
ACCESS DISPUTE RESOLUTION COMMITTEE

MINUTES of MEETING No. 44

held in London on 13 September 2000

Present:

Bryan Driver, Chairman
Julia Glenn (Railtrack)
Tony Deighan (Eurostar (U.K.))
Geoff Knight (Railtrack)
Bil McGregor (ScotRail Railways)
Nigel Oatway (English Welsh & Scottish Railway)

Apologies:

Tim Clarke (Anglia Railways)
Graham Eccles (South West Trains)
Ian Osborne (Freightliner)

In attendance:

Chris Blackman (Secretary)
Martin Shrubsole (Clerk)

44/1 Minutes of meeting No.43

The minutes of meeting no.43 held on 19 June 2000 were approved without modification. The Chairman signed a copy of the minutes as a true record of the proceedings.

44/2 Matters arising from the minutes of the previous meeting

43/5 Annual Report

The Secretariat will table a draft annual report, with a preamble in a similar format to the previous year, at the next meeting of the Committee. The objective is to finalise approval before the end of October.

43/6 Review of the Access Dispute Resolution Rules

The Secretariat confirmed that legal advice had been received as to any misalignment which might exist between the Access Dispute Resolution Rules and the Arbitration Act 1996. Further clarification is being sought on one aspect.

43/7 Technical Sub-Committee

Members noted that the Technical Committee had been abolished with effect from 19 August 2000.

44/3 Review of the Access Dispute Resolution Rules

Members noted the comments received from Industry Parties in response to the recent consultation exercise, and reiterated that the Committee should formulate a formal stance for input to the Review. There had been no response from Railtrack, but Geoff Knight advised that there was no strong view in Railtrack for a radical change in the processes, and a written response would be presented shortly.

Tony Deighan advised that the Class Representative Committee, which had reviewed the responses at its meeting the previous week, had concluded that there was no evidence of any significant number of disputes sidestepping the ADRC via any other mechanism. Moreover, the prospect of a hearing in front of the ADRC had, in some cases, assisted the process by focusing the minds of the parties to reach, of their own accord, a solution to their dispute.

The responses received from the industry contained some common threads. Members commented that the perception in some quarters that the preparation of a joint paper for submission to the Committee was an unnecessarily big hurdle, overlooked the fact that such preparation, and possibly in even greater degree, would be required for any alternative forum for resolution.

The Secretariat had on a number of occasions facilitated the parties in preparing submissions, and the responses received had indicated that this assumed role was helpful. Noting this, and also the Secretariat's role in exhorting parties to continue further dialogue to attempt to reach their own solution, in advance of a Committee hearing, members commented that there appeared to be grounds for recommending a strengthening of the provisions for mediation. Such a change would be sensible now that the railway industry is entering the second stage of contractual arrangements.

Members agreed that they saw their role as a committee of peers rather than judicial analysts. Views on the issue of the role of lawyers appeared to be polarized, and suggestions had been made as to whether some form of half-way house should be specified. The Committee acknowledged that it was not a law-free zone; although it did not have a lawyer present at every meeting or hearing, it had access to legal advice, and indeed, as in the case of dispute references AD13 and AD19, it had taken care to be fully informed with a brief on relevant legal aspects before commencing a hearing.

The consensus is that the Timetabling Committee operates well but it is a speedy process and necessarily does not afford any time for disputants to prevaricate.

The Committee noted comments made by some parties as to the length of time taken to bring cases, but regarded such arguments as artificial because the time taken to reach a hearing is almost entirely dependent on the time taken by the parties to produce submissions. The speed and performance of the Timetabling Committee had shown that it is perfectly possible for parties to prepare cases quickly. Members advocated that more detail needed to be built into the rules relating to timescales for producing and preparing papers for the Committee. It

was agreed there might be benefit in formalising the giving of guidance to the parties in preparation of submissions to assist them in focusing on the real issues.

Members supported the CRC in encouraging Industry Parties who had not yet responded, to now submit comments. Members would consider any such further comments before preparing a formal document for submission to the Regulator.

44/4 Determination of jurisdiction on an issue referred by West Anglia Great Northern Railway and Railtrack

The Committee noted the issues raised in reference 'ttc101' from West Anglia Great Northern Railway and Railtrack to the Timetabling Committee, and in particular the potential linkage between the Rules of the Plan and the level of any Train Operator's contribution towards the infrastructure change which had caused, or had led to, changes in the parameters of the Rules of the Plan.

Where Railtrack wishes to propose an allowance under the Rules of the Plan such proposal should be made as part of the review of the Rules of the Plan. A party which seeks a modification to a Sectional Running Time should make the case for such a revision at the time of reviewing the Rules of the Plan. This is, in either case, in accordance with Access Condition D2.4; if the parties affected cannot agree then it should be the subject of a reference to the Timetabling Committee who will determine the matter on the merits of the case, and by reference to the Decision Criteria.

The provisions of Conditions G2 and G4 govern the way in which compensation for disadvantage resulting from implementation of a Network Change is to be calculated, and also make provision for the extent to which the amount of any such compensation should take into account the benefits that accrue from the change. Where the parties cannot agree on the level of compensation involved this matter can be referred to the Network and Vehicle Change Committee in accordance with Condition G6.

The Committee is resolved to ensure that matters relating to Part G of the Access Conditions should be handled by the Network and Vehicle Change Committee whilst matters relating to Part D including the Rules of the Plan/Route should be handled by the Timetabling Committee, with exception for those disputes stemming from Condition D2.3. In particular, it is inappropriate for issues relating to compensation to be handled by the Timetabling sub-Committee. Noting the particular circumstances that had led to the parties submitting the paper, the Committee agreed that it would rule on any issue of jurisdiction when a formal submission from the parties had been produced. The Committee wishes to remind the parties that, in the case of a hybrid or composite reference, it has the option of remitting those aspects relating to Part G to be handled by the Network and Vehicle Change Committee, and the remaining items relating to Part D to then be handled by the Timetabling sub-Committee.

The parties were remitted to re-submit any dispute reference on the issues at the earliest opportunity.

Action: Secretary

44/5 Proposal for a sub-committee to be set up (Rule A4.4)

The Committee noted the proposal submitted by the Network and Vehicle Change sub-Committee and approved the setting up of a sub-Committee to facilitate the proper preparation of documentation for a submission to the Network and Vehicle Change Committee. Details are attached as an appendix to these minutes.

44/6. Interim Arbitration Award by Richard Siberry QC (Reference AD18)

Members noted that, in the case of the referral by North Western Trains of Committee determination no.AD18, the Arbitrator considered that engineering allowances are to be understood as Network Possessions thus disagreeing fundamentally with the Committee's view expressed in clause 8.1 of its determination. The Arbitrator agreed with the conclusions in clauses 8.2 to 8.5 of the determination, albeit that he reached the same conclusion via a different route.

Members acknowledged that the Arbitrator's considered view was based on the law, whilst the Committee decision was influenced by industry practice. The Committee concluded that it wished a paper to be prepared by the Secretariat highlighting the points of variance between the two decisions and any other key issues that needed to be given further consideration.

Action: Secretariat

44/7 Update on References

The Secretary reported that the Committee would hear Reference AD21 from South West Trains and Connex South Central at its next meeting.

44/8 Date of next Meeting

The next meeting will be on Wednesday 4 October 2000 in Room 230, East Side Offices at Kings Cross commencing at 10.00.

**Formation of, and terms of reference for, the
NV7 Submission Drafting sub-Committee**

1. The Access Dispute Resolution Committee has made use of its discretion, under Access Dispute Resolution Rules A4.4 and A5.3, in order to lay down a process for the parties to dispute NV7 (referred to the Network and Vehicle Change Committee) to follow for the purposes of assisting them to comply with the guidance given in paragraph 6.1 of the Note for Guidance issued on 25th July 2000.
2. The Access Dispute Resolution Committee has therefore instructed the Clerk to the Committee to convene a special working group, to be known as the NV7 Submission Drafting sub-Committee, whose make-up, function and mode of operation shall be as follows.
3. Make-up of the NV7 Submission Drafting sub-Committee: the Committee shall consist of
 - 3.1. the Clerk to the Access Dispute Resolution Committee, who will act as Chairman of the sub-Committee;
 - 3.2. one unaccompanied representative of the Train Operating Company known as First North Western, (*who shall be empowered as in paragraph 6 of this document*) and
 - 3.3. one unaccompanied representative of the Railtrack North West Zone (*who shall be empowered as in paragraph 6 of this document*); plus
 - 3.4. an assistant for the purposes of typing and copying documents (and who shall otherwise have no part in the deliberations of the sub-Committee).
4. The Function of the NV7 Submission Drafting sub-Committee shall be to draw out of all the documents so far prepared by the parties (but only such documents as, prior to the meeting of the NV7 Submission Drafting sub-Committee, shall previously have been presented by the parties to each other, or to the Network and Vehicle Change Committee), all points of contention, and the arguments advanced to support those contentions, and assemble them into a single document. The single document so produced shall
 - 4.1. make clear to the Committee the scope and nature of the points of disagreement, and, where appropriate, the points of agreement
 - 4.2. set out clearly (making such use of different type faces, tabular layouts, or any other appropriate editorial device) the arguments advanced by each of the parties, in words drawn from the documents previously prepared
 - 4.3. set out clearly the detail of any evidence brought in support of the arguments; and
 - 4.4. set out clearly the nature of any determinations sought from the Committee.

5. The Mode of Operation of the NV7 Submission Drafting sub-Committee shall be as follows:
 - 5.1. the sub-Committee shall meet at an agreed date, at an agreed venue, and, once convened, shall operate without further external reference, and shall not then de-convene until its task is completed, or the Clerk determines that it is appropriate to do so;
 - 5.2. the sub-Committee's task will only be complete when it has despatched to the Parties, and to the Secretary of the Network and Vehicle Change Committee, a completed joint submission, which will then be used, **without further written commentary or amendment**, as the source document upon which the Network and Vehicle Change Committee will base its determination;
 - 5.3. all text included in the document shall be extracted from other documents, as previously prepared by the parties, except where, in the opinion of the sub-Committee, there is need for additional text to provide continuity, or clarification for the benefit of the Network and Vehicle Change Committee. Any such additional text shall be agreed by the members of the sub-Committee, or, failing such agreement, determined by the casting vote of the Clerk. All such additional text shall be visually differentiated from the remainder of the submission;
 - 5.4. as there are differences of opinion as to which issues can and should be brought to the attention of the Network and Vehicle Change Committee, the submission document shall include details and evidence of any issue that ONE of the parties considers should be submitted. It shall be open for the sub-Committee to include comments from another party as to why it is not appropriate for an issue to be heard; this will then form part of the considerations of the Network and Vehicle Change Committee, who will expect to opine (or seek the guidance of Access Dispute Resolution Committee) on any question relating to its own jurisdiction.
6. It shall be understood by the parties that the appointing of a representative to NV7 Submission Drafting sub-Committee implies that that representative is fully empowered, without further reference, to complete the task as defined in 5.2 above.
7. The Network and Vehicle Change Committee will not object if the parties find that they are, after all, able to produce a serviceable joint submission without calling upon the services of the NV7 Submission Drafting sub-Committee. However the Network and Vehicle Change Committee are satisfied that they will not convene a hearing on this matter until EITHER the parties have complied with the Note of Guidance previously issued, OR have made use of the NV7 Submission Drafting sub-Committee. In any case, the Network and Vehicle Change Committee will conduct its hearing in accordance with its normal rules of procedure, with opportunities for oral representations and for questions and answers.