
NETWORK and VEHICLE CHANGE SUB-COMMITTEE

Determination No. 1

(Made at Euston on 24th May 1996)

1. The Committee was asked by the parties, Mainline Freight and Railtrack to determine, in relation to a temporary closure of Greenford loop, as a result of an earth slip,
 - 1.1 that, because the closure had persisted for seven months, the Train Operator fell to be compensated under Access Condition G, and
 - 1.2 which of the possible interpretations of Access Condition G should determine the commencement date for compensation to the Train Operator, howsoever that compensation might be assessed.
2. The Committee commended the parties on producing a joint submission. It further acknowledged that if the possible outcomes to the dispute were confined to those in the submission then the reference was clearly within the locus of the Committee.
3. The Committee considered that to resolve the dispute it required to interpret the general intention of Access Condition G, and the specific import of
 - 3.1 sub-paragraphs (i), (iii) and (iv) of the definition of “Network Change”.
 - 3.2 paragraphs G1.8 and G1.9 in relation to circumstances where the consultative processes required in G1.1 cannot have been completed before a de facto Network Change occurs,
 - 3.3 paragraph G2.1 in relation to determining the powers and rights of the Train Operator in relation to G1, and
 - 3.4 paragraphs G2.2 and 2.3 in determining the basis on which applicable compensation might be assessed.
4. The Committee considered that the main purpose of Access Condition G, related to sub-paragraph (i) of Network Change, namely a mechanism for ensuring that, where a permanent Network Change was proposed to the Network, affected Access Parties had the opportunity for any adverse impact upon their operations to be assessed and the related costs/compensation factored into the project plan and costs. The Committee noted that the ADRC, in its Determination No.1 of 4th December 1995, had determined that, where there was a difference of view as to the materiality of any proposed Network Change, that materiality was to be assessed by means of invoking the Network Change procedure, if necessary by recourse to the provisions of G2.1(a)(ii).

5. The Committee considered that the force of paragraph G1.8, in association with sub-paragraph (iii) of the definition of Network Change, is that it provides a protection to Train Operators against the possible introduction, under a temporary banner, of any Network Change that subsequently becomes permanent, by default, without there having been an opportunity for the affected Train Operators to have had their interests considered by the application of G1.1 and G2.
 - 5.1 The Committee noted that, whilst the parties had drawn attention to the rights of the Train Operator after a lapse of 6 months, paragraph G1.8 empowers Railtrack to invoke Access Condition G at an earlier date. The Committee considered that Railtrack might find this course of action would be helpful in removing doubts when a disruption is protracted.
 - 5.2 The Committee considered that recourse to Access Condition G is required by sub-paragraph (iv) of the definition of Network Change, if, for example, the Network will not be restored on an equivalent basis to that existing prior to the disruption.
6. The Committee considered that paragraph G1.9 was intended to enable Railtrack to take deliberate and permanent action, in accordance with its judgement on how best to discharge its safety responsibilities, without requiring to delay to complete the due processes of Access Condition G1. However the Committee considered that the obligation to invoke after three months G1 was a protection for other Access Parties against a possible abuse of the safety provision.
7. The Committee considered that the force of the phrase “as if the relevant Network Change were a Network Change proposed by Railtrack”, in paragraphs G1.8 and 1.9 implied that affected parties were entitled to have account taken of all costs and benefits that had accrued since the effective date of the Change, that is those items they would have been entitled to had the Change only been implemented following the due processes of Access Condition G1.1. This consideration has to be understood in the context of the Committee's other views in relation to G2.2 and G2.3. The Committee considered that:
 - 7.1 in relation to G1.9 this implied that the effective date of the Network Change for compensation purposes is the date on which Railtrack first takes action which affects the use made of the Network by the Train Operator.
 - 7.2 in relation to G1.8 this implied that the effective date for compensation purposes is that from which the Network Change automatically becomes subject to Access Condition G in accordance with sub-paragraph (iii) of the definition of Network Change, namely “more than 6 months”.

8. The Committee considered that the protections for Train Operators in paragraphs G1.8 and 1.9 were intended to protect Train Operators against uncompensated permanent Network Change. The Committee considered that
 - 8.1 temporary, even protracted disruption, should be compensated by Performance Regimes, irrespective of whether they ultimately fall under sub-paragraph (iii) of the definition of Network Change.
 - 8.2 where Performance Regimes pay compensation this would be taken into account, along with other payments between the parties and to other customers, OPRAF etc., in assessing the amount of compensation in accordance with G2.2 and G2.3.
 - 8.3 the force of G2.2 and G2.3 is to give general direction as to the factors to be taken into account in assessing compensation and does not prescribe the weight to be attributed to any item.
9. The Committee considered that, in the specific reference, it might have been of benefit to the parties had Railtrack invoked Access Condition G at an early stage, if only to confirm that no permanent Network Change was considered and that Railtrack was intending to restore the Network without delay. The Committee further considered that
 - 9.1 it was not appropriate for either party to invoke Access Condition G with a view to obtaining compensation that was not provided by a particular Performance Regime
 - 9.2 a Train Operator was not precluded from obtaining compensation under Access Condition G because they were also beneficiaries of a Performance Regime.
10. The Committee determined that, in this particular case,
 - 10.1 for purposes of compensation under Access Condition G the disruption only became a Network Change after six months, and that therefore
 - 10.2 Mainline Freight should be compensated in accordance with Access Condition G with effect from 6 months after the incident (i.e. G1.8 and sub-paragraph (iii) of the definition of Network Change), and
 - 10.3 for the intervening six months Mainline Freight's only entitlement should be that provided for by its Performance Regime.

Bryan Driver
Chairman
Network and Vehicle Change Sub-Committee