ACCESS DISPUTES COMMITTEE

To: Network Rail Infrastructure Ltd ("Network Rail")
Abellio Scotrail Ltd
DB Cargo (UK)
First Greater Western Ltd ("FGW")
Transport for London ("TfL")
GB Railfreight Ltd ("GBRf")
Serco Caledonian Sleepers Ltd
East Coast Main Line Company Ltd ("East Coast")
Stagecoach South Western Trains Ltd ("SWT")
XC Trains Ltd ("XC")
Arriva Rail North Ltd ("ARN")

From: Hearing Chair
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Ref: ADC/TTP
Date: 4 April 2017

Dear Sirs

Directions relating to Timetabling Disputes TTP1064, TTP1065, TTP1066, TTP1068, TTP1069, TTP1070, TTP1071, TTP1072, TTP1073 and TTP1075

My Directions of 31 March 2017 explicitly left open the issue raised by Eversheds Sutherland (International) LLP ('Eversheds') in paragraph 12.2 of their letter of 29 March 2017, in which they reserved Network Rail's rights on the basis that in respect of some of the Claimants' claims the Sole reference Documents ('SRDs') contain issues which are new and were not referred to in the Notice of Dispute. Further, Eversheds expressed doubt as to whether some of the Notices of Dispute were validly served and, '*as to whether some or all are valid Notices of Dispute in various other respects*'.

I left this open because I thought it important that Parties received those Directions as soon as possible. After the SRDs were served I had spent time reviewing them; further, for reasons beyond anyone's control, I did not see Eversheds' letter of 29 March 2017 until 31 March 2017. I have now had time to reflect on Eversheds' points, and also to consider whether they shed any light on the way in which these Disputes are being conducted.

Further Directions dealing with these and other points were on the point of being issued when I received Eversheds' letter of today's date (4 April 2017), which is attached for ease of reference. The first section of these Directions responds to paragraph 8 of Eversheds' letter today.

As part of my consideration I have reviewed all the extant Notices of Dispute. It is noteworthy that this is the first Dispute which I have chaired in which this has been necessary, nor am I aware of any other Dispute since the current Rules were adopted having needed to do so. Having completed this task I am now aware of the fact that the format of a Notice of Dispute set out in Access Dispute Resolution Rule B2 has been somewhat simplified in the template version shown on the ADC website. I shall recommend that this is considered further by the Access Disputes Committee after these Disputes have been determined. For the reasons explained

I have already commented on the essential need for any Dispute to be determined fairly. I have also commented on the pressures imposed by the timetable development cycle. In the event of a clash between these two factors fairness would obviously have to prevail, but in any issue which I have to decide I would wish to establish whether there was any real unfairness involved; to date – in my experience – neither Timetabling Panels nor Access Dispute Adjudications have descended to procedural quibbling and it is to be hoped that these Disputes are not going to break this valuable precedent.

Eversheds comment in today's letter that they do not regard the points on which they are still reflecting as solely as a question of Network Rail's awareness, but rather that of compliance with an express contractual provision. As yet, however, it is not clear which express contractual provision it is claimed has been breached, and whether any such claim which can be substantiated can be remedied by the exercise of the broad case management powers available to a Hearing Chair.

In general terms my experience of chairing Timetabling Panels and Access Dispute Adjudications suggests that procedural irregularities which do not create any real unfairness are likely to be waived, so long as the Dispute(s) can still be determined fairly.

It remains my view that the key issue is whether Network Rail is aware of the case that it has to meet. (I return to the other points below). The procedural timetable is deliberately tight, for justifiable reasons. The Access Dispute Resolution Rules ('ADRR') include the specific right for Parties to be represented legally. As I understand it, this provision was introduced because of arguments mounted under the previous Rules which sought to exclude or silence a Dispute Party's legal advisors. While my personal opinion is not relevant, I do think that it is fair that a Dispute Party may be legally represented if it so chooses, but I do not imagine that the draftsman thought that the procedural timetable was to include time to allow legal advisers unfamiliar with the Timetabling Panel (or any other ADRR process) time to understand the rules applying to Timetabling Panels, and why the procedural timetable is so compressed.

The procedural timetable does not give the luxury of time for any Dispute Party to 'reflect' on procedural issues, whether or not it claims any entitlement to reserve its rights. If Network Rail wishes to submit that the ADRR should be amended to include such an allowance of time then it should use the appropriate mechanism rather than seeking to do so during any live Dispute.

Having reviewed all the extant Notices of Dispute I note that they vary between the Rule B2 format and the template format, but all clearly state the Parties involved and the rule under which the Dispute is being brought. They vary in content, hardly surprisingly, ranging from those (such as Abellio Scotrail, TTP1064) which set out headings in the Notice of Dispute which are then echoed word for word in the SRD, to those which use a more abbreviated summary of the points at issue. In all but one case I am left with no doubt that the Notice of Dispute clearly states the reasons for the Claimant raising the Dispute and I am not persuaded that there are any new issues freshly raised in the SRDs.

The exception is TTP1065, brought by DB Cargo, in which the Notice of Dispute dated 17 February 2017 merely states that, '*This dispute is brought on the basis that there are areas of contractual deviation which may require resolution through the Dispute mechanism*'.

The question therefore arises as to whether Network Rail has been unfairly disadvantaged by this wording.

It could be argued that on its own this explanation is not sufficient to alert Network Rail to the points in issue, but I note that of the two points raised by DB Cargo, one echoes part of GBRf's Claim, the other deals with the Claim raised by FGW, TfL and XC. It is also relevant that DB Cargo's concerns were the subject of discussions with Network Rail both before the Dispute was registered and subsequently. Therefore I find it difficult to imagine that Network Rail has suffered any prejudice because of the wording of DB Cargo's Notice of Dispute.

In any event, if Network Rail is not clear about the points at issue in any registered Dispute the time to query it is when the Dispute is registered, not when external lawyers are instructed some weeks later. The Secretary includes in his letter notifying the registration of a Dispute a request that Network Rail should notify him within 5 working days if Network Rail considers that the Dispute is not a Timetabling Dispute. If Network Rail had any concerns about DB Cargo's Notice of Dispute that was when they should have been raised.

Eversheds do not particularise the concerns that they have about whether some of the Notices of Dispute (not specifying which) were validly served. In this context I suggest that once a Dispute has been registered – without any objection being raised by Network Rail to its registration – it is difficult to understand how the way in which the Notice of Dispute was served remains relevant.

I do not pretend to understand what is meant by Eversheds' comment that there are concerns, '*...as to whether some or all are valid Notices of Dispute in various other respects*'. To purport to reserve rights on such a vague basis does not immediately seem to comply with the duties placed on Dispute Parties which are set out in Rule A9.

I do not wish to devote time on the first hearing day to procedural issues or objections. To that end Network Rail is to confirm **by 12 00 on Friday 7 April 2017 whether it is pursuing any procedural objection to hearing the substance of the Claimants' claims on the hearing dates reserved from 20 April 2017. These objections must be particularised sufficiently to allow them to be addressed.**

In this event the Secretary is to try to arrange a preliminary hearing to deal with any procedural issues before 20 April 2017.

While seeking to dispose of all the issues raised in Eversheds' letter of 29 March 2017 I think it appropriate to comment on the suggestion in paragraph 10 that it should be for the Claimants to create any consolidated document , not least because, in Eversheds' words, '*....the Claimants are all substantial private sector organisations with access to and the means to fund resource* [sic]'.

This comment appears not to recognise that wherever the ultimate ownership of an Access Beneficiary might lie, the Access Beneficiary is the company which holds the *Railways Act* 1993 Licence to operate on the Network, and that some of these companies are very small indeed when compared with Network Rail. Further, the comment also seems to ignore the fact that the consolidation is required to defend a number of claims brought on precisely similar grounds; it is difficult to understand how this could be achieved in practice by the Claimants. Finally, should it need to be pointed out, Network Rail owns and manages the Network, with specific responsibilities and funding to enable it to do so.

Turning now to the further points raised by Eversheds in today's letter, Hearing Chairs exercise their case management powers through the Secretary and I can see no reason for varying this

Using the numbering in Eversheds' letter of today's date:

4.1 Yes. Although issues of principle are raised in GBRf's Part 1 SRD, these principles are not the same as in the common objections to the outcome of the TRIP process.

4.2 Yes.

4.3 My error, for which I apologise. All these issues fall under Head C.

4.4 As above. All these issues fall under Heads A/B.

5. As I hope is already clear, what I regard as important is that both sides of the argument are set out clearly, so that they can be understood by the Panel and can be addressed at the hearing(s) by the Dispute Parties. That requires sufficient detail, while trying to keep any submission as short as possible. The templates are for guidance, if there is a better way of submitting any Party's case that complies with the spirit of the Rules then I would not anticipate the point being taken by the Panel.

6. Thank you.

7. I am not inviting FGW, East Coast, XC and ARN to extend their Claims, but seeking clarification to avoid the possibility of fresh routes being raised at the hearing(s). I regard my own case management powers as entitling me to do so, in particular as I made it clear that any significant expansion of any Party's claim would lead to my amending the current timetable to ensure that Network Rail has sufficient time to address any such points.

9. The only discussion to which I can find specific reference in the Secretary's e-mail of 17 28 of 22 March 2017 was the discussion in which he alerted me to the fact that Mr Tucker of Burges Salmon was representing Abellio Scotrail. Therefore I do not understand the purpose of this question but would comment that, like me, all the Hearing Chairs are assisted by the fact that the Secretary is constantly in procedural discussions with Network Rail and Access Beneficiaries to assist in preparing for and managing the process under the Rules.

10. I am able to confirm that the Secretary's second e-mail of 22 March 2017 (at 18 43 – copy attached), like the first, reflected comments which I had asked him to circulate to the Parties concerned.

It is hoped that all Parties can now devote their time to concentrating on the substance of the claims, rather than indulging in what might unfortunately be interpreted as procedural skirmishing with the resulting risk – if not the aim – of delaying a Determination on the substantive issues.

Yours faithfully

Clive Fletcher-Wood
Hearing Chair pp

Committee Secretary

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Date: 4 April 2017
Your ref: Tony Skilton
Our ref: SHACKL/PIRESC/161318.000968
Direct: [redacted]
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By Email

Dear Sir,

Part D Claims Ref: TTP1064; TTP1065; TTP1066; TTP1069; TTP1070; TTP1071; TTP1072; TTP1073; TTP1075;

1. We refer to your letter dated 31 March 2017 setting out your Directions. Unfortunately we still do not have your contact details and hence why we are writing to you c/o the ADC Secretary. We would be grateful to receive your contact details.

2. We refer to your categorisation of the various Claimants' claims as Head A, Head B, Head C and Head D and the table annexed to your Directions.

3. We acknowledge that Network Rail is to serve its Response to the:

3.1 Head A and Head B claims by 3.00pm on 12 April 2017; and

3.2 Head C and Head D claims on 26 April 2017.

4. We should be grateful if you would confirm the following:

4.1 The GBRf Part 1 and SWT claims are exclusively categorised as Head C and Head D claims and thus will not be addressed in the Network Rail Response to be served on 12 April 2017.

4.2 In respect of DB Cargo, please would you confirm that it is Issue 2 (paragraph 4.3(b) of the Sole Reference Document ("SRD")) that you have categorised as Part B and Issue 1 (paragraph 4.3(a) of the SRD) that you have categorised as Part D (and thus will not be addressed in the Network Rail Response to be served on 12 April 2017).

4.3 In respect of GBRf Part 3, please can you identify by reference to the paragraph numbers in the SRD, which issues you have categorised as Head A and which you have categorised as Head C (and thus will not be addressed in the Network Rail Response to be served on 12 April 2017).

4.4 In respect of East Coast, please can you identify by reference to the paragraph numbers in the SRD, which issues you have categorised as Head A and which you have categorised as Head C (and thus will not be addressed in the Network Rail Response to be served on 12 April 2017).

5. We note your preference for a consolidated Network Rail Response on Head A and Head B rather than individual Responses to each Timetable Participant's SRD. We will endeavour to accommodate your preference. However, please can you confirm that if Network Rail responds to the nine SRDs in a consolidated Response, it is not limited to 10 pages as per ADRR Chapter H paragraph 23. We are not currently in a position to estimate what length a final consolidated Response will be but we confirm, we will endeavour to meet the spirit of ADRR Chapter H paragraph 23 and ensure it is proportionate to the number of SRDs, the nature, complexity and importance of the issues raised therein. Further, it is unlikely that such a pleading can usefully follow the detailed format of the approved template, although we will endeavour to ensure that it covers the ground described in the template. If that causes you any particular concern, we would be grateful if you could indicate that now.

6. We confirm it is currently our intention to address TRIP and the extent to which TRIP depended on ODA.

7. We refer to the point you make in paragraph 3 in respect of the FGW, East Coast, XC and ARN claims. Please can you confirm whether you are inviting these Claimants to consider extending their claims beyond that which is set out in the existing Notice of Dispute and SRD. In so far as you are, please can you clarify on what basis it is said there is authority or jurisdiction to do this. In the meantime, we reserve all of Network Rail's rights in respect of such, including the right to make submissions and to object to such and any amendment of the claims.

8. We refer to paragraph 12.2 of our 29 March 2017 letter, which sets out that some points in the SRDs appear not to be referred to in the relevant Notice of Dispute. As explained in our letter, we are still reflecting on the point. If we wish to pursue the issue, it is a point which will be addressed in the Response. As you will appreciate, the point is not necessarily about awareness but rather compliance with an express contractual provision, particularly in the context of ADRR Chapter A paragraph 5 and the sound practical reasons for insisting that an appeal by way of Notice of Dispute is in accordance with relevant Part D provisions to ensure it can be resolved fairly, rapidly and inexpensively. We would be concerned if you were to seek to determine the point before Network Rail deciding whether to pursue it and before you having the benefit of Network Rail's submissions, and in the mistaken belief it is a point solely about awareness.

9. We note the point you make in paragraph 10. We agree that it is not in the usual course appropriate for the Dispute Parties to see the details of the case management deliberations as between the Hearing Chair and the Secretary, and our request at paragraph 5 of our 29 March 2017 letter was not for such. What we requested, was for the Secretary, to whom our letter was addressed, to disclose the details of the discussions which he has had with the Claimants and which he has then passed onto you. Please will you direct that the Secretary disclose full details of the discussions he has had with the Claimants as identified in his 22 March 2017 (17:28) email.

10. Please will you also direct that the Secretary address the point we make at paragraph 2 of our 29 March 2017 letter.

11. Network Rail continues to reserve all its rights.

EVERSHEDS SUTHERLAND

Yours faithfully,

Eversheds Sutherland (International) LLP

Eversheds Sutherland (International) LLP

cc.

Tony Skilton

From: "Tony Skilton" <sec.adc@btconnect.com>
To: "Pires, Carlos" [redacted]
Cc: <Sam.Price[redacted]; "Ian Tucker" <[redacted]; "Matthew Allen" [redacted]
Sent: 22 March 2017 18:43
Subject: Timetabling Panel hearing regarding Timetable Planning Rules for 2018, Version 2

Although the e-mail covering today's letter from you is timed at 1322, it was clearly delayed in transmission and therefore crossed with my e-mail of 17 27.

As you will see from that e-mail, the Hearing Chair is not accepting Abellio Scotrail's proposed way ahead, just as he is not accepting your proposal. Instead he is seeking to manage all these cases in the most efficient and cost-effective manner, commensurate with the need to achieve a timely resolution of issues in dispute which are of sufficient importance to the operators concerned to justify their being brought into the regulated dispute mechanism process.

Regarding giving Network Rail reasonable and fair time to respond to the full Part D claim from Abellio Scotrail when it is served, you will appreciate that the ADR Rules only allow 7 days as the norm, but given the number of parties involved in these disputes the Hearing Chair has already authorised longer; industry parties are expected to be resourced to meet their obligations under the Network Code and the ADR Rules; this is particularly the case with Network Rail with its national role.

Tony Skilton
Secretary
Access Disputes Committee

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