ACCESS DISPUTES COMMITTEE

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ACCESS DISPUTES COMMITTEE

Dear Rachel,

Background

Thank you for the opportunity to comment on the GBRTT discussion papers (1.1, 3.1, 3.2 and 4.1) and attend the plenaries held over the previous few weeks. As noted in the sessions, it is difficult to comment in detail without understanding the overall future industry structure (and therefore where disputes and issues might arise, to provide input on where to mitigate said issues during design). Consequently, whilst this response covers all four discussion papers, it should be read in light of the information available at time of writing. We would welcome the opportunity to have further discussion and detailed input as the design stages progress and, indeed, believe this is critical to realise the full opportunity that GBR could offer.

The Access Disputes Committee (ADC) is responsible for the operation of the independent dispute resolution procedures that form part of all access agreements on the national network of Great Britain and has existed, in some form, since 1994. ADC provides cost-efficient, quick and effective ways of resolving any contractual issues that arise from the management of the contracts, including timetabling. It is currently managed by an elected, volunteer committee made up of experienced railway employees from different sectors of the industry. The ADC employs two part-time staff on an as-required basis and utilises pools of independent, legally-trained expert hearing chairs and advisors for its cases, also on an as-required basis. For 2023 there is no cost to industry; due to lower-than-expected numbers of hearings following changes to franchise arrangements during COVID-19, the Committee has been able to waive levies for the 135 companies who hold some form of regulated access agreement with either Network Rail, other Infrastructure Managers or other rail-related companies (collectively, “Resolution Service Parties”).

Discussion Paper 1.1 – Planning the use of the railway.

Timetabling disputes make up the bulk of ADC’s workload. Numbers have reduced and stabilised from a peak of 242 disputes in 2018 (mainly due to the May 2018 timetabling crisis) to 175 registered in 2021, and 173 registered in 2022. The key changes in the last few years have, however, been in the type of dispute registered and the type of operator registering it: 74% of disputes in 2022 related to engineering access decisions; only 7 disputes apiece were made against the May 2022 and December 2022 Working Timetables; only two each of those disputes were made by future-PSC operators (both of these disputes were only lodged awaiting permission from DfT to concede to Network Rail’s decision; had permission been swifter in coming, the disputes need not have been made). In 2022 future-PSC operators made up only 7% of timing disputes, but over half (57%) of engineering access disputes. There are therefore two clear conclusions that can be drawn: there is a clear need for an independent dispute resolution process in the future, to cater for non-PSC operators; designing a better system for creating the Working Timetable will not address the biggest cause of industry timetabling disputes today. This presents a risk, not just in a missed opportunity to address (and resolve) causes of current issues, but also for the Working Timetable, changes to which are often reliant on engineering access delivering infrastructure improvements.

Q1 Given the limits of this workstream and its remit set out in section 1, do you agree with our analysis of the problems outlined in section 2.1? Are there other problems in this area that we have missed?

Generally we agree with the analysis set out in section 2.1.

However, the Secretary recently undertook some analysis of timing disputes (excluding engineering access) for Network Rail, to assist with the BTPF programme. A summary table, highlighting the reasons why operators (of all categories) have made timing disputes since January 2017, is below. It is clear that culture, training and good behaviours are a fundamental pillar in a smooth timetabling process; whilst these issues are being addressed by another GBRTT workstream, the data makes it clear how critical they are to future success. The fact that 33% of timing disputes since 2017 have been lodged for alleged failures to follow the process, demonstrates that these underlying issues require just as much concurrent focus if this workstream is to succeed and if disputes, whether via independent processes or PSC contracts, are to reduce in the future.

Reason given	No. of disputes giving this reason	% of total (356)
Poor quality of decision	176	49%
Inadequate or no consultation before decision made, including no evidence provided to support decision	117	33%
NR's general operation of Part D (significant departure from Part D processes or timescales)	80	22%
DfT / funder issues	9	3%
Wider NR business issues, e.g. May 2018 Infrastructure Projects	37	10%
Genuine (technical) disagreement as to Decision Criteria interpretation or TPR values (as a distinct issue from behavioural concerns)	81	23%
Unable to be categorised (most were D8.5 disputes)	29	8%

We would note that planning of engineering access is critical to the success of the timetabling process and this appears to be omitted from the report. Clearly, industry data shows there is a problem; the Committee would welcome further discussion with the GBR Transition Team to understand how we can take the opportunity presented by industry change to reduce numbers of formal disputes in the future.

Q2 Given the contextual constraints of current plans for reform as described in section 2.2, do you agree that the general approach outlined in section 3.1 is correct? If not, what do you suggest?

We welcome the move towards making key decisions earlier, and locking them in (unless there is a clear, evidenced, socio-economic basis for change). Based on ADC's experience over the past 30 years, it is recommended that any new processes have clear stage gates, with a 'use it or lose it' approach to appeals (i.e. if an operator has not disputed something at the appropriate time they cannot dispute it later on), unless the decision made has been substantially changed by its next iteration. Existing deadlines for the appeals process should remain; it is critical that, once instigated, the process can move swiftly to a clear resolution.

Finally, we welcome the suggestion made in the plenary of stress-testing worked examples before any proposals are taken forward; this is critical to ensure success and avoiding some of the issues we have seen historically with the planning processes.

Discussion Paper 3.1 – Station access
Discussion Paper 3.2 – Depot access

Since 2010, and the redrafting of the disputes process and available fora, there have only been 12 formal disputes relating to station access. Since 1994 there have only been two formal disputes relating to depot access (one pre-2010, one linked to a 'global' dispute about responsibility and charging). The majority of station disputes have related to charging, most frequently QX charging calculations at the start of Control Periods. Anecdotally it is understood (and clearly reflected in the consultation papers) that there are many bones of contention in the station and depot access arenas, but these are not being resolved using the formal processes available. Separately, the Secretary receives many queries relating to station access issues, but having provided advice and signpointed to previous cases, these rarely materialise into formal disputes.

Generally speaking, proposals for simplification of the relationships and suite of contracts for both stations and depots are very welcome; if designed correctly this should reduce both confusion and disputes, albeit there have not been many formal disputes in recent years.

One final point to note is that, following private investment and devolution, there are now many station and depot contracts that are not held by DfT-funded organisations, e.g. stations owned by local authorities, other depot providers etc. All Connection Agreements include a right of appeal via the current Access Dispute Resolution Rules ("ADRR") (and ADC). It is imperative to map these contracts out to avoid GBR simply creating yet another layer of bureaucracy and the industry being forced to operate multiple systems (and disputes processes). It is suggested that scenario-testing, similar to the proposal made in the workstream 1.1 plenary, might be a good way to address this.

Paper 3.1 Q1 Are there any other problems or issues that GBRTT should consider within the scope of this Commission?

Testing scenarios for the future GBR Code, contracts and relationships to ensure that contractual complexity (and therefore likelihood of disputes) is reduced.

Putting in hard deadlines (per recent changes to delay attribution disputes, and existing timetabling provisions) to ensure that 'disputes' either get resolved by set deadlines (including via the formal processes if needed) or are withdrawn as immaterial; ADC has no control over issues before they are formally notified to the ADC Secretary and it is clear from advice sought from the Secretary by industry parties, and from the discussion paper, that many issues continue for months without swift and clear resolution. Once in ADC's system, disputes are resolved in a timely, appropriate and agile manner.

The suitability of under-used existing ADC provisions such as 'Early Neutral Evaluation' to provide non-binding legal guidance to involved parties prior to any formal dispute.

Where changes are made to contractual relationships (e.g. in terms of station and depot responsibilities), issuing clear guidance, available online, for parties to refer to when trying to understand contractual definitions and responsibilities. Clear definition guidance will help the new GBR Code stand the test of time.

Paper 3.1 Q2 Are there any proposals … that you do not agree with? If so, please say which ones and why.

We have some concern about an incremental approach to bedding in new contracts, particularly where several operators share facilities or a station. A consistent 'big bang' approach, similar to that at rail privatisation would seem best in order to avoid confusion, gaps between legal responsibilities and to provide clarity.

We are extremely concerned about the risk of having multiple layers of different contracts within the industry given that the paper does not propose to alter arrangements for existing devolved or privately-owned facilities; this needs considerable further work to avoid complex bureaucracy and different parts of the industry operating to different rules and responsibilities, particularly around charging, asset management etc.

Paper 3.2 Q1 Are there any other problems or issues that GBRTT should consider within the scope of this Commission?

See response to Paper 3.1 Q1 above.

Paper 3.2 Q2 Are there any proposals … that you do not agree with? If so, please say which ones and why.

See response to Paper 3.2 Q2 above.

We have no comment to make on any of the other questions posed in Papers 3.1 and 3.2.

Discussion Paper 4.1 – Framework for access and joint processes

Q1 Are the problems, issues and barriers set out in Section 2 recognisable and do they have significant impacts?

Under point 2.1(d) it is important to draw a distinction between formal and informal disputes, i.e. those that are registered with ADC and those that are not. Disputes registered with ADC are subject to deadlines for resolution and are resolved swiftly; in a recent example a hearing was arranged with four working days' notice (Day 1: notification of dispute and hearing arrangements made; Day 2: operator submission deadline; Day 3: NR submission deadline; Day 4: hearing).

We therefore do not recognise that the statement in 2.1(d), "disputes drive disproportionate cost and effort, and are open to gaming", as one applicable to the current ADRR and ADC processes. The introductory section of this letter makes some points about ADC costs. In addition we would note that the entire independent ADC process costs approximately £400,000 per annum (2022/23), including office premises and staff, which equates to about £2,280 per new case in 2022 and £1,266 per case that had rolled over from the previous calendar year. We also provide, as noted elsewhere in this response, a free independent advice service, which is heavily used. It is simply not possible to obtain dispute resolution relating to rail issues for this level of funding anywhere else; a point made frequently by our Hearing Chairs operating in other jurisdictions. Additionally, there are rules prohibiting "gaming" of the ADRR process; this is something taken extremely seriously, and which can attract penalties.

There is a problem (as noted in our response to Papers 3.1 and 3.2) with regard to informal disputes dragging out. Simple deadlines, and effective management of the same, per the recent changes made to delay attribution processes and those that exist for timetabling processes, would prevent some of these issues. Others would be resolved - per the Commission's other work - by redesigning the structure to streamline relationships between the Parties (and therefore removing the cause of the dispute, for example since 2010 there have been 37 formal disputes lodged with ADC relating to compensation money claimed by operators from Network Rail, most of them relating to the Schedules 4 and 8 compensatory mechanisms).

Q3 Do you agree the proposed framework features set out in Section 3 are relevant, helpful or necessary for the future framework? Are we missing significant propositions for the future framework?

We agree that independent disputes processes are key (please see previous statistics mentioned in this response). This is distinct from ORR's role, which deals with strategic and regulatory issues.

Whilst GBR needs independence from DfT, it is imperative that it has appropriate contractual expertise to manage any contracts it lets appropriately, efficiently and in line with *Managing Public Money* guidelines. Appropriate, clear and consistent contract management should also reduce instances of "gaming" (noting comments in the discussion paper) and formal disputes.

Thought needs to be given as to how any internal GBR-PSC dispute resolution mechanism would work alongside independent dispute resolution for non-PSC operators. For example, if there is an issue affecting multiple types of operator (major timetable change, major Network Change), would the processes run concurrently (risking different or conflicting outcomes), or in succession (risking delay if one disputes process has to be concluded before the other can start). ADC would welcome the opportunity to share expertise on this point - including that of our Hearing Chairs - in future discussions with GBRTT.

Q5 Do you have specific views on holding GBR to account for delivery, performance and non-discrimination (Section 4.3)?

See response to Q3.

Q6 Do you have views on how to design the GBR Code change mechanism described in Section 4.4?

Noting the final paragraph about compensation provision. Use could be made by industry of something similar to the Early Neutral Evaluation provisions that exist within the current ADRR, providing non-binding legal or expert guidance to involved parties prior to any formal dispute, in order to give parties confidence and avoid "delaying change unduly".

Q8 Do you have any further comments on the issues explored in this paper?

Proposal documents and discussion have so far been silent on the Claims Allocation and Handling Agreement (CAHA). ADC has responsibility for the CAHA Registrar and, as mentioned during previous direct ADC discussions with the GBRTT, it is critical that the GBRTT open dialogue with us on the future of this Agreement.

The paper is currently silent on how success will be measured; it would be good to understand current thinking on this point.

We have no comment to make on any of the other questions posed in Paper 4.1.

On behalf of the Access Disputes Committee

Kind regards,

Tamzin Cloke
Secretary
Access Disputes Committee