
ACCESS DISPUTES COMMITTEE

MINUTES of MEETING No. 9
held in London on 8 November 2006

Present:

Tony Holland, Chairman
Tony Crabtree (Greater Western Trains)
Bill Davidson (Network Rail)
Tony Deighan (Eurostar (U.K.))
Nigel Oatway (English Welsh & Scottish Railway)
Gabrielle Ormandy (Network Rail)
Mike Price (First ScotRail)
John Thompson (London & South Eastern Railway)

In attendance:

Chris Blackman (Secretary)
Martin Shrubsole (Clerk)

Apologies:

Lindsay Durham (Freightliner)

9/0 Introduction

The Chairman welcomed Gabrielle Ormandy to her first meeting of the Committee.

9/1 Approval of Minutes of meeting no.8

The Draft minutes of meeting no.8 were approved without modification. The Chairman signed a copy of the minutes as a true record of the proceedings.

9/2 Matters arising from the minutes of the previous meeting

8/6 Changes to the methodology of funding of the Committee

The Secretary reported that the Proposal for Change had been approved by the Class Representative Committee, and formal regulatory approval had been received to take effect on 17 November 2006. Invoices for the Committee levy for 2006/07 are now being prepared for issue to Industry Parties.

9/3 Procedural Issues arising out of Reference ADP09

The special meeting of the Access Disputes Committee was convened in order to review experience with the operation of the revised Access Dispute Resolution Rules since their introduction in April 2005.

The Committee noted a paper from the Secretariat and affirmed that, in general, it considered that the new processes, introduced in April 2005, had worked well.

- The new smaller Panels, and the Secretariat, had adopted the (tighter) procedures without undue difficulty, and there had been no problems in appointing Panels or Members of the relevant Pools being available for hearings.
- Dispute parties had adhered (in large measure) to the guidance given in the template for joint submissions available on the Committee's website. However,
- the Secretariat had, on occasions, needed to seek further information from the parties by way of additional documents, or an amplification of the text of the submission.

The Committee noted that a procedural matter, in relation to TTP96, had been the subject of an appeal to the Office of Rail Regulation. The issue related to the status of a bidder, not yet the holder of a Track Access Contract, in relation to a second party's appeal against the content of an offer. The Chairman had given directions based upon a reading of an aspect of procedure where the Rules and the provisions of Network Code Part D were in conflict and, on the face of the documentation, denied a right to appear as an interested party. These directions had been challenged, and the subsequent ruling by the Office of Rail Regulation had accepted an argument that in such a case the meaning should be derived from the purpose of the text, rather than the strict wording.

The timing of the review was also prompted by representations from National Express, relating to particular case management issues raised by reference ADP09. The Committee noted that ADP09 was a case that the parties had subsequently settled without a need for a hearing. In view of the fact that the Committee had, at its previous meeting, had the opportunity to hear further oral representations from the representatives of National Express, it had been considered appropriate to invite Network Rail to provide written comment on those representations, and to invite Nigel Dewick of Network Rail to attend the meeting to answer any specific questions relating to the specific case.

The Committee was concerned that it should not get drawn into a consideration of the merits of ADP09, but should concentrate upon the issues of principle raised. There were significant differences between the representations received from National Express and Network Rail, just as there had been a significant difference between the views of the parties in their initial submissions, as to the nature of the matter in contention. That said the Committee considered that the essential challenge to the smooth operation of the Access Dispute Resolution Rules process derived from the following aspects of the case:

- the sum alleged to be at difference between the parties was of tens of millions of pounds. This alone would justify the expenditure, by either party, of considerable effort, and cost, whether on the preparation of arguments or the deployment of expert witnesses;
- the nature of the case, which related to the construction to be placed upon the Regulator's findings in respect of the partial appeal of NV33, was such that it depended upon the appellant obtaining the benefit of the disclosure of the defendant's full records for the totality of the Midland Main Line for a period of about ten years; an expensive exercise for both parties in retrieval and analysis.

- the written directions that had been issued by the Disputes Chairman, with a view to causing the parties to establish a common understanding of what had happened, and to help assess whether or not disclosure should be ordered;
- the possible advantage to entrusting some preliminary consideration of the issues to an appointed assessor,
- the timing of a possible directions hearing, at which to address the parties' procedural concerns;
- the possibility that the case would/could only be argued before a hearing in such a way that a Panel might require to be convened to sit between 10 and 20 days, and the extent to which that would be impractical to organise;
- the extent to which even such a time span would likely be affected if the proceedings were to be conducted upon an adversarial basis (e.g. involving cross-examination of expert witnesses by barristers or other specialists), rather than on the more general inquisitorial model (i.e. with the Committee's officers directed to ensure that the parties are required to produce documents likely to be requested by Panel Members, and to formulate arguments that relate to points of law identified in advance).

The Committee, some of whose members had been on the working party reviewing the ADR Rules in 2004, was clear that the revised ADR Rules are designed to provide a "short and sweet" method of establishing the respective rights ("the legal entitlements") of the parties in dispute, in most instances because such findings then give the parties the basis for working out practical solutions. It was noted that the working party had recognised that "Big issue" disputes, with a £x million price tag, could not readily be finalised by such a method, and would, in most cases be taken to next levels of appeal. The working party had considered the practicality of providing the option of a trap door mechanism, by which "big" cases could be referred to be handled by another body such as arbitration or a court.

It was noted that such a provision was incorporated into some Track Access Contracts, but that such provisions were specifically not available in relation to cases that related to on – rail competition, and which the Network Code (parts D, F and G) directed could only go on appeal to the Office of Rail Regulation. This position had been defended strongly by the Office of Rail Regulation in the course of the working party's deliberations. This however would not preclude an option where a "big issue" could be routed to say an arbitrator, and then on appeal to the Office of Rail Regulation. It was recognised that before such a "suitable" mechanism could be put in place or invoked, it would need to be subject to very clear criteria.

The Committee was satisfied that the procedures written into the ADR Rules were entirely compatible with, and indeed tended to require, an inquisitorial approach. In particular it was such an approach which made best use of the prior knowledge of Panel Members ("a knowledgeable peer group with relevant railway expertise"). The Committee accepted the advice of the working party members that the instructions given to the drafters of the reviewed Rules had sought specifically to preclude an adversarial approach.

The Committee considered that there could be advantage in future in appointing assessors, but that the function of such assessors would be to assist with making a case "triable" in Panel terms. Members were quite unanimous that calls for Panels to sit for long unbroken periods would not be acceptable to their employers.

Finally the Committee noted that the Rules give the Disputes Chairman considerable discretion as to the way in which procedures are varied to provide the most appropriate form of hearing. However, it acknowledged that that same discretion was potentially subject to judicial review and could not be exercised unreasonably.

The Committee considered that, all in all, the specific queries raised by a single case did not cast doubt on the generality of either the Rules, or the way in which they have been applied. However it was resolved that the question should be put specifically to the Industry Steering Group (ISG) as to whether there was a generally perceived need for a "big issue" process. If there were such a general view then the I.S.G would be asked to propose a remit for the development of appropriate proposals.

9/4 The ORR's decision on an appeal by Grand Central Railway in connection with reference TTP96

The Committee noted the ruling of the Office of Rail Regulation's 'Decision on Grand Central Railway Company Limited's Notice of Appeal against the decision of the Timetabling Panel made on 4 October 2006'. The Chairman explained to Members that, in respect of reference TTP96 from Great North Eastern Railway, Grand Central Railway (GCR) had raised the issue of its entitlement to attend and participate at the hearing. The Chairman had declared that there was no such entitlement provided in the Rules. This had been challenged by GCR and referred on appeal to the ORR. In its decision the ORR had taken a pragmatic view on the question of entitlement, but had left it to the Industry to address what appeared to be lacunæ in the Network Code.

Members noted with particular interest paragraph 18 of the ORR's decision which asserted the principle that *"in view of the existence of two alternative constructions of the Rules, we have considered which of them appears to accord most with the purpose of Part D and the Rules"*.

With the support of other Members present, the Network Rail Members agreed that, as Network Rail was the custodian of the Network Code, they would instigate measures to ensure that the matter was brought to the attention of the Industry Steering Group so that a thorough review of the relevant parts of the Code could be undertaken with a view to closing, if appropriate, the lacunæ.

9/5 Any Other Business

There were no other items of business.

9/6 Date of next Meeting

The next meeting will take place on Wednesday 13 December commencing at 15.00.

