
NETWORK and VEHICLE CHANGE COMMITTEE

Determination No. NV5

Hearing held at Kings Cross on 12th July 2001

*[Note: this case was first registered in 1999 but did not come to hearing until this date:
the previous published determination was NV21 issued on 12th April 2001]*

1. The Committee was asked by Connex South Eastern (CSE) to rule that the costs of works to Network infrastructure necessary to permit the introduction of class 375 trains on designated routes, should be paid by Railtrack, because “On the assumption that the new build vehicles comply with the dimensions set out in the relevant Railway Group Standards, ...Railtrack [is] liable for the costs of carrying out works to the infrastructure so that the infrastructure also meets the specifications set out in the relevant Railway Group Standards.”
2. The Committee noted that although formal advice of a dispute had been served by CSE in February 1999, the parties had had great difficulty in formulating subsequent papers. The Committee noted that it had received advice from Access Dispute Resolution Committee, and, on the basis of that advice, had issued guidance to the parties as to how it intended to proceed towards achieving a hearing of the dispute.
3. The Committee noted that other Train Operating Companies (TOCs), who had not registered any formal reference of a dispute, had sought to be associated with the appeal brought by CSE. There had been a preparedness from all the TOCs concerned, and Railtrack, to attempt to assemble all of the arguments of all the parties, and to present a single joint submission. The Committee was of the view that, as this had not been achieved, then it had to proceed to a determination of the original case, brought by CSE as NV5. There has still been no formal reference from the other TOCs.
4. The main thrust of the argument from CSE was that there is an obligation on Railtrack, as part of its Network Licence, to change the Network, to achieve compliance with Railway Group Standards in respect of structure gauging, and clearances, and that therefore,
 - 4.1. if any vehicle presented for operation on the Network complies with the relevant Railway Group Standards (and CSE believes that the class 375 is fully compliant with those standards), it is reasonable to expect that the Network will also be already in a state of compliance with those standards;
 - 4.2. to the extent that there is, nevertheless, a need for the Network to be modified to receive such a train, such works should be paid for by Railtrack;
 - 4.3. this view of the pre-eminence of the Railway Group Standards was acknowledged in Track Access Condition F1.1 which reads: “*The obligation to comply with the requirements of this Part F shall be without prejudice to the obligations of the Access Parties to comply with the Railway Group Standards.*”; and
 - 4.4. the principle that the TOC sponsoring any change to vehicles, which in turn requires works to the infrastructure, should also pay for all such works, was inequitable, and unfairly penalised whichever TOC first introduces new stock.

5. Against this view Railtrack argued that
 - 5.1. the Railway Group Standards in question (and in particular GC/RT/5204) were being misinterpreted by CSE, since they related primarily to the standards for clearances etc. to be respected for new works; pending such works, they permitted the continued reasonable use of existing installations to existing standards; and that Railtrack was observing this principle;
 - 5.2. the Vehicle Change process exists to enable TOCs to introduce new stock, in a context that starts from the condition of the Network “as is”, but relies on the principle that the sponsor of change should bear other parties’ costs of implementing those consequential changes necessary to permit the new stock to operate.

6. In respect of these various arguments the Committee’s view was that
 - 6.1. the Committee had no jurisdiction in relation to the enforcement of Railtrack’s Licence conditions;
 - 6.2. the force of Track Access Condition F1.1 was to prevent an Access Party from praying the Track Access Conditions in aid as an excuse for non-compliance with Group Standards; and that
 - 6.3. Track Access Condition F does not impose any obligation on Railtrack to undertake works at its own initiative and expense with a view to modifying lines of route to comply with relevant Railway Group Standards for new works.

7. Taking account of the evidence presented as to the dialogue that had taken place between the parties in pursuance of Track Access Conditions F1.2, F1.3 and F3.2, the Committee concluded that
 - 7.1. in relation to the serving, by CSE, of the proposal for change in accordance with Track Access Condition F1.2, there had been dialogue between the parties, over the design of the new rolling stock, with consideration given to the extent to which the kinematic envelope of the new stock could be changed to improve the scope for the trains to run with the minimum of necessary works on routes;
 - 7.2. by agreement between the parties, some derogations from Railway Group Standards had been sought from HMRI;
 - 7.3. to the extent that the stock proposed could not be introduced, other than with the carrying out of works to the infrastructure, then there is a duty on the sponsor of the Vehicle Change to pay compensation of *“an amount equal to the amount of the costs, direct losses and expenses (including loss of revenue) which can reasonably be expected to be incurred by Railtrack ... as a consequence of the implementation of the proposed change”* (Track Access Condition F3.2); however
 - 7.4. any works undertaken to the Network in order to implement a Vehicle Change must also be given consideration as to whether they deliver benefits to Railtrack (or other Train Operators). Track Access Condition F3.3 is clear that

“There shall be taken into account in determining the amount of compensation referred to in Condition F3.1:

 - (a) *the benefit (if any) to be obtained or likely in the future to be obtained by Railtrack or any other operator of trains as a result of the proposed Vehicle Change; and*

(b) *the ability or likely future ability of Railtrack or any other operator of trains to recoup any costs, losses and expenses from third parties including passengers and customers*".

8. The Committee therefore determined that:

- 8.1. there is a duty imposed by Track Access Condition F on a party wishing to introduce a Vehicle Change to compensate other parties, including Railtrack, for the reasonable costs they might reasonably expect to incur to make such a change possible;
- 8.2. Railtrack's liabilities under Track Access Condition F, in respect of the costs of changes required to accommodate a Vehicle Change, are not increased or changed by any other duties that may be imposed on Railtrack in respect of Railway Group Standards; however
- 8.3. it is NOT reasonable to argue that
 - 8.3.1. any changes to the infrastructure required to implement a Vehicle Change automatically have no benefit to Railtrack, taking into account all considerations of *inter alia*, reliability, asset maintenance, normal renewals, and the duties in respect of Railway Group Standards; and that therefore
 - 8.3.2. such benefits have no value in relation to any calculation of compensation in accordance with Track Access Condition F3.3;
- 8.4. if it can be demonstrated that the Train Operator, in pursuing its Vehicle Change proposal, had not been provided with relevant information that, if known and/or available, would have changed the nature, and consequential costs, of the Vehicle Change, or had been misled, then this should also be taken into account in relation to the calculation of the compensation payable by the Train Operator;
- 8.5. the parties should direct their efforts to ensuring that the amount of compensation payable by the TOC to Railtrack in respect of the costs of the works carried out by Railtrack to permit the introduction of class 375 trains on the designated routes, is calculated in accordance with both Track Access Condition F3.2 and F3.3, and taking into appropriate account the directions in paragraphs 8.3 and 8.4 of this determination;
- 8.6. the parties should conclude such discussions so that Railtrack may invoice CSE, and be paid, for the costs (subject to such adjustments arising out of this determination) of all works so far completed no later than 30th September 2001;
- 8.7. there are no grounds for either party being awarded any form of re-imbusement of costs in relation to the bringing of these proceedings.

Bryan Driver
Chairman,
Network and Vehicle Change Committee