

IN THE MATTER OF PART G OF THE NETWORK CODE

AND IN THE MATTER OF ACCESS DISPUTES ADJUDICATION ADA 57

BETWEEN

GRAND CENTRAL RAILWAY COMPANY LIMITED

CLAIMANT

V

NETWORK RAIL INFRASTRUCTURE LIMITED

DEFENDANT

RULE G9(c) LEGAL NOTE

Preamble

1. I take note of the parties' agreement that this Appeal is brought to ADA on the basis of the Claimant's dissatisfaction as to a matter concerning the operation of the procedure in Part G (G11.1(a)).
2. I have considered the parties' Statements of Case, including all Appendices. Factually, I understand that the matter concerns the Defendant's implementation of a Network Change proposal relating to the East Coast Digital Programme ('ECDP'), which is a programme aimed at delivering the conversion to a digital railway of a significant section of railway track. The nature of the work involved Restrictions of Use (RoUs) in view of implementing the proposed Network Change.
3. In light of the parties' Statements of Case, I have identified the following issues falling for my determination at the hearing:

Issue 1 – whether the Claimant was obliged to give notice of response to (in other words, ‘object to’) the Defendant’s proposal for Network Change on the basis that it would not be “adequately compensated”

4. The Claimant’s objection to the Network Change proposal was based on RoUs identified in that proposal. It seems to be common ground between the parties that the existing primary mechanism for compensating an Access Beneficiary (here, the Claimant) for RoUs is Schedule 4 to the Track Access Contract (hereinafter ‘Schedule 4’ and ‘TAC’ respectively) following progressive changes which had been made to Part G in view of moving compensation for RoUs from Part G to Schedule 4. It also seems to be common ground that the RoUs for which the Claimant would not be compensated for under Schedule 4 were so-called ‘Type 1’ and ‘Type 2’ RoUs, because the Claimant does not pay the Access Charge Supplement (‘ACS’). As such, the Claimant could only be compensated for Type 3 RoUs or for Sustained Planned Disruption (‘SPD’) under Schedule 4. In respect of compensation relating to ‘performance,’ I understand that the primary mechanism for compensation is Schedule 8 of the TAC (‘Schedule 8’).
5. Against this backdrop, and in light of the wording of G2.1.1(a)(iii), I will need to decide on what legal basis the Claimant considered, when objecting, that it cannot adequately be compensated under the TAC in the event of a material deterioration of the performance of its trains in circumstances where, seemingly in contradiction to the wording of G2.1.1(a)(iii), compensation for RoUs is specifically excluded from Part G under G2.4.1. Essentially, the core issue is how G2.1.1(a)(iii) should properly be construed in this context.
6. Given that the Network Code (and therefore Part G) is incorporated into the TAC, the question is fundamentally one of contractual construction. I will therefore be guided by the principles applicable to the construction of contract terms summarised in *Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd* (‘*The Ocean Neptune*’) [2018] EWHC 163 (Comm). These involve an objective assessment of the meaning of the language used in order to ascertain what a reasonable person, who has all the background knowledge which would reasonably have been available to the parties at the time that the contract was entered into, would have understood the parties to have

meant. The contract must also be considered as a whole and weight can be given to the ‘wider context’ when considering the objective meaning. The process is both unitary, which involves striking a balance between the indications given by language and the implications of competing constructions, and ‘iterative,’ in that each suggested interpretation is checked against the provisions of the contract and the commercial consequences are investigated.

7. I am entitled to take into account the factual background, but not any pre-contractual negotiations (*Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38). To this end, and by way of background, both parties seek to rely on changes that were progressively made to Part G by the ORR under a process referred to as PR08, the final conclusions of which were set out in a document titled *Final Conclusions – Compensation for Possessions* dated August 2008 and *Schedule 4 possessions regime Factsheet* dated 30th September 2021. I will need to decide whether I can rely on the above as ‘factual background’ (distinct from ‘pre-contractual negotiations’) alternatively as relevant decisions of the ORR by which I am bound pursuant to R 7(a) Chapter A of the ADRR.

Issue 2 – whether the Defendant was entitled to implement the Network Change proposal in the prevailing circumstances

8. The Defendant’s entitlement to implement the proposed Network Change is governed by the provision of G10.1. I will therefore firstly consider whether the Defendant breached this provision in the circumstances of the Claimant’s objection to the Network Change proposal pursuant to G2.1.1(a).
9. If I conclude that the Defendant was not entitled to implement the Network Change proposal under G10.1, I will need to determine what it is that the Claimant would like me to do in that specific regard. It seems to me that, if the Claimant were to succeed in this respect, it would be entitled to damages for breach of contract to the extent that it can be established that it has suffered any loss. However, I note that it has not made any request in this regard, and primarily seeks compensation in respect of an RoU, which is a loss flowing from the implementation of the RoU itself rather than from any breach on the Defendant’s part of the provisions of G10.

Issue 3 – whether the Claimant is entitled to suitable compensation for the Network Change

10. As with issue 1, the fundamental question is whether the Claimant is entitled to compensation under Part G when this is apparently excluded under G2.4.1 and it does not pay an ACS for the purposes of the compensation regime in Schedule 4. In any event, I need to consider what the legal entitlement in Part G relied on by the Claimant in fact is. The relevant entitlement appears to arise pursuant to G2.1.1(c)(ii) when read together with G2.2 and G2.4.1. I will need to decide whether there is an entitlement in the circumstances, taking into account the exclusion in G2.4.1, in line with the principles to which I refer in respect of Issue 1.
11. If the Claimant is entitled in principle to compensation, I will need to decide whether the implementation of the Network Change has resulted in a material deterioration of the performance of the Claimant's trains leading to a 'loss of revenue' in accordance with G2.2 (i.e. if the Claimant successfully establishes that the exclusion in G2.4.1 does not apply). Essentially, the issue is whether the RoUs in connection with the implementation of the Network Change had a material impact on the performance of the Claimant's trains and, if so, whether this resulted from the Network Change itself. To this end, I will need to consider whether, properly construed, the 'performance' of trains can be said to include the running of a certain number of trains on a planned basis.

Issue 4 – if I resolve the dispute in favour of the Claimant, what remedy is the Claimant entitled to?

12. I note that, under R47 Chapter G ADRR, I can make such orders as I consider necessary to resolve the dispute.
13. I understand that the Claimant is not seeking that I order the Defendant to pay any specific sum, or that I calculate any compensation that I find is due to the Claimant, but rather that any such compensation (if the Claimant is entitled to it in principle) be determined between the parties through the normal negotiated process as used for both Type 3 RoUs and SPD under Schedule 4.
14. I bear in mind, however, that the basis for the calculation of any compensation to which the Claimant may be entitled to as a matter of principle is fixed as “an amount equal to the amount of the costs, direct losses and expenses (including loss of revenue) which are reasonably incurred or can reasonably be expected to be incurred by the Access Beneficiary as a consequence of the implementation of the proposed change” (G2.2). I will therefore order that the Claimant set out a schedule of its lost revenue, or that the parties agree compensation based on the formula in G2.2. Should the Claimant propose a calculation of compensation to which it asserts entitlement, I will invite the Defendant to respond if it so wishes.

Questions to the Parties

15. In order to assist in preparation for the hearing, I intend, in the first instance, to explore the following questions with the parties.

Grand Central

16. On the basis that G2.1.1(a)(iii) provides a basis for an objection, but does not in itself provide a basis for compensation, what do you assert to be the purpose of this Condition? In other words, what entitlement do you suggest it provides you with?
17. Can you articulate, essentially, the basis upon which you assert that the express exclusion of compensation for RoUs in G2.4.1 does not apply in the circumstances relating to this dispute?
18. If I were to conclude that you made a valid objection pursuant to G2.1.1, and that Network Rail did not properly respond to it in breach of the provisions of G10, what do you seek by way of remedy for this? What do you say that the appropriate measure of loss should be?
19. Are you seeking compensation for revenue loss beyond the 48 hours planned for August 2023, or is there any consequential or ongoing loss to you from that RoU?
20. Can you explain in more detail what you assert is the relevance of the calculation of the ACS and how this inter-relates with the provisions of Part G?

Network Rail

21. In light of RoU-related compensation being expressly excluded from Part G pursuant to G2.4.1, what do you assert is the effect of the words “cannot adequately be compensated ... in respect of a Restriction of Use...” in G2.1.1(a)(iii)?
22. Irrespective of GC’s entitlement to compensation for RoUs, if any, can you articulate the basis upon which you assert that its objection under G2.1.1 was not valid rather than simply, in your view, unmeritorious?
23. To what extent and on what basis do you assert that the issues raised by GC were “resolved” pursuant to G10.1.1(c) prior to the implementation of the Network Change?
24. Is there any reason why you did not exercise your discretion to issue a notice under G10.1.2 prior to the implementation?

25. If I conclude in favour of GC either that it is entitled to compensation for RoUs, or that you have breached the provisions of G10 (and consequently that there has been a breach of contract), do you have any submissions on the basis upon which such compensation should be calculated (bearing in mind the wording of G2)?

Alexander Rozycki

Hearing Chair

21st November 2023