as a result of the construction of the CTRL Project*” does not imply that a **CTRL possession** can only occur as a consequence of planned operations; it could equally well result because of unintended consequences of “*the construction of the CTRL Project*”;
- 21.2. where a possession is made necessary, wholly because of unintended consequences of “*the construction of the CTRL Project*”, it would be reasonable to categorise that possession, for the purposes of Part IV of Part 4 of Schedule 4, as a **CTRL possession**;
- 21.3. where a possession is made necessary primarily because of unintended consequences of “*the construction of the CTRL Project*”, it would still be reasonable to categorise that possession, for the purposes of Part IV of Part 4 of Schedule 4, as a **CTRL possession**, where there are reasonable grounds for assessing that, but for “*the construction of the CTRL Project*”, “*the Train Operator [would NOT have been] unable to operate or Bid to operate Services in either or both directions on the Routes or those parts of the Routes during the time in which such CTRL Possession takes effect*”;

- 21.4. where a possession is made necessary only incidentally because of unintended consequences of “*the construction of the CTRL Project*”, and where there are grounds for assessing that, even without “*the construction of the CTRL Project*”, “*the Train Operator [would have been] unable to operate or Bid to operate Services in either or both directions on the Routes ...*” it would NOT be reasonable to categorise that possession, for the purposes of Part IV of Part 4 of Schedule 4, as a **CTRL possession**;
- 21.5. in respect of the full spectrum of actual events on the night of 27th April 2004, it is not possible to determine precise proportions for the possible sources of the flooding of Thameslink tunnel, but there is sufficient evidence before the Panel to enable it to make a judgement on the “balance of probabilities” as to the primary source of such flooding, and thus whether that flooding should reasonably be deemed a **CTRL possession**.
22. On the basis of the “balance of probabilities”, the Panel takes into account that
- 22.1. Part 4 of Schedule 4, was only included within the Track Access Agreement with Thameslink because “*the construction of the CTRL Project*” presented a potential for disruption to services greater than envisaged in the formulation of Part 3 of Schedule 4;
- 22.2. the Atkins report, commissioned by Network Rail, tends to conclusions that
- 22.2.1. the volume and nature of the flooding could only result from one of two possible sewers (the Midland Road, or the Caledonian Road) discharging into the tunnel;
- 22.2.2. there are no grounds for concluding that the flooding did originate from the Caledonian Road Sewer, and good grounds for judging that it did not;
- 22.2.3. the Midlands Road sewer, by contrast, was subject to diversion and pumping arrangements which made it well positioned to discharge sewage into the tunnel.
- 22.3. the RLE/CORBER report confirms that a failure of the diversionary arrangements for the Midland Road sewer, when subjected to heavy rainfall, did result in the breaching of a dam and the discharge of sewage into the tunnel;
- 22.4. it is probable that the volume of rainwater and sewage conveyed by the Midland Road sewer, in both normal and peak conditions, will be considerably in excess of the rainwater potentially collected in the Thameslink tunnel;
- 22.5. the only previous clearly documented occasion when rainwater potentially collected in the Thameslink tunnel caused an interruption to services, was when the permanently installed pumps failed, because of a wider power failure;
- 22.6. it appears reasonable that the contents of Midland Road sewer would not normally pose any form of threat to the Thameslink Tunnel. In 2004 the scope for the contents of the Midland Road sewer to find their way into the Thameslink tunnel was wholly attributable to the need to divert the sewer as part of the works necessary for “*the construction of the CTRL Project*”, and the nature of the temporary arrangements made to achieve that diversion.

23. The failure of the permanently installed pumps on this occasion probably resulted in the flooding, at its peak, being worse than had the pumps not failed. However, the Panel does not accept that a failure of equipment intended to mitigate the risk of flooding, and under the responsibility of Network Rail, is, on balance, a reason for saying that therefore the cause of that flooding is less clear cut.
24. The Panel therefore finds for Thameslink that, on the balance of probabilities,
- 24.1. the flooding of Thameslink tunnel on the evening of 27th April 2004, and the consequent need for the line to be closed to Thameslink trains until the morning 29th April was a “*restriction of use of all or any part of the routes as a result of the construction of the CTRL Project*”; as such
 - 24.2. the period of closure fulfils the terms of the definitions of both a **CTRL possession**, and a **Part IV CTRL possession**, and therefore
 - 24.3. Thameslink is entitled to compensation in respect of this blockage in line with the provisions of Part IV of Part 4 of Schedule 4 of its Track Access Agreement.
25. 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

Chairman