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## ***ACCESS DISPUTES COMMITTEE***

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### **Annual Report for 2017**

- Continuing high number of Timetabling Disputes registered
- The first Costs awards made by Access Dispute Adjudication and Timetabling Panel
- Concern regarding increased use of external legal advisors
- Parties cannot expect to raise fresh arguments or to present new evidence during the Timetabling Panel or Access Dispute Adjudication processes
- A Code of Practice being trialled for the management of "CPPP" disputes
- The Committee's premises by Euston station may be found to offer an acceptable and less costly alternative to booking meeting rooms in Central London
- The Committee expects to slightly reduce its overall funding call when issuing levy invoices for 2018/19

## REPORT FOR 2017

Access Dispute Resolution Rule J3(g) requires the Committee to “monitor and report at least annually to the Resolution Service Parties upon the work of the Committee”. The Committee is pleased to issue its report for the calendar year 2017.

### Communications

Our report for 2017 follows the format adopted for the past nine years. In the absence of any adverse feedback regarding the recent reports, we again invite comments regarding the adequacy of content of this one.

The Committee's website ([www.accessdisputesrail.org](http://www.accessdisputesrail.org)) provides a ready source of reference material whilst also containing downloadable templates for use in connection with dispute procedures. The website is updated promptly following a change in any item of information.

Comments regarding the website and Committee matters in general will always be welcomed and may be passed to the Committee Secretary, Tony Skilton (e-mail: [sec.adc@btconnect.com](mailto:sec.adc@btconnect.com), tel: 020 7554 0601). Alternatively, a channel of communication is available through the Committee members who have been elected or appointed on behalf of areas of the industry; the current Committee members are listed at the back of this report along with details of the operators in the respective voting Classes/Bands as at December 2017.

The Committee is happy to provide briefing sessions to enhance familiarity of Resolution Service Party staff with the ADR Rules and associated processes. Request should be made to the Committee Secretary.

### Administration

John Czyrko left the Committee following completion of his elected term ending on 31 March 2017 and was replaced by Raj Patel. The Committee records its appreciation of the contribution which John made to its work.

The Committee members elect the Committee Chair from amongst their number and Nigel Oatway continues in the role.

The Committee met twice in 2017.

Following abolition of the Rail Industry Disputes Resolution Committee and Council effective from 1 November 2015, the Committee became responsible for oversight of the CAHA Registrar and the Committee Secretary is deemed to act also as RIDR Secretary in any circumstances where that may become necessary. The current RIDR Rules can be found on this Committee's website. No problems have arisen in relation to any residual RIDR matters during 2017.

### Dispute references - national network

Details of all dispute references received can be found on the Committee's website, together with any associated Timetabling Panel or (subject to the confidentiality provisions) Access Dispute Adjudication (“ADA”) determination and any ORR appeal decision. In accordance with the ADR Rules, Timetabling Panel determinations are also issued direct to a nominated person in each operating company.

The position regarding dispute references handled in relation to the national network during 2017 can be summarised as follows:-

For a Timetabling Panel

Unheard references on hand at 31 December 2016	67
New references received in 2017	159
References withdrawn in 2017	132
Hearings held in 2017	4 (involving 7 days of hearing)
Determinations issued in 2017	5 (covering 9 dispute references)
Determinations appealed in 2017	2 (1 ORR appeal decision awaited)
Pending hearing at 31 December 2017	85
Hearings arranged for 2018	1

For an Access Dispute Adjudication ("ADA")

Determinations awaited at 31 December 2016	1
Unheard references on hand at 31 December 2016	1
New references received in 2017	2
References withdrawn in 2017	1
Hearings held in 2017	1
Determinations issued in 2017	2
Appeals submitted in 2017	2
Pending hearing at 31 December 2017	1
Hearings arranged for 2018	1

One allocation hearing took place during the year. Three disputes have been referred for Arbitration, two of these being appeals against ADA decisions. No other matters have been submitted to any other dispute resolution forum covered by the ADR Rules.

The task of preparing for a hearing concentrates minds and can often lead to a solution being identified without needing to have the case heard. For those disputes where a hearing has been arranged, the Hearing Chairs are committed to combining the application of the ADR Rules with recognised legal practice in order to provide efficient case management; in some cases, directions from the Chair or a request for further information have helped parties to recognise a way forward and settle their differences. The occasional Directions Hearing has taken place in past years and there is emerging perception that there may be benefit in Hearing Chairs meeting more often with the parties involved as a preliminary to a full Timetabling Panel hearing, thus enabling focussed directions to be issued.

Of the ADA determinations which were published during 2017, ADA30 explored the failure of Network Rail to comply with a previous determination concerning the removal of Clay Cross Down Loop; on appeal, the Arbitrator decided that exemplary damages which had been awarded by the ADA were not contractually available as a possible deterrent against such behaviour in future. The ADA determination and the appeal award (A33) can be found on the Committee's website. The Committee is disappointed that two ADAs and an arbitration appeal have not moved the matter forward to a positive outcome, despite much time and effort being spent across the industry – at a cost.

The Rules for ADAs and Timetabling Panels allow for Costs to be awarded in situations where "(a) the case of the relevant Dispute Party shall have been so lacking in merit that the reference should not have been made (or defended); or (b) the conduct of the relevant Dispute Party before or during the reference was such as to justify an award of costs being made against it" (ADR Rules G54 and H60). Hearing Chairs have, over the years, recognised that the construction of these Rules sets a very high bar for making a Costs award and no awards have been made. However, two determinations issued during 2017 (ADA30 and TTP1174) awarded Costs against Network Rail on account of its conduct and these Costs decisions were not appealed.

As shown above, four Timetabling Panel hearings were held in the year, covering nine Timetabling Disputes. Additionally, hearings were arranged for fourteen Timetabling Disputes on seven dates but stood down due to late discussions between the parties achieving resolution.

Regarding the number of Timetabling Dispute references, it is of interest to compare statistics for recent years:-

	<u>2017</u>	<u>2016</u>	<u>2015</u>	<u>2014</u>	<u>2013</u>	<u>2012</u>	<u>2011</u>	<u>2010</u>	<u>2009</u>
New disputes registered	159	138	141	115	107	96	60	70	64
Disputes determined by Panel	9	6	4	5	0	5	6	8	3

As can be seen, there is a continuing high number of Timetabling Disputes being registered. The number in 2017 has been inflated by issues associated with (or resulting from) new Timetable Planning Rules following Network Rail's TRIP (Timetable Rules Improvement Programme) initiative.

Network Code Condition D5.3.1 provides that in "exceptional circumstances" a Timetabling Panel may "substitute an alternative decision in place of a challenged decision of Network Rail". What constitutes "exceptional circumstances" has exercised some time in Panel hearings during 2017; the matter was noted by ORR in its appeal decision relating to Timetabling Dispute TTP1064 and suggestion made that D5.3.1 could be clarified. The Committee is seeking to move the matter forward through industry processes.

Legal issues have been brought to the fore in some 2017 Timetabling Panel cases, with parties making heavy use of external legal advisors. The Timetabling Panel process is meant to be quick – recognising that the timetable production process is time-constrained – yet lead to a legally robust conclusion without being legalistic. It is for the parties to a dispute to decide how best to protect their legal and commercial rights, but it is self-evident that extensive use of external legal resources increases the costs of a dispute, especially as if one party uses external advisors then the other party may feel that it ought to do so as well. It appears that behaviours may be changing in that some parties have not been altogether avoiding antagonistic or unduly adversarial behaviour as expected by ADR Rule A9(c). This situation was noted by ORR in its appeal decision relating to Timetabling Dispute TTP1064 with concern being expressed that if the Panel process (or the appeal process to ORR under Part M of the Network Code) starts to take on the adversarial characteristics of commercial litigation then it will become increasingly difficult for the Panel or ORR to conduct their roles. The Committee echoes ORR's hope that the industry will bear this in mind for the future.

The efficiency of the Timetabling Panel process relies on the party bringing the dispute ensuring that it sets out at the right time all the grounds upon which it wishes to rely; a party cannot expect to change the basis of its dispute mid-way through the Panel process or necessarily to introduce new evidence (although ADR Rule H14(c) does entitle the Panel to take the initiative in ascertaining the facts and law relating to the dispute and this may on occasion introduce new evidence requirements at the hearing). Similarly, in an appeal to ORR a party cannot expect to be allowed to raise arguments that were not pleaded to the Timetabling Panel. Again, the Committee echoes ORR in encouraging parties bringing a Timetabling Dispute to do their utmost to ensure that their case is appropriately argued and evidenced at the right time to aid speedy resolution in their own interests and those of Network Rail and the wider industry. The same consideration applies to evidence and pleadings at an Access Dispute Adjudication.

Some difficulties have been encountered by Timetabling Panels because of parties wishing to withhold commercially sensitive information and the associated evidence; it has sometimes been necessary to exercise a measure of good faith in relation to certain categories of information, including where there had been late submission of relevant material.

We have previously reported that in its stewardship role for the dispute resolution process, the Committee has sought to engage with Network Rail to seek to address reasons for escalation in the number of Timetabling Disputes being notified by operators. Disputes relating to the 4-weekly Confirmed Period Possession Plan ("CPPP") decision notices have been contributing to the high numbers in recent years: a working group has developed a non-contractual Code of Practice for the future management of CPPP disputes and this is being

trialled with a view to eventually being endorsed by the Committee for application on a "best practice" (but non-contractual) basis.

ADR Rule J3(h) requires the Committee to satisfy itself that the Principles (as set out in Rules A5 – A10) are being observed in the way in which disputes are being managed and determined. Having sought and considered the professional view of the Allocation Chair (Professor Richard Butler) in this regard, together with feedback received by Committee members and their own individual experiences under the Rules, the Committee is suitably satisfied although there are some reservations as indicated above.

### Dispute references - HS1

No disputes have been registered under the HS1 Access Dispute Resolution Rules during 2017.

### Accommodation

In common with all business premises in London, the Committee's office on Floor 8 of 1 Eversholt Street was subject to a significant increase in business rates from 1 April 2017. The Committee is happy to make its meeting facilities available for the benefit of the industry and readers are reminded that its offices conveniently situated by Euston station may be found to offer an acceptable alternative to booking meeting rooms in Central London – contact the Committee Secretary regarding facilities and availability.

### Finance

Prior to release of provisions, audited expenditure in the Financial Year to 31 March 2017 was £242,710 against routine income of £289,567. The balance was used for 2017/18 pre-payments, to meet cashflow requirements pending receipt of levies for the new 2017/18 Financial Year and to facilitate a reduced call upon Resolution Service Parties for funding in 2017/18.

Two 2017/18 levy payments remained outstanding on 31 December 2017 [payment has since been received].

The Committee is in a position that it expects being able to slightly decrease its overall funding call when issuing the levy invoices for 2018/19.

On behalf of the Committee

[SIGNATURE REDACTED]

27 April 2018

**Committee members (as at 31 December 2017)**

<u>Class/Band</u>	<u>Member</u>	<u>Company</u>	<u>Telephone</u>
Franchised Passenger Class, Band 1	Raj Patel	Govia Thameslink Railway	07975 603552
Franchised Passenger Class, Band 2	Dean Warner	Abellio East Anglia	07920 878739
Franchised Passenger Class, Band 3	Helen Cavanagh	Arriva Rail North	01904 568447
Non-Franchised Passenger Class	Andy Wylie	Hull Trains	07881 510021
Non-Passenger Class, Band 1	Nigel Oatway	DB Cargo (UK)	0130 257 7010
Non-Passenger Class, Band 2	Ian Kapur	GB Railfreight	020 7983 5174
Network Rail	Peter Craig	Network Rail	020 3356 9316
	Richard Parsons	Network Rail	07917 857937

**Operators by Class and Band (as at December 2017)**

Franchised Passenger Class, Band 1:- Abellio ScotRail; West Coast Trains; Govia Thameslink Railway

Franchised Passenger Class, Band 2:- First Greater Western; East Coast Main Line Co; First MTR South Western Trains; Abellio East Anglia; XC Trains; London & South Eastern Railway

Franchised Passenger Class, Band 3; Arriva Trains Wales; London & Birmingham Railway; East Midlands Trains; Arriva Rail London; Trenitalia c2c; Chiltern Railway Company; Merseyrail Electrics; First Transpennine Express; Arriva Rail North; MTR Crossrail; Serco Caledonian Sleepers

Non-Franchised Passenger Class:- Eurostar International; Hull Trains; Heathrow Express; Grand Central Railway; West Coast Railway Co; Rail Express Systems; North Yorkshire Moors Railway; DB Regio Tyne and Wear; Peak Rail; East Coast Trains; Ffestiniog Railway; Chinnor & Princes Risborough Railway

Non-Passenger Class, Band 1:- DB Cargo (UK); Freightliner

Non-Passenger Class, Band 2:- GBRf; Freightliner Heavy Haul; Direct Rail Services; Babcock Rail; COLAS Rail; Amey Railways; Balfour Beatty Plant & Fleet Services; Volker Rail; Devon & Cornwall Railways; Crossrail; Harsco Rail; LORAM; Rail Operations Group; Victa Railfreight