
NETWORK and VEHICLE CHANGE COMMITTEE

Determination NV59

Hearing held at Kings Cross on 5th May 2004

[Note previous published determination was determination nv58]

1. The Committee was asked by Network Rail Infrastructure Limited (“Network Rail”) to rule that it had complied fully with the terms of Determination NV35 of 13th December 2001 (“NV35”). Such a ruling would clear the way for ScotRail Railways Limited (SR) to settle outstanding invoices in respect of works undertaken by Railtrack (now Network Rail), in 1999-2000, in relation to the introduction of the Class 170/4 trains on the Edinburgh-Glasgow, and Edinburgh-Aberdeen-Inverness routes. A comparable, but subsidiary, issue also arose in respect of the Class 334 electric units.
2. In NV35 the Committee (“the earlier Committee”) had reviewed all the evidence and arguments put before it, had recorded its understanding of that evidence, and the conclusions that it drew in respect of the arguments, and had issued certain directions as to how the parties were to proceed towards agreeing what sums, and in respect of which works, SR should be billed. It had also directed the parties that *“Where, having complied with the directions set out above, the parties still cannot agree the detail of the monies due, that difference may be referred to this Committee”* (NV35 para. 11).
3. Although the main issue for this reference was one of whether or not the preconditions to para 11 of NV35 had been fulfilled, the Committee took the view that
 - 3.1. *“the parties still cannot agree the detail of the monies due”*, and therefore there is a legitimate matter for reference to this Committee.
 - 3.2. the parties had not challenged or appealed any aspect of Determination NV35, and that therefore
 - 3.3. this should be interpreted as implying that the parties accepted the force of all that Determination NV35, and that therefore
 - 3.4. it should not revisit or re-appraise the conclusions of the earlier Committee.
4. The Committee reminded itself that, as presented by the parties, the commercial context of both the earlier and the current references was as set out in NV35, namely that:
 - *“3.1 SR had ordered new trains with, as part of the purchasing specification, the requirement that the new trains (Class 170/4) would be able to pass over all lines over which SR currently operates Class 158 trains;*
 - *3.2 the parties were agreed that they had applied the provisions of Track Access Condition F, insofar as these related to initial evaluation by Railtrack (Condition F1.1 to 1.6);*
 - *3.3 Railtrack and SR had worked in close collaboration to ensure that there were no infrastructure impediments to the introduction of the Class 170/4s, even to the extent that there had been agreement that clearance works be undertaken, without having formally complied with Conditions F1.7 & 8 and F3.2 & 3;*

- 3.4 a request from SR in August 1999 for details of the justification for the works undertaken, had lain formally unanswered until, in 2001, Railtrack had submitted an unsubstantiated invoice for over £215,000, being 75% of the costs of evaluation works, and 100% of the costs of the physical works at 12 locations;
 - 3.5 SR confirmed that the manufacturers of the Class 170/4 trains asserted that they had met the specification for a train that would pass over routes used by Class 158 trains, although they did concede that, in particular in the area of the cab valance/footstep, the kinematic envelope of the Class 170/4 exceeded that of Class 158;
 - 3.6 the most obvious difference between the Class 170/4 and the Class 158 was that, on the Class 170/4, the passenger doors were at the 1/3 2/3 locations rather than in the end vestibules (as on Class 158); there was no clear understanding as to whether this aspect of the design had required accommodating works over and beyond any works being undertaken in relation to more general questions of stepping distances;
 - 3.7 there was concern, expressed by both SR and its manufacturer, that Railtrack had only arrived at the conclusion that any infrastructure works were needed, because it had made alternating use of two different computer models of vehicle gauging, in ways that lacked consistency and rigour.” (NV35 paras 3.1 to 3.7)
5. In its Determination of the matters before it the earlier Committee had directed the parties as follows:
- 5.1. in respect of the assessment works, that
- “10.1 there were inconsistencies as between the absolute gauging and comparative gauging techniques employed by Railtrack Scotland;
 - 10.2 the fact of such inconsistencies may have contributed to the costs associated with the vehicle assessment being higher than if there had been a single proven technique consistently applied; some acknowledgement of this factor should be agreed in relation to the assessment of reasonable costs in accordance with Conditions F1.6 and F1.7; (NV35 paras 10.1 and 10.2)”
- 5.2. in respect of the justification of the sums due for infrastructure works, that
- “10.7 Railtrack should reasonably be expected to supply, on a site by site basis, details of the works undertaken; these details should be sufficient to inform SR, in relation to the concerns expressed in its letter of 19th August 1999, that
 - 10.7.1 all works that have been undertaken do support clear and definitive physical gauge differences between a Class 170/4 and a Class 158 unit,
 - 10.7.2 all works are supported by empirical information for each site, which supports the requirement for this work, such that SR can use this information in its commercial back-to-back arrangements, and
 - 10.7.3 it should be clear where any gauge clearance works have been undertaken to improve clearance to Group or Industry standards not otherwise associated with the variance between a Class 170/4 and a Class 158 unit”.

6. Neither party presented any evidence to clarify the degree of compliance, or not, with NV35 para 10.2.
7. Network Rail tabled, as evidence of its full discharge of its responsibility to comply with para 10.7 of NV35, three documents, namely, in chronological order;
 - 7.1. a letter, and Appendix 1, from Network Rail to SR of 4th February 2002;
 - 7.2. a letter of 14th May 2002 (in reply to SR's letter of 11th March 2002: see 8.1 below) and
 - 7.3. a report, prepared by Scott Wilson, entitled **“Gauge Clearance Works for ScotRail’s new Class 170 and Class 334 units: Kinematic Envelope Comparison; Class 170/158; Class 334/318” October 2003.**
8. SR, challenged these documents and stated that they did not demonstrate fulfilment of the earlier Committee’s directions. For its part, it tabled,
 - 8.1. a letter of 11th March 2002 from SR to Network Rail (in response to 7.1 above), and
 - 8.2. a letter of 26th August 1999 from Laser Rail to Adtranz; this letter had been before the earlier Committee, but SR was of the view that it remained valid, in respect of the doubts it cast upon the merits of the Scott Wilson report, and should therefore be considered again.
9. The Committee, in respect of the representations made to it, found, as matters of fact, that
 - 9.1. The earlier Committee had been led to believe that *“the actual definition of works needed had depended upon absolute gauging techniques, backed up by empirical measurement”* (NV35 para 7.3).
 - 9.2. The letter of 4th February 2002, from Network Rail to SR stated that *“Attached as Appendix 1 is a table showing by location the modelled clearances for Class 170 vehicles and, where appropriate, the comparator Class 158 vehicle. The table also identifies when the works were undertaken and the appropriate cost”*.
 - 9.3. The Appendix in question to the letter of 4th February 2002 is titled *“Summary of Comparative Class 158/170 Gauging Evaluation: (...as at 24th Jan 2002)”*. This appendix states, in respect of three named locations, that *“Initial E&G Route clearances undertaken using absolute gauging technique”*.
 - 9.4. No information had been given that demonstrated that the case for any of the other clearance works had actually been made on the basis of absolute gauging.
 - 9.5. The parties were both aware of the fact that different models of Kinematic Envelopes, for the same class of train, are likely to vary as to the results that they give. Furthermore, the parties were agreed that:
 - 9.5.1. In respect of the Class 170, the only Kinematic Envelope model available had been one based on VAMPIRE principles. (This model has been progressively developed as Class 170 trains have gone into production).

- 9.5.2. In respect of the Class 158, two models had been available in the context of this dispute, namely the DG501 model, and a later model based upon VAMPIRE principles. For the purposes of complying with the directions given in NV35, both models had been available for use by either Network Rail or SR.
- 9.5.3. There are circumstances where the Kinematic Envelope of the Class 170 exceeds that of the Class 158. An measure of that exceedance can be achieved by a comparison between models of the two train types.
- 9.6. The parties do not agree which of the two available models of Class 158 is the more appropriate for the purposes of comparing with Class 170.
- 9.7. In respect of the Scott Wilson report of October 2003
 - 9.7.1. Network Rail asserted that, as part of the remit given, Scott Wilson were advised that their report was required to help demonstrate compliance with the earlier Committee's directions in NV35;
 - 9.7.2. There was no textual evidence in the finished document to acknowledge this facet of the remit;
 - 9.7.3. Network Rail did not consult with SR as to its intentions to commission the report, nor as to the remit to be given.
 - 9.7.4. Scott Wilson was remitted to use,
 - 9.7.4.1. in respect of the Class 170 trains, the Issue 10 VAMPIRE model, and
 - 9.7.4.2. in respect of the Class 158, the earlier DG501 model.
 - 9.7.5. Scott Wilson was not remitted, even on an exemplar basis, to produce any comparison, in respect of Class 158, of the differences between the outputs from the DG501 model, and those from the Class 158 VAMPIRE model.
 - 9.7.6. The report, as presented does not include any summary of findings aimed at the non-technical expert. Nor has the Committee been given any supplementary account of its findings that demonstrates "*that 10.7.1 all works that have been undertaken do support clear and definitive physical gauge differences between a Class 170/4 and a Class 158 unit*".
- 9.8. The letter of 28th August 1999 from Laser Rail to Adtranz, before both the earlier Committee, and this Committee, made reference to "*Recent work undertaken led to a report clarifying the comparative gauging of the two stocks, based on like-for-like comparisons of Vampire models in specific known situations. The main report, and subsequent summary report provide, I believe, sufficient evidence that the 170/x and 158 are substantially similar, within bounds clearly stated.*" (No evidence was laid before the Committee, by either party, as to the actual substance, or conclusions, of such a report, nor of any equivalent piece of work that actually compares the two Vampire models for Classes 158 and 170).

10. The Committee considered that the prime force of NV35 was that it required Network Rail to table certain information, information which was defined in terms of the function that it was required to fulfil (... *“these details should be sufficient to inform SR, in relation to the concerns expressed in its letter of 19th August 1999,...”*), to permit the parties to calculate and agree *“the monies properly due”* (NV35 para 10.8). The Committee found, as a matter of fact, that the earlier Committee had, through questions and answers set out in the Record of Hearing, established that such information did exist, was available, but was not always shared, and was also acknowledged to have some imperfections:

“Q16 Have you information for each location on the precise problems, and the extent to which the gauge clearance is compromised?”

A16 We have the information, and could provide it, on whether the valance is the key element.

...

Q18 (to ScR) Have you had any information for each site in response to the letter of 19.8.99?

A18 (ScR) No. However, we knew what was done, but not the linking with gauge clearance. We have 15 trains costing £3m and didn't want them standing in the siding.

...

Q20 (to RT) Have you evidence to supply to Train Operators to demonstrate that the work is required? You implied that some of the work is still outside Group Standards? Could you supply this evidence to the Train Operator?

A20 (RT) Yes.

...

Q26 When you know what works are required to allow the Class 170 to run on the routes concerned, what attempts are made to sit down with the Train Operator to discuss?

A26 (RT) Much of the analysis was done very quickly in order to get the work done quickly.

Q27 Was it Railtrack's view that its knowledge was perfect?

A27 (RT) Imperfection does not necessarily mean rubbish, but we must use the information with care.

...

Q34 So, for the physical work carried out, you have documentary evidence that the work was done and that it all needed to be done?

A34 (RT) Yes.”

11. The Committee therefore concluded that its task, in respect of the current reference was simply to determine whether the information supplied by Network Rail had fulfilled the requirement to inform SR sufficiently that SR would be able to make *“a prompt settlement of the monies properly due”* (NV35 para 10.8). In making any such judgement the Committee had to take into account that in 1999-2000 Network Rail, and SR, collaborated, on a pragmatic basis, to achieve the earliest possible introduction of the Class 170/4s. Although, including in SR's letter of 19th August 1999, the parties had been at pains to protect their respective interests, they proceeded, at least in part, with the implementation of the Class 170 project, on a basis of trust, and the expectation that each would behave reasonably.

12. The Committee therefore considered that the following were pertinent to its determination:

12.1. It is apparent that Network Rail sought to meet the service needs of SR, in respect of possible line clearance works, in a way that was both expeditious, and compliant with its responsibilities for the safe operation of the Network. In any case of Vehicle Change, it is, subject to the operation of the Track Access Conditions, the sole responsibility of Network Rail

12.1.1. to determine what works may be required;

12.1.2. to determine where derogations from standards may achieve the same effect more economically;

12.1.3. to price all works, and, to obtain the agreement of the relevant Train Operator that it will pay such costs, and

12.1.4. to commission such works.

12.2. It is not part of the Committee's purpose, in this case, to challenge Network Rail's right to exercise its responsibilities in respect of 12.1.1, 12.1.2 or 12.1.4 above. This reference relates to the manner of discharge, by Network Rail, of its responsibilities under 12.1.3 above. In this respect Track Access Condition F3 requires that such costs (*"which can reasonably be expected to be incurred by [Network Rail] as a consequence of the implementation of the proposed change" (F3.2)*) are encompassed within any statement of claim for compensation, which *"shall contain such detail as is reasonable to enable the sponsor to assess the merits of the statement" (F3.1)*.

12.3. Appendix 1 to the Network Rail letter of 4th February 2002 appears to give a measured assessment of the works undertaken at each location, in connection with the stated project, and the itemised costs. As such, it represents a significant contribution towards Network Rail's compliance with para 10.7.2 of NV35, which states that *"all works are supported by empirical information for each site, which supports the requirement for this work..."*.

12.4. The Committee

12.4.1. is not convinced that this Appendix demonstrates that these works fall solely to the charge of SR, nor that the detail and reasons given are, *"such that SR can use this information in its commercial back-to-back arrangements"*.

12.4.2. does not see that this Appendix, establishes that *"absolute gauging against a Class 170/4 specification (backed up by empirical measurements) had been used to determine what precise works were needed to accommodate Class 170/4"*(NV35 para 10.3.2).

12.5. Network Rail had conceded to the earlier Committee that its assessment methods, for the works required, contained an element of approximation, such that, for example *"the risk that locations that might be in need of works would be missed was acknowledged and accepted by Railtrack"* (NV35 para 10.3.3).

- 12.6. The Committee considered that the same methodology could logically have led to Network Rail undertaking some works that, in the event, were not required. The implication of the letter of 19th August 1999, in which SR had given its go-ahead for necessary works, was that this risk was also one that fell to Network Rail's cost: *"Our main proviso is that [Network Rail] can demonstrate that all works being requested are to support clear and definitive physical differences between a Class 170/4 and a Class 158 unit"*. Given that SR were investing substantial financed sums of money in capital equipment, it needed to know details, firstly, of the impact, if any, upon the infrastructure, and then of what it faced in terms of cost, where that infrastructure needed altering. Only when supplied with such details could SR, as a matter of contract, pass any resultant costs onto the supplier of the capital equipment. To put it simply, and in commercial terms, SR's authority to proceed placed the onus of proof on Network Rail to demonstrate the true need for the works, before SR could reasonably be expected to pay.
- 12.7. This onus was clearly set out by the earlier Committee in its direction that *"these details should be sufficient to inform SR, in relation to the concerns expressed in its letter of 19th August 1999, that...all works that have been undertaken do support clear and definitive physical gauge differences between a Class 170/4 and a Class 158 unit"* (NV35 para 10.7.1).
- 12.8. It is difficult to see how this obligation can be discharged without the deployment, by Network Rail, of a basis of comparison between the classes that has the confidence of all parties, and/or the Committee. Given the lapse of time from the date of completing these works, there has been ample opportunity for Network Rail to seek to demonstrate that any error in its previous method of assessment, as benchmarked against more up to date measures, has no, or only marginal, significance.
- 12.9. The Committee cannot claim expertise in the mechanics of measuring Kinematic Envelopes. Neither party produced, at the hearing, unambiguous evidence to assist the understanding of the Committee in this highly technical area, which was unfortunate. Further the Committee must give consideration to the implications of the apparent failure of the parties to agree to any work that might lead to an appropriate mode of assessment acceptable to both.
- 12.10. The Committee has no jurisdiction in relation to the commercial arrangements between SR and its rolling stock supplier. However, to the extent that such arrangements were made known to Network Rail by SR, then SR's needs in this respect could be material to any consideration of what is *"reasonable"* in *"such detail as is reasonable to enable the sponsor to assess the merits of the statement [of compensation]"*.
13. Faced with all these relevant matters, and following its findings of fact, the Committee determined that
- 13.1. in respect of a Vehicle Change, where [Network Rail] *"considers that it should be entitled to compensation from the sponsor for the consequences of the implementation of the change"* there is an obligation that *"any such statement [in respect of compensation] shall contain such detail as is reasonable to enable the sponsor to assess the merits of the statement"* (Track Access Condition F3.1);

- 13.2. the direction given in NV35 para 10.7 required Network Rail to present to SR information that was first requested by SR in 1999, and that the earlier Committee was told was available;
- 13.3. Network Rail has not, thus far, complied with that direction, insofar as it
 - 13.3.1. has not given “*details of the works undertaken...sufficient to inform SR, in relation to the concerns expressed in its letter of 19th August 1999*”, and, in particular,
 - 13.3.2. has not demonstrated that the allocation, between itself and ScotRail, of the costs of works carried out to facilitate the introduction of Class 170 trains, is solely justified by the “*clear and definitive physical gauge differences between a Class 170/4 and a Class 158 unit*”.
- 13.4. the Committee has not been convinced that, after this lapse of time
 - 13.4.1. it is possible to know with precision what allocation of costs, for the works done, might be appropriate, nor that
 - 13.4.2. there is one set of data so compelling that it will convince all parties, without the need for serious face to face negotiations, taking account of all the information that is available. Therefore
- 13.5. Network Rail
 - 13.5.1. should comply with NV35 para 10.7, in particular to remedy the omissions set out in 13.3 above; and then
 - 13.5.2. should engage in early, and positive, discussions with SR to resolve all differences of interpretation in respect of the information supplied by Network Rail in compliance with this Determination NV59.
14. For the avoidance of doubt, the parties should note that, although the current reference does not explicitly ask the Committee to determine “*the detail of the monies due*”, the right to return to the Committee set out in NV35 para 11 (“*Where, having complied with the directions set out above, the parties still cannot agree the detail of the monies due, that difference may be referred to this Committee*”) remains in force. However, taking into account all the circumstances addressed in this determination, the Committee would not expect to receive any such reference without documented evidence of both full exchange of further information, and exhaustive negotiation.
15. In respect of the Class 334 electric trains, to the extent applicable, Network Rail shall remedy any failure to comply with the terms of NV35, in line with the directions given in 13 above, and then, informed by all “*such detail as is reasonable*” the parties shall seek to resolve their differences by means of negotiation.

Sir Anthony Holland

Chairman