ACCESS DISPUTE ADJUDICATION

Determination in respect of dispute reference ADA06
(following a hearing held at 1 Eversholt Street, London on 11 April 2011)

The appointed Adjudication Panel ("Panel")

Tony Askham	Hearing Chair
Robert Howes	Industry Advisor
Mark Leving	Industry Advisor

The Dispute Parties

For First Greater Western Ltd ("FGW")

Russell Evans	Head of Network Strategy
Robert Holder	Network Access Manager
Ian Tucker	Burges Salmon, solicitors

For Network Rail Infrastructure Ltd ("Network Rail" or "NR")

Susan Yeo	Customer Manager (FGW)
Carew Satchwell	Contract Services Manager
Dan Kayne	Legal Advisor
Andy Thomas	Customer Manager (FGW)
Karen Patterson	In-house legal team (observing)
Fadaia Hussain	In-house legal team (observing)

Interested parties represented:

For First/Keolis Transpennine Ltd

George Thomas	Commercial Contracts Manager

For Northern Rail Ltd

Helen Cavanagh	Track Access Manager
Joanna Williams	Head of Service Planning

For West Coast Trains Ltd

Robert Hodgkinson	Commercial Operations Manager

In attendance:

Tony Skilton	Committee Secretary

Table of contents

1. Introduction, Substance of Dispute and Jurisdiction

1.1. This matter involves a decision on the interpretation of certain provisions of Part 3 of Schedule 4 of the Train Access Agreement between NR and FGW ("TAC"). The dispute between the parties arises out of the service by NR of a Restriction of Use (RoU) notice on FGW, its subsequent withdrawal and the compensation payable to FGW as a result. That claim for compensation is for the costs of FGW staff employed in its diagramming and planning team ("the Team").

1.2. By Notice of Dispute dated 14 February 2011 FGW referred the dispute for determination in accordance with the Access Dispute Resolution Rules ("the Rules") pursuant to clause 13.3 of Schedule 4 to the TAC between NR and FGW.

1.3. A Procedure Agreement was subsequently entered into between FGW and NR, stating that the determination procedure would be an Access Dispute Adjudication ("ADA") in the first instance, with any appeal to be referred to arbitration. Within the terms of the Rules, Arriva Trains Wales Ltd, East Midlands Trains Ltd, First/Keolis Transpennine Ltd, First ScotRail Ltd, London & Birmingham Railway Ltd, London Eastern Railway Ltd, London Overground Rail Operations Ltd, Northern Rail Ltd, Southern Railway Ltd, Stagecoach South Western Trains Ltd and West Coast Trains Ltd declared themselves to be interested parties.

1.4. In accordance with Rule G17, FGW and NR filed statements of case setting out their respective positions and submissions. A hearing took place on Monday 11 April 2011. Of the interested parties, First/Keolis Transpennine, Northern Rail and West Coast Trains had representatives in attendance.

1.5. In its consideration of the parties' submissions and its hearing of the dispute, the Panel was mindful that, as provided for in Rule A5, it should "reach its determination on the basis of the legal entitlements of the Dispute Parties and upon no other basis".

1.6. The abbreviations used in this determination are as set out in the list of Parties above, in this section 1 and otherwise as specified in the text below.

2. Background, history of this dispute process and documents submitted

2.1. Following receipt of the Dispute Parties' submissions and in accordance with Rule G10(c), I considered whether there were any relevant issues of law raised by the dispute; I concluded that no such issues were raised and this was conveyed to the Industry Advisors and the Dispute Parties. Neither of the Dispute Parties produced any authorities on the subject matter of the dispute.

2.2. In summary, the written material and evidence provided over the course of this dispute process was as follows:

2.2.1. Statement of Claim by FGW
2.2.2. Statement of Defence by NR
2.2.3. Response statement by FGW
2.2.4. Schedule by NR of the disputed costs claimed
2.2.5. Opening statements, responses to questions and closing remarks to the hearing on 11 April 2011 by FGW and NR.

2.3. I confirm that the Panel has taken into account all of the submissions, arguments, evidence and information provided over the course of this dispute process, both written and oral, notwithstanding that only certain parts of such material may specifically be referred to or summarized later in this Determination.

3. Submissions made and outcomes sought by Dispute Parties

3.1. FGW's principal submission was that the submissions of NR (see 3.2 below) are totally misconceived. It says that the normal costs of its Team do not include dealing with Type 2 and 3 RoUs. The costs claimed are precisely those covered and intended to be covered by the provisions of the Schedule. It would not have increased its Team to be able to deal with such

disruptions as the one giving rise to the dispute if there were no Type 2 and 3 RoUs and no right to compensation.

3.2. NR's principal submissions were that FGW has incurred no extra cost as all the work was done by its Team under their contracts of employment with no additional payments being made to them. Whilst it accepted that the costs claimed fall into a category of costs recoverable under the Schedule nevertheless it maintains that NR should only have to pay compensation if either FGW had incurred extra costs by payment of overtime or if it had bought in extra staff to deal with the RoU. It submitted that in this case there was no "cost" to FGW and hence no payment should be made to it by NR. In addition it maintains that the costs are not recoverable because they are "directly linked" to the cause of the expenditure and neither are payable "as a result of the RoU."

3.3. Neither party has produced any authorities to support its own construction of the provisions in the contract or any general authority which might deal with the recoverability of management costs in a claim for damage for breach of contract.

3.4. FGW seek a determination that:

3.4.1. the intention of the definition of RoU direct costs in Part 3 of Schedule 4 of the TAC is to include the cost of train planning activity including when this is incurred as a part of the current establishment and salaried base and

3.4.2. as a result the claim for staff payment for work on the strike timetable referred to should be met whether or not such work was undertaken by additional staff or on an overtime basis and

3.4.3. any costs incurred by the ADA as a result of this adjudication should be covered as explained by the Network Code and any cost not catered for by the Network Code parameters are borne by NR.

3.5. NR seeks a determination that:

3.5.1. on the matter of principle the disputed sum is not a RoU direct cost is defined in paragraph 1 of Schedule 4 to the TAC

3.5.2. as a result NR is not liable to pay FGW the disputed sum of £[redacted] and

3.5.3. any costs not catered for by the provisions of the Network Code are borne by FGW.

4. **Oral exchanges at the Hearing**

4.1. Both parties restated their positions and arguments in support of their cases.

4.2. FGW gave considerable additional details about the employees in its Team, their contractual position and how, if at all, members who worked on the project were remunerated for so doing. [redacted]

4.3. We were told that after the work had been done those who worked at weekends were given time of in lieu and those who worked during normal hours were not. There is no dispute that work was carried out but NR does query the amount of the claim made and would if we find against it on the principle before us wish further details of the work done by whom and when etc.

4.4. We were also told that FGW had made a decision to increase the Team in the years 2006-9 so that the Team has been expanded by [redacted] specifically to enable it to cope with Type 2 and 3 RoUs. This was for practical reasons because it was not possible to bring in extra members on a short term basis and neither were there sufficient consultants available to

be called in to deal with these occurrences. In any event FGW maintains that to rely on overtime and consultants are both impractical on large disruptions such as this case and would dramatically increase the value of any claim to NR which could not be to the benefit of it or the industry. As part of the expansion FGW had factored in those costs which could be recovered under this process from the NR. [redacted]
Alternatively, as it may under the TAC, reject such RoUs, putting NR into some difficulty.

4.5. NR and FGW told us that some compensation had been already paid to FGW in respect of the RoU which mostly involved work done in the marketing and retail side of the FGW business. NR understood that all the payments that it had made were for additional staff or overtime and no payments had been made in the same circumstances as applied to the dispute before us.

5. Analysis and consideration of issues and submissions

Factual position

5.1. The papers and the evidence and discussions before us showed that in reality there is little if any factual dispute between the parties.

5.2. In April 2010 the rail industry was facing industrial action to be held between 6th and 9th April. Because this would have impacted on train services for a period greater than 60 hours NR served a Type 2 RoU and FGW had to undertake work using the Team to plan for the notified disruption.

5.3. The work had to be done in a short period given the unplanned nature of the proposed interruption. Some of the work was done over weekends and the rest during the normal working week.

5.4. In the event the strike was declared illegal by the High Court and notice of this was given by NR to the Claimant. This gave rise to FGW seeking payment of its costs incurred in dealing with the RoU under paragraph 2.9(a) of the Schedule. The total of these costs exceeded some £[redacted] and some were agreed by NR because it perceived these were actual additional costs incurred by FGW and because it accepted that the RoU and its subsequent cancellation did give rise to the right of FGW to claim certain costs under the RoU. It may be that a little of what was paid might have included payments for staff where overtime was not worked but most dealt with repayment of actual additional costs including overtime and the employment of temporary staff in the retail areas.

The contractual terms

5.5. Given the factual issues and the parties' respective positions set out above we start by identifying the question we are asked to determine. We are asked to determine whether in the circumstances of this dispute FGW is entitled to recover from NR the cost of the train planning operation carried out by its Team when no overtime payments were made to the Team members and where all the Team were salaried staff members of the claimant. We are not asked to determine the amount due to FGW given that NR reserves its position on that matter.

5.6. In doing so we approach this matter as akin to a claim for damages resulting from what would be a breach of contract by NR. The contract in this matter though identifies that on occasions NR will give a RoU to a train operator and then sets out what sort of "damages" are then recoverable in these circumstances. Some are provided for on a formulaic basis under Schedule 4 and others, such as the ones in dispute in this case, being compensated on an actual cost basis. As such the parties are agreeing to the type of damage recoverable and how such damage is to be calculated. Schedule 4 Part 3 deals with both the type and recoverability.

5.7. We set out the relevant provisions of the Schedule. Paragraph 2.9 states that:

"2.9 changes to restrictions of use

(a) Where a single Restriction of Use falls within the of the definition of one type of Restriction of Use and there is a change which means that no restriction of the use occurs or that the Restriction of Use occurs as another type of Restriction of Use, then that Restriction of Use shall be treated, for the purposes of the calculation and payment of compensation, as if it had always been the latter type of Restriction of Use (or, where applicable, and as if it had not been a restriction on the use).

(b) For the purposes of paragraph 2.9(c), a Restriction of Use shall be deemed to be taken if and to the extent that it results in any difference between timetables of the type referred to in the definition of "Restriction of Use" when notified, whether or not the restriction giving rise to that Restriction of Use was subsequently cancelled in whole or in part.

(c) Where a change to a Restriction of Use reduces the impact of the Restriction of Use and accordingly changes its type or means that there is no Restriction of Use in accordance with paragraph 2.9 (a), the train operator may, within 28 days of the date on which the change to the Restriction of Use was notified to the train operator by Network Rail, serve a notice on Network Rail which sets out any cost to which the train operator is already committed or has already incurred and any costs associated with responding to the Restriction of Use both before and after the change. The train operator shall be entitled to recover such costs provided such costs are reasonable and were properly committed or incurred in the circumstances. For the purposes of this clause 2.9(c), references to "costs" shall mean those categories of costs which the train operator would have been entitled to recover under the schedule for that type of restriction of use which the Restriction of Use was classified as prior to its change."

5.8. From this it is apparent that to be recoverable any costs must have been committed or already incurred or be associated with the RoU. Such costs are recoverable provided that they are "reasonable and were properly committed and incurred in the circumstances".

5.9. As to what constitutes the type of "costs" recoverable under this provision, reference is made to those categories which a train operator such as FGW would have been entitled to recover under Schedule 4 had the RoU not been withdrawn.

5.10. These costs are set out in Part 3 of the Schedule under the heading "RoU Direct costs". This provisions says:

"ROU direct costs means the aggregate amount of:

(a) bus and taxi hire costs

(b) publicity costs;

(c) train planning and diagramming costs; and

(d) other costs directly related to the organisation and management of the Train Operator's response to a Type 2 restriction of Use."

5.11. Thus it is clear as accepted by NR that the type of costs recoverable include "train planning and diagramming" costs.

5.12. So the issue is in reality what constitute "costs". NR argues that the Team's costs are not "costs" because it says there is no extra cost to FGW and thus there is nothing for NR to compensate FGW for. In addition NR maintains that the costs are not recoverable because they are "directly linked" to the cause of the expenditure and neither are payable "as a result of the RoU."

5.13. We have concluded that interpreting the contract using the language of the Schedule that the expenditure is in principle recoverable by FGW from NR. In reaching that decision we have not considered the position under previous contracts or any evidence as to the intention

of the provision. Given we are asked to interpret the wording of the existing contractual provision it would have been wrong for us to do so. We reach that conclusion because it seems apparent to us that there is a real cost to FGW of reacting to a RoU of the type and extent as the one the subject of this dispute. The 350 hours or so of time had to be devoted to dealing with the ROU. This clearly is at a cost to FGW and one which the contract recognises as recoverable. The costs are directly linked to the RoU and incurred as a result of it and in this case had been incurred prior to the withdrawal of the RoU.

5.14. When receiving the RoU, a train operator, if it accepts it, has to arrange to carry out the necessary work of timetabling and diagramming. The costs of this have to be reasonably incurred as the operator has a duty to mitigate its loss or claim. If they are reasonable and properly incurred they are clearly recoverable.

5.15. As a result it could seek:

5.15.1. to bring in others to undertake the work, which NR says is acceptable to it and they would not dispute the right to recover that cost

5.15.2. to cover the work using voluntary overtime, which carries the risk that insufficient staff will volunteer when asked, and recover that cost from NR, which again NR accepts is fully recoverable or

5.15.3. to mitigate the cost to itself and NR by employing staff on permanent contracts and claiming time paid for by the operator by way of salary and overhead in train planning and diagramming as a direct result of the RoU.

5.16. We accept that it is impractical for FGW to have done either of the first two to cover this RoU and was entitled to plan for such occurrences in the way it has by employment of permanent staff at its risk and cost.

5.17. As a result there is an actual cost to FGW in employing staff to do the actual work and the amount of that claim is less than would be the case using either external consultants or overtime if either were available and viable options. We do not find that it makes any difference whether the work was done at week ends or during the normal working week, nor do we consider that whether the employee was or was not allowed time of in lieu makes any impact on the recoverability of the amounts claimed. We have no doubt that the sums if properly incurred are thus recoverable.

5.18. We agree with submission of FGW that to find to the contrary would be perverse as it would lead to inefficiencies, refusal to accept RoUs and greater costs to NR. The employment of salaried staff is as we set above compliance by FGW with its duty to mitigate the amount of a potential claim which clearly would be larger if carried out on overtime or by consultants. Indeed a claim based on such an approach in similar circumstances may in turn be partly rejected as being unreasonable in amount because the train operator has failed to employ sufficient staff to deal with such RoUs and if it had done so the quantum of the claim might have been significantly less.

5.19. In conclusion therefore in our judgment, as a matter of principle, such head of loss (i.e. the cost of staff time spent on working on timetabling and diagramming) is recoverable, notwithstanding that no additional expenditure "loss", or loss of revenue or profit can be shown. However, this is subject to the proviso that it has to be demonstrated with sufficient certainty that the abortive time was indeed spent on dealing with the RoU; i.e. that the expenditure was directly attributable to the RoU.

Quantum

5.20. Finally whilst we are not asked to adjudicate on the quantum of the claim it may be helpful to identify what we would expect to see produced by a claimant operator. We would expect to see a written record of the time spent by each member of the Team, the dates and times when that time was incurred, the task being carried out, the salary costs of each member of the Team claimed for and how the hourly rate has been calculated. There is no need for the

Team members to be identified by name but merely by job title. The only issue given our decision on the principle involved is to decide whether the time spent on each activity was reasonable and that the appropriate level of staff was used to carry out the task.

6. Determination

Having considered carefully the submissions and evidence as set out in sections 2, 3 and 4, and based on the Panel's analysis of the issues and submissions set out in section 5,

I DETERMINE that:

6.1. In principle the disputed sum is a "RoU Direct cost" as defined in paragraph 1 of Schedule 4 of the TAC and is recoverable under the provisions of paragraph 2.9(c) of the TAC.

6.2. There should be no order for costs against either party.

I confirm that, so far as I am aware, this Determination and the process by which it has been reached are compliant in form and content with the requirements of the Access Dispute Resolution Rules.

A.S. Askham

Tony Askham
Hearing Chair
20th April 2011