
NETWORK and VEHICLE CHANGE COMMITTEE

Determination no. NV 53

Hearing held at Kings Cross on 8th December 2003

[Note: previous published determination was determination NV 50]

1. The Committee was asked by ScotRail Railways Ltd (SRR) to rule that Network Rail Infrastructure Ltd (Network Rail) had acted in breach of the Track Access Conditions in the way in which, in 2003, it had introduced revised and new techniques in respect of the painting arrangements for the Forth Bridge. It was SRR's contention that the nature of the revised arrangements should be deemed a Network Change within the terms of that definition. It was SRR's further contention that, the time-span over which Network Rail was introducing these revised arrangements, and the impact on services in that time-span, brought those arrangements within the scope of the definition of a Major Project. They should, therefore have also been the subject of a Major Project notice.
2. The Committee gave consideration as to its standing in relation to both elements of this appeal. It concluded as follows:
 - 2.1. the matters raised in respect of the application (or in this case non-application) of the procedures laid down in Track Access Condition Part G, are, under the terms of Track Access Condition G6.1, to be referred to the NVCC;
 - 2.2. in respect of the applicability of the definition of "Major Project", and the application (or in this case non-application) of the procedures in Track Access Condition Part D "Major Projects", the standing is defined as follows

[to note that the relevant paragraphs in Track Access Condition Part D have recently been re-numbered: the paragraph numbers cited are those that were to be found in the "white" pages that applied to the preparation of the 2003 Timetable; the corresponding paragraphs in the current "pink" pages that applied to the preparation of the subsequent Timetables are shown in brackets{}]. There are otherwise no textual differences between the two versions]

 - 2.2.1. D2.3.4(a) {D2.2.4(a)} "any matter concerning the operation of the procedure in this Condition D2.3" {D2.2} should reasonably be deemed to embrace any failure to operate that procedure, and therefore open to reference by the bidder "to the Industry Committee for determination";
 - 2.2.2. in D2.3.5 {D2.2.5} any appeal in respect of items raised under D2.3.4 {D2.2.4} "shall be treated as a matter referred to that Committee under Condition G6.1, and the provisions of G6.2 to G6.7(inclusive) shall apply to it mutatis mutandis"; and
 - 2.2.3. in G6.1 "that Access party may refer the matter to the Network & Vehicle Change Committee for Determination"; and that therefore
 - 2.2.4. Network & Vehicle Change Committee is properly the committee to determine the applicability of the Major Project provisions in D2.3 {D2.2}.
3. The Committee found that the following facts were relevant to its consideration of the procedure for painting the Forth Bridge:

- 3.1. The established method of painting using successive over-coatings of red lead-based paint was no longer effective and was failing to prevent corrosion. As a consequence there was a need to remove all paint and clean back to bare metal before applying a modern three part protective epoxy resin surface treatment.
- 3.2. The established method of painting could, in general, be undertaken without interruption to the passage of trains, other than the introduction, every Sunday, of Single Line Working over the bridge. However, methods of working had been extensively reviewed and revised to comply properly with current Health and Safety requirements.
- 3.3. It appeared that parts of the bridge in close proximity to the kinematic envelope of passing trains, in particular the suspended spans, had not been painted for many years.
- 3.4. Safety regulations now require that all lead-based paint removed from the bridge should be captured and encapsulated for safe disposal; this requires the erection, around areas to be treated, of screening. The nature of this screening is such that, on parts of the bridge, painting of the area surrounding one track requires the screening to encroach upon the kinematic envelope of the other track.
- 3.5. The next stage of the new technique, the epoxy resin treatment, requires to be cured in controlled temperature conditions. This also demands special screening arrangements; in certain weather conditions it may not be feasible at all.
- 3.6. Once any part of the structure has the benefit of the full three part epoxy resin treatment, future protection is primarily a matter of renewing the outer gloss coat: this is likely to require application in ways analogous with those used previously for the application of the lead-based paint.
- 3.7. The requirement for the screening referred to in 3.4 and 3.5 above, the time this takes to assemble and dismantle, and the fact that it cannot be erected in a way to permit single line working, has already resulted (during July 2003) in 4x54hr full blockages of the bridge.
- 3.8. It emerged at the hearing that a seven-year contract has been awarded for the bridge re-painting works. The first two years of this contract are being used for exploratory and trial works, in order to ensure that the maximum possible results are achieved in the latter five years of the contract. This contract is managed, for Network Rail, by a designated "Project Engineer".
- 3.9. At different times, proposals have been advanced for other blockages in later years. The most recent proposal is for an 8-day blockade in July 2005, with possible contingency 54 hr possessions later in the same year. There is currently no commitment as to the need, or otherwise, for possessions during the balance of the seven-year contract.
- 3.10. Although, during the implementation of the new system of painting, there is a requirement, both past, and in the remainder of the seven-year contract, to take extended possessions, these are intermittent, and liable to careful scheduling and planning.
4. The Committee found as a fact that SRR does not contest either the necessity for the change of painting method, nor that it cannot be delivered without some exceptional line blockages. However, what is at stake, in the bringing of the reference, is the level of compensation, payable by Network Rail to SRR, for the scale of disruption resulting from the necessary blockages, and which varies dependent upon the regime under which they are applied.
5. Such differences have no bearing upon the Committee's determination as to which is the more correct regime, but, for the sake of completeness, the following should be recorded:

- 5.1. To date, SRR has been compensated for the 2003 blockages under the provisions regarding Restriction of Use in Schedule 4 of the SRR Track Access Agreement.
- 5.2. Were it to be decided that the revised Forth Bridge repainting constituted a Network Change, it would entitle SRR to compensation in accordance with the provisions of Track Access Condition G2.2 and G2.3.
- 5.3. Were it to be decided that the revised Forth Bridge repainting should be deemed a Major Project then any blockages necessary for the completion of the works would be compensated under the terms of those provisions of Schedule 4 that relate to a “Significant Restriction of Use”.
- 5.4. Finally, were it to be decided that the revised Forth Bridge repainting should be deemed neither a Network Change nor a Major Project, a future blockade of 8 days, as currently proposed for 2005, would nevertheless automatically attract compensation for SRR under the terms of the “Significant Restriction of Use” provisions of Schedule 4. Other 54hr possessions, however, would attract only normal Schedule 4 “Restriction of Use” compensation.
6. The Committee’s task was to determine which of the categories, Network Change, Major Project, or “normal” maintenance activity, was the appropriate one to describe the revised Forth Bridge repainting arrangements. From that determination would flow the due processes to be followed and the consequent basis for assessing compensation. It is important to state that there could be no presumption that the categorisation of the activity should be determined by that which would attract a particular level of compensation.
7. In considering whether or not the revised Forth Bridge repainting should be categorised as Network Change, the Committee adopted the following rationale:
 - 7.1. The change is essentially the introduction of a new technique that Network Rail is to employ to assure the long-term availability of the Forth Bridge for “*trains operated by that operator on the Network*”.
 - 7.2. Whilst the essence of what is under consideration can broadly be described as “painting” the change of technique does require some changes to possessions, as compared with past general practice. However, those changes to possessions relate only to the period of implementation of the technique: once the three coat epoxy resin paint has been applied and established, its subsequent maintenance (namely over-painting of topcoat) should be, broadly, only as disruptive as previous painting.
 - 7.3. Other than during brief parts of the period of transition, the functionality of the Forth Bridge, the hours that it will normally be open during the week, and the number, or weight, of trains that can be passed, will be neither reduced nor enhanced to any perceptible degree that might be categorised as “*likely materially to affect the operation of the Network, or of trains operated by that operator on the Network*” (Part G Definition (i)).
 - 7.4. Although, during the implementation of the new system of painting, there is a requirement, both past, and in the remainder of the seven-year contract, to take extended possessions, these are intermittent, and liable to careful scheduling and planning. It would not be appropriate to seek to classify such occasional interruptions as “*a change... which has lasted for more than six months...and which is likely materially to affect the operation of trains by that operator on the Network*” (Part G Definition (iii)) because there is no continuity of material impact. (Indeed for the great majority of any possible six-month period, there will be no impact on train operation at all).

8. On the basis of the findings of fact, and the rationale set out above, the Committee determined that it would be unreasonable to classify the revised Forth Bridge repainting as a Network Change, whether in the terms of Part G Definition (i), or Definition (iii).
9. The Committee then directed its attention to the issue of what, in this context, is a Major Project, and whether the revised Forth Bridge repainting fell within the scope of the definition of a Major Project. The Committee took into account the following factors:
 - 9.1. the implication of the discrete category “Major Project” is that it is something that can be differentiated from the normal run of renewal and maintenance activity that is carried out, year in, year out, subject to the terms of the “*applicable Rules of the Route/ Rules of the Plan*”.
 - 9.2. the definition brings together a number of discrete elements, all of which would appear to require to be met, for there to be an **obligation** on Network Rail to categorise and manage an activity as a “Major Project”. These are:
 - 9.2.1. the activity relates to “*engineering, maintenance or renewal*”;
 - 9.2.2. it requires “*a possession or series of possessions of one or more sections of track*”;
 - 9.2.3. that requirement lasts “*a period of more than one year*”; and
 - 9.2.4. the activity relates to a defined “*project*”.
 - 9.3. “*project*” is not a defined term in either the Track Access Conditions, or the Railways Act, and therefore must be construed in line with common English usage. In this regard a project is something not “run of the mill”, but is non-repetitive, is undertaken to achieve a specific objective, implies the commitment of identified resources, and, probably, extends over a sustained period of time.
10. The Committee’s rationale was that the introduction of a changed method of painting for the Forth Bridge involved the commitment of specifically contracted resources, over a period of seven years, during the whole course of which there was a potential requirement for possessions, all to achieve the finite goal that future maintenance would be on a different system. It was the view of the Committee, therefore, that this specific activity did fall logically within the scope of the definition of a Major Project. It followed therefore from that that SRR was entitled to require Network Rail to administer the specific activity as a Major Project and in accordance with Track Access Condition Part D2.3 {now D2.2}. In taking that view the Committee did so in the context of this particular and unique set of facts. It was not in any way moving in a direction whereby other more usual types of maintenance could be categorised as Major Projects.
11. The Committee therefore determined that Network Rail should have designated the revised Forth Bridge repainting project a Major Project, and acted in accordance with the provisions of Track Access Condition D 2.3 {now D2.2}. The Committee therefore, in accordance with its powers under D2.3.5 {now D2.2.5}, and G6.5.3(a)(i), directs Network Rail to take such steps as are necessary to ensure compliance with Track Access Condition Part D “Major Projects”, including, as appropriate, the issue of a Major Project notice, as if it had complied with that condition from the time it decided to implement the change in painting technique.

Sir Anthony Holland
Chairman