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## **ACCESS DISPUTES COMMITTEE**

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### **MINUTES of MEETING No. 31** held in London on 14 December 2011

#### **Present:**

John Beer (First Capital Connect) (Committee Chair)  
Bill Davidson (Network Rail)  
Richard Dean (London & South Eastern Railway)  
Nigel Oatway (DB Schenker Rail (UK)) (Present for items 31/6 and 31/8 - 31/10)  
Gabrielle Ormandy (Network Rail)  
Mike Price (First ScotRail)  
Andy Wylie (Hull Trains) (Present for items 31/1 - 31/7 and 31/11 - 31/12)

#### **In attendance:**

Professor Richard Butler (Allocation Chair)  
Tony Skilton (Secretary)  
Kathy Couldridge (Assistant Secretary)

#### **31/1 Approval of Minutes of Meeting no.30**

The Minutes of Meeting no.30, held on 22 September 2011, were approved. The Chair signed a copy of the Minutes as a true record of the proceedings.

#### **31/2 Matters arising from the Minutes of the previous Meeting**

All matters arising from the Minutes were listed as agenda items except:-

##### 30/2 (previous 29/2 and 28/2 Implementation of the new Access Disputes Resolution Rules – Contract changes

It was reported that ORR was making progress with amending Access contracts to align with the choice of dispute resolution forums offered by the new (August 2010) Rules.

##### 30/6 Appeal against determination of dispute reference TTP210

The Secretary had written to ORR concerning the delay in finalising the appeal submitted by Network Rail against the Timetabling Panel's determination of dispute reference TTP210 and it has been learned shortly before the start of this meeting that Network Rail had withdrawn its appeal, believing that it was not in the best interests of the industry to now proceed with an appeal focussing upon historic issues that were – in the view of Network Rail – satisfactorily concluded more than 3 years ago.

**31/3 Matters determined in correspondence**

No matters had been determined in correspondence since Meeting no. 30.

**31/4 Position on references**

The Committee noted a report from the Secretary regarding dispute references handled since the last meeting.

**31/5 Update on the website**

The Secretary reported that the website was up to date.

**31/6 Review of dispute resolution process and associated matters**

ADR Rule J3(h) requires the Committee to satisfy itself that the Principles (as set out in Rules A5 to A10) are being observed in the way in which disputes are being managed and determined. To assist the Committee in this duty, a report had been compiled by the Allocation Chair and this was considered.

Prof Butler's report incorporated and reflected upon feedback from Hearing Chairs and the Secretary regarding operation of the disputes resolution process since introduction of the revised Rules; where issues had arisen regarding legal process or future such issues could be anticipated, suggestions were made to enable the Committee to consider whether any formal guidance should be issued. In presenting the report, Prof Butler provided additional feedback received from Hearing Chairs since the report document was compiled.

One Allocation Hearing had taken place and this had been conducted by means of telephone conference. Although only two parties were involved in the dispute, each had a number of representatives participating in the conference call. It was recognised that a telephone conference offers the prospect of significant cost savings over a face-to-face meeting but the effective management of such conferences raises various challenges and conference calls are not right for every procedural hearing. The Committee noted that the Civil Procedure Rules contained a relevant Practice Direction to the Courts and considered that formal guidance to the Allocation Chair should be prepared in order to establish a fair procedure for the use of telephone conferencing. Guidance regarding use of video-conferencing was also considered appropriate although it was recognised that this mode was only suitable where all concerned could be gathered into two locations.

Remaining with the subject of allocation, the Access Dispute Adjudication ("ADA") was, except in the prescribed matters of timetabling, emerging as the preferred first stage forum for determining disputes. Whilst it was appreciated that the ADA was free at the point of delivery and also probably the best forum for considering issues involving terms in templated industry contracts in order to create published precedent, there was a perceived risk that over time the other forums available under the ADR Rules would become redundant; it was important for all involved to be alert to spot appropriate opportunities to use the other forums.

A common view emerging from the Hearing Chairs was that much time would be saved at Timetabling Panel hearings if case documents (claim, defence, reply) were to be provided in all disputes rather than the option of a joint reference document; it was also thought that the

practice of sequential submissions had much to be commended when additional parties wished to consider making submissions. The Committee thought the Secretary could continue to work with Hearing Chairs and parties to secure the provision of documentation deemed most appropriate for each individual dispute.

A key issue for Hearing Chairs was that of applying due process where a party might seek exclude sight of information from other parties attending the hearing and Timetabling Panel members or Industry Advisors. ORR had provided some guidance on the matter in dealing with an appeal against the Timetabling Panel determination of disputes TTP337/359/382, saying that “generally speaking, best practice is to provide all members of the Panel with the same information for the purposes of their decision-making”, but this did not address the matter of all parties to the dispute being privy to all information held by the Panel and having the means to challenge it. Hearing Chairs had broadly arrived at the position that Dispute Parties should be asked not to put documents forward if everybody present at the hearing is not to have sight of them, whilst any commercially sensitive information can be redacted from documents which are to be placed on the Committee’s website. The Committee decided that it would be appropriate to amend the template submission documents on the website in order to provide relevant guidance to parties preparing to bring a case before a hearing.

Feedback indicated that Hearing Chairs had felt extremely well supported by Timetabling Panel members and Industry Advisors in preparing for hearings and throughout hearings themselves but in some cases availability problems had been encountered during the subsequent drafting of the determination. All concerned were aware of the likely time commitment when appointed for a hearing but it had to be accepted that the process of preparing the first draft of the determination and subsequent iterations called for flexibility which might not always be readily possible amongst other commitments.

The process of moving from the Access Dispute Adjudication or Timetabling Panel hearing to the delivery of a final and binding determination (subject to any appeal) without intermediate reference to the Dispute Parties differed from both Court and Tribunal practice; apart from diligence of the part of the Industry Advisors/Timetabling Panel members and the Secretary during the drafting process, there was little opportunity for errors in the determination document to be identified and addressed before issue. Whilst appreciating that any subsequent appeal is against the outcome as set out in the determination document, not the words used in explaining how the outcome has been arrived at, the Committee nevertheless concluded that Hearing Chairs should be encouraged, where practicable (and recognising the time constraints which applied in the case of Timetabling Disputes), to provide their draft determinations in confidence for review by the Dispute Parties in advance of issue. A guidance document was considered appropriate.

In addition to setting down good practice in the area of dispute resolution, adherence to guidance issued by the Committee was a matter of contract between the Committee and the Allocation Chair and Hearing Chairs. It was agreed that any formal guidance issued by the Committee should be placed on the Committee’s website to give transparency regarding processes that Resolution Service Parties might expect to encounter.

Prof Butler’s report also provided the Committee with feedback regarding the support provided by the Secretary in connection with dispute hearings and in managing the Committee’s contractual relationships with its appointed Chairs; both areas of administration were satisfactory.

Following discussion, the Committee thanked Prof Butler for his report and concluded that the Principles were being observed satisfactorily in the way in which disputes were being managed and determined.

The Committee then noted recently received correspondence from Network Rail concerning the determination of Access Dispute Adjudication ADA07 and formulated how to respond within the exercise of its governance responsibility for the management of the dispute resolution process.

Dispute ADA07 had related to Network Change. Despite various revisions to the Network code and precedent being created through dispute hearings, Committee members were disappointed that the relevant Conditions were understood differently across the industry and believed that work ought to be done to bring consistency of approach.

### **31/7 Internal check arrangements**

Gabrielle Ormandy had tabled a report regarding internal check activity which she had carried out since the last meeting and this was noted.

The Committee recognised that the internal check regime put in place upon introduction of single signature operation of the bank account served only as a deterrent against fraud on the part of the individual bank signatories and as a means detecting any defalcation between the annual external audits. In view of the not inconsiderable sum of money which might be held by the Committee over the course of a Financial Year, the Committee considered it appropriate to introduce a dual signatory arrangement to improve control of such proportion of the funds that was not reasonably required to meet immediate expenditures. The Secretary was requested to explore what arrangements might be available, having regard for the desired levels of practicality and convenience.

It was agreed that Andy Wylie would undertake internal check until the next meeting.

### **31/8 Outturn for 2011 and preliminary budget for 2012/13**

The Committee noted a report setting out the outturn projections against the current year budget; it anticipated a significant excess of income over expenditure. Four Resolution Service Parties had yet to pay their 2011/12 levy.

In considering the preliminary budget for 2012/13, the Committee recognised the need to cater for pricing uplifts in several areas of expenditure. However, with the emerging trend for fewer disputes to proceed to being heard by the Timetabling Panel or an Access Dispute Adjudication and with surplus expected to be available out of the 2011/12 income, the Committee took the view that the 2012/13 expenditure budget should be constructed to produce a reduction of £150k upon the 2011/12 budget. It was hoped that the consequential reduction of some 25% in the overall levy demand upon Resolution Service Parties would be good news for the industry in the current economic climate.

### **31/9 Annual Report for 2011**

Subject to any appropriate adjustments to reflect discussions at this meeting and factual changes arising in the remainder of the month, the Committee approved the draft for the 2011 Annual Report for issue early in January 2012.

### **31/10 Management of the Committee's property interests**

Further exploration of the drafting for the proposed Property Management Agreement between the Committee and Access Disputes Resolution (GB) Ltd (the "Agency Company") with the Committee's solicitors had revealed that the previously suggested delegations arrangement would not have the required legal effect and that amending the ADR Rules would be the only assured way to ensure continuity of the intended property management relationship in the event of changes in Committee membership. The effect of the envisaged Rule amendments would be that new Committee Members would be required to become members of the Agency Company and also to adhere to any existing contracts in place between the Committee and the Agency Company.

The Committee endorsed draft Rule changes and Gabrielle Ormandy, through Network Rail, was asked to sponsor a proposal for change to the Class Representative Committee in accordance with Condition C5 of the Network Code.

The desirability of a number of corrections to the current Rules had also been identified, it being sensible for these to be progressed concurrently with the Rule changes regarding the Agency Company in order to minimise costs in producing a revised version of the Rules.

### **31/11 Committee and Timetabling Pool membership**

The Committee noted that recent elections had changed the composition of the Committee for 2012/13 and also noted changes taking effect within the membership of the Timetabling Pool.

### **31/12 Meetings in 2012**

The Committee agreed the dates and times for business meetings to be held during 2012.



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