
ACCESS DISPUTE RESOLUTION COMMITTEE

MINUTES of MEETING No. 70
held in London on 8 December 2004

Present:

Tony Holland, Chairman
Bryan Driver, Independent Vice-Chairman
Mark Causebrook (Thameslink Rail)
Bill Davidson (Network Rail)
Tony Deighan (Eurostar (U.K.))
Julia Glenn (Network Rail)
Bil McGregor (ScotRail Railways)
Nigel Oatway (English Welsh & Scottish Railway)
Ian Osborne (Freightliner)

In attendance:

Chris Blackman (Secretary)
Martin Shrubsole (Clerk)

Apologies:

Niel Wilson (North Western Trains)

70/1 Minutes of meeting no.69

The minutes of meeting no.69 held on 5 October 2004 were approved subject to a minor modification. The Chairman signed a copy of the minutes, as modified, as a true record of the proceedings.

70/2 Record of the Hearing of reference AD39

The Record of the Hearing of joint reference AD39 from Great Eastern Railway and Network Rail was approved subject to a minor modification. The Chairman signed a copy of the Record, duly modified, as a true record of the proceedings. Circulation of the Record is to Committee Members and to those parties involved at the hearing.

70/3 Matters arising from the minutes of the previous meeting

There were no matters arising.

70/4 Budget outturn for 2004/05 and Preliminary budget for 2005/06

Members noted the preliminary budget proposals for 2005/06 and gave them general endorsement, but asked the Committee Secretary to review the Committee's status regarding VAT. Members were content with the Committee Secretary's proposal regarding the application of Rule A3.9.1 in respect of late payments of the annual levy.

The Committee agreed that Ian Osborne should assist the Secretary in the forthcoming negotiations regarding the renewal of the lease of the accommodation at Kings Cross.

The budget will be subject to formal review at the next quarterly meeting, when further emerging data would also be taken into account.

70/5 Dispute Resolution Regime: update on progress by the CRC working party

Tony Deighan made a presentation on progress in preparing proposals for change to the dispute resolution regime.

Key issues are the future role of the Chairman, the structure of the Committee and hearing panels, procedure for appeals and the structure of determination, and timescales for introduction of the changes.

Members noted that, in the proposals, a dispute of a nature that is currently heard by the ADRC, or, with certain exceptions, by the NVCC would in future be heard by a panel drawn from a pool of 16 people, 8 of whom would be the Members of the Committee. The Timetabling Committee would be retained to hear all disputes relating to Part D of the Network Code; thus its jurisdiction would be expanded to include matters relating to Major Projects that are currently heard by the Network and Vehicle Change Committee.

It was noted that the proposed role of the Chairman would include oversight of all legal aspects of references to a hearing panel and to the Timetabling Committee. There are implications for the ADRC website, which is in the process of being set-up, and there could be a significant increase in the amount of paperwork to be exhibited on the website. However, it is not envisaged that this would require significant expansion in the structure of the site itself. The Committee Secretary will advise potential tenderers accordingly.

It was also noted that the procedures for Arbitration, Mediation and Expert Determination are likely to revert in large measure to the present procedures.

Members thanked Tony Deighan for his update and expressed general support for the thrust of the proposals now being finalised. It was noted that the Committee will have the opportunity to comment as part of the consultation process.

70/6 Transition period to the former Regulator's C8 proposals for the Network Code

The Clerk advised the Committee that, in the Network Code, there are certain parts of Conditions A, D, F and G that fall to be amended or deleted in early 2005 as a

consequence of implementation of the Regulator's 'C8' notices issued in summer 2004. In particular Conditions D5, F5 and G6 are substantially altered.

The Network Code changes issued in July were drafted on the assumption that the date of their introduction would coincide with implementation of the changes to the ADRR, as put out by the Regulator on 2nd July. This is not going to happen, because of the uncoordinated decision by the Regulator to defer (and suspend) the changes to ADRR. As a consequence there will be a period, between January 2005 and the ultimate date of introduction of the revised ADRR, when the Network Code and the ADRR will be out of step.

During this period the ADRC will continue to operate under its existing rules, including continuance of the Timetabling and Network and Vehicle Change (NVC) Committees.

However, with effect from January 2005, each of Network Code Conditions D5, F5 and G6 is changed, in ways that need reasonably to be taken into account during the next few months. These changes are

- References to Timetabling or NVC Committee are deleted and replaced by references to "the relevant ADRC tribunal" (a defined term in the revised Network Code Part A, which gives Counsel to the Committee the discretion to set up standing tribunals for Timetabling and NVC matters).
- The previous provisions in Network Code D5.5.3, F5.5.3, and G6.5.3, which defined the Powers of the Appeal Bodies, have all been deleted. The practical effect of these deletions is that the previous restraint on the Timetabling and NVC Committees that, in certain situations, they could only give "*directions which specify the result to be achieved but not the means by which it is achieved ("general directions")*" disappears. By implication, the powers of all Committees therefore become aligned with those of ADRC, and include the powers to make orders as in ADR Rule C4.2. This would significantly expand the powers of the two sub-Committees, and would carry the risk that, in some circumstances there would be scope for a Committee to attempt to micro-manage.

The first of these is primarily an administrative question, and, in the absence of any legitimisation of a post of Counsel to Committee, it would be appropriate merely for each set of Minutes, or Determination to record that "*This Committee has been deemed, by the ADRC, to be the "relevant ADRC tribunal" for the purposes of hearing this reference*".

In regard to the changes to the "Power of Appeal Bodies", the Committee noted that the Dispute Process Working Group (DPWG) had recognised that, at least in respect of the powers of any future Timetabling Panel, something akin to the present constraint on the Timetabling Committee (D5.5.3(a)) would be needed; in particular, to forestall any attempts to make determinations that might transfer responsibility for the detail of the timetable from Network Rail to the Panel. The DPWG is in contact with other Network Code drafting groups with a view to re-establishing (at least in Network Code Part D) provisions analogous with the current "Power of Appeal Bodies".

The Committee noted the position, and agreed that

- it would be appropriate, during any transitional period, for Timetabling Committee to deal with disputes from Part D (excluding D2.2) and Condition H11, and NVC Committee those from Condition D2.2 and Parts F and G;
- a clarificatory note should be included in each set of proceedings to confirm that the ADRC has delegated the hearing to the correct forum for the dispute;
- that clarificatory note also contains a specific citation of the former “Power of Appeal Bodies” provisions of Parts D, F or G (as appropriate), with the proviso that the delegation to the sub-Committee is conditional upon those discretions not being exceeded;
- the Secretariat to produce such standard forms of words, taking counsel with the ORR, and legal advisors, as appropriate.

70/7 Handling of references pursuant to Part L of the Network Code

Members agreed that they wished to hold a seminar on 23 December on the subject of Part L, with Network Rail and, if appropriate, a representative of the Train Operators to make a presentation on the purpose and objectives of Part L so that members might have a full understanding of the Condition before for hearing the three references that are pending. Members also agreed that they would hear references AD40, AD41 and AD42 together on 10 January 2005.

In the meantime the Chairman will review the papers and decide/confirm the process.

70/8 Letter from the Chairman of the Delay Attribution Board

Mark Causebrook declared an interest as a member of the Delay Attribution Board (DAB). He said that he had noted the Committee’s position and found that the Secretariat’s file note, which had been circulated to Members, was most helpful in summing up the position and reflecting the fact, illuminated clearly by hindsight, that the drafting of the determination might have been more felicitously expressed.

Members agreed that the Committee was right to say that it did not feel bound by the DAB’s advice. That is not to say that it had not taken notice of the Board’s advice; in other words inputs were taken into account. The Secretary was asked to draft a response reflecting the Committee’s views for the Chairman to sign to the Chairman of the DAB.

70/9 Submissions received in respect of reference AD35

The Chairman advised Members that he had read the submissions in respect of AD35 from Great Eastern Railway and Network Rail on the subject of provision of telecommunications equipment at Liverpool Street Station. He formally declared that this is an issue that should go to mediation and not be accepted by the Committee before the process of mediation had been duly followed. Members therefore remitted the Committee Secretary to respond accordingly to the parties and to ask the Disputes Secretary to proceed with the processes for mediation. It was noted that mediation on the earlier reference AD36 was not yet complete.

70/10 Update on References

- AD31 The parties, Great Eastern Railway, Anglia Railways and Network Rail, are still seeking guidance from the Delay Attribution Board;
- AD34 West Coast Trains and Network Rail have concluded discussions on the issue of watering facilities at Carlisle, and West Coast Trains has now withdrawn the reference.
- AD35 see Minute 70/9 above.
- AD36 As directed by the Committee, Thames Trains and Network Rail are currently in the course of mediation of their dispute.
- AD37 The parties, Thames Trains and Network Rail, will prepare a joint submission informed by the outcome of any hearing of reference AD35.
- AD38 from Arriva Trains Wales and Network Rail re allocation of delays; this has been referred back to the Delay Attribution Board for further advice.

70/11 Proposed Dates of meetings in 2005

Members agreed that Quarterly meetings would take place in 2005 as follows:

Wednesday 9 March
Wednesday 1 June
Wednesday 14 September
Wednesday 14 December

Dates 'ear-marked' for hearings in the first half of 2005 are as follows:

Monday 10 January (commencing at 14.00)
Friday 14 January
Tuesday 15 February
Tuesday 22 March
Tuesday 19 April
Tuesday 10 May
Wednesday 15 June

70/12 Any Other Business

70/12-1 Committee Website

The Secretary reported that he had sought tenders from a number of sources and was seeking to commission a contract for the setting up of the Committee's website early in the New Year 2005. He would advise potential tenders about the likely need for additional "space" for the incorporation of submissions to the Committee in respect of references for hearing.

70/12-2 Changes in Membership

The Secretary reported on the results of elections that had taken place earlier in the day at the Annual Class Meetings. Members noted that the changes, which were all consequent upon changes to the constituencies of the Bands, would be formally published before they take effect in April 2005:

John Thompson will succeed Niel Wilson as Member of ADRC; Geoff Sandberg will succeed Brian Rowley as Member of the Timetabling Committee; and Nick Hortin will succeed Andrew Pennington as Member of the Network and Vehicle Change Committee.

In the meantime the Train Operators would receive early notification regarding the results of elections held in their respective Classes.

There was no other business.

70/13 Date of next meeting

Tuesday 14 December 'earmarked' date now not required.

Thursday 23 December